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HAMDAN V. RUMSFELD:
HIGH COURT SHOULD UPHOLD
EXECUTIVE WARTIME POWERS

by
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Thoroughly rejecting a controversial lower court ruling, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit held on July 15, 2005 that a confidante of al Qaeda leader Osama bin-Laden found by the military to be an unlawful enemy combatant is not entitled to the Geneva Convention's prisoner-of-war privileges and may be tried by a military commission.

On November 7, 2005, the U.S. Supreme Court granted Hamdan's petition, and the Court will review the D.C. Circuit's decision early next year. *Hamdan v. Rumsfeld*, 74 USLW 8222 (Nov. 7, 2005). The Court will revisit the highly contentious issue of presidential war-fighting prerogatives it explored in *Rasul v. Bush*, 124 S. Ct. 2686 (2004). This LEGAL OPINION LETTER examines the D.C. Circuit's ruling and explains why the Supreme Court should affirm that decision.

On November 13, 2001, President Bush ordered trials by military commission for captured enemy combatants believed to be terrorists. That same month, Salim Ahmed Hamdan, a Yemeni national, was captured in Afghanistan and detained in Guantanamo Bay, Cuba. Later, he was designated for a military commission.

Hamdan has admitted being bin-Laden's personal driver. He has been accused, moreover, of serving as bin-Laden's bodyguard, transporting him to training camps and safe havens, delivering weapons for al Qaeda, and training to commit terrorist acts. Following the suggestion of Justice O'Connor's opinion in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), Hamdan was given a formal hearing in 2004 before a Combatant Status Review Tribunal (CSRT), which reaffirmed his status as an enemy combatant tied to al Qaeda. The prisoner, however, sought a writ of habeas corpus. On November 8, 2004, Judge James Robertson of the federal district court ruled that Hamdan was presumptively entitled to prisoner-of-war protection under the Geneva Convention of 1949, that the CSRT's contrary determination was not competent, and that the military commission was impermissible.

Circuit Judge A. Raymond Randolph's July 15th opinion emphatically overruled each of the district court's major conclusions. Though unpersuaded by the government's contention that civilian courts were without jurisdiction to interfere with military proceedings at this stage, the panel flatly rejected Hamdan's Separation-of-Powers challenge to the President's order establishing military commissions.

Although Congress did not formally *declare* war, the court found that it fully authorized the president to *conduct* war in the resolution passed days after the 9/11 attacks. Commissions are thus consonant with the

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Supreme Court's post WW-II ruling in *Yamashita v. United States*, 327 U.S. 1, 11 (1946), that "[t]he trial and punishment of enemy combatants" who have violated the law of war are part of the "conduct of war." The court further noted that Congress has authorized military commissions in two other statutes: Sections 821 and 836(a) of Title 10, U.S. Code – the predecessor of the former having been relied on by the Supreme Court to uphold military commissions in *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942). Given this wealth of congressional approbation, the panel did not reach the question whether the president's own commander-in-chief power (U.S. Const., art. II, sec. 2) independently validated the commissions.

It was in reviewing Hamdan's Geneva Convention claims, however, that the panel truly took the district court to task. Those who qualify as prisoners of war under the convention must be afforded procedural protections available to the armed forces of the "Detaining Power." A ruling such as Judge Robertson's, applying the convention to Hamdan, would thus effectively proscribe military commissions because American personnel are entitled to courts-martial with due process protections superior to those entailed by commissions. This difference, it should be underscored, remains critical because the panel also took pains to reverse the district court's separate, erroneous holding that military commissions must comply with the Uniform Code of Military Justice (as courts-martial do).

Polar opposite to Judge Robertson's analysis, the appellate court concluded that Geneva was unavailing to Hamdan for several reasons. To begin with, it is black letter law that international agreements do not create private, judicially enforceable rights – even when their provisions directly benefit private persons. Rather, as the panel elaborated, alleged treaty violations are resolved by "international negotiations and reclamation," not by lawsuits. The court derided Judge Robertson for not only "disregard[ing]" these settled principles but failing even to mention, let alone address, the two precedents directly controlling Hamdan's claims: *Johnson v. Eisentrager*, 339 U.S. 763 (1950), in which the Supreme Court held that Geneva's cognate 1929 forerunner was not judicially enforceable, and *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972), in which the D.C. Circuit ruled similarly with respect to the NATO Status of Forces Agreement. The panel stressed that *Eisentrager* had specifically rejected the contention that Geneva rights could be enforced by habeas corpus. The Supreme Court's recent *Rasul* decision, Judge Randolph explained, had held merely that civilian courts were empowered to entertain detainee claims, not to enforce the Geneva Convention – "That a court has jurisdiction over a claim does not mean the claim is valid."

The panel added that even if Hamdan were not foreclosed from litigating Geneva, the treaty would not help him for several reasons. First, Hamdan did not fit Geneva's definition of a privileged combatant because al Qaeda members do not wear uniforms and fail to "conduct their operations in accordance with the laws and customs of war." Second, al Qaeda is not a party to the Convention. Nor does it fall into either of two recognized exceptions to that requirement. Specifically, while a non-party must be extended the Convention's protections in hostilities against a party if it accepts and applies the treaty's terms, al Qaeda is obviously not a state and, to put it mildly, flouts the terms.

Furthermore, though a non-state entity engaged in a civil war within the territory of a Convention party (such as Afghanistan) may qualify, the court found abundant support – including the 9/11 attacks inside U.S. territory – for the President's judgment that the war on terror is international. Here, the panel expressly abjured the district court's rationale that the war against al Qaeda was indistinct from the war against the Taliban. And, although Judge Williams, in a concurring opinion, demurred from the panel's conclusion that the Convention did not embrace al Qaeda, he agreed this was of no benefit to Hamdan since the treaty is not judicially enforceable.

The United States courts are a core part of our government. They should not be deemed a neutral forum open to America's enemies to press their case against our country – particularly in wartime. It is critical that the Supreme Court, in its review of *Hamdan*, recognize and embrace this concept. The Court should take this opportunity to restore common sense to the debates over presidential powers during wartime and uphold a limited role for the courts.