

washingtonpost.com

# Court Case Challenges Power of President

Military Tribunals' Legitimacy at Issue

By Charles Lane  
Washington Post Staff Writer  
Sunday, March 26, 2006; A01

Seized by U.S. forces in Afghanistan and imprisoned at Guantanamo Bay, Cuba, Osama bin Laden's former chauffeur is now seeking victory over President Bush in a new arena: the Supreme Court.

In oral arguments Tuesday, an attorney for Salim Ahmed Hamdan will ask the justices to declare unconstitutional the U.S. military commission that plans to try him for conspiring with his former boss to carry out terrorist attacks.

Significant as that demand is, its potential impact is much wider, making Hamdan's case one of the most important of Bush's presidency. It is a challenge to the broad vision of presidential power that Bush has asserted since the terrorist attacks of Sept. 11, 2001.

In blunt terms, Hamdan's brief calls on the court to stop "this unprecedented arrogation of power." Just as urgently, the administration's brief urges the court not to second-guess the decisions of the commander in chief while "the armed conflict against al Qaeda remains ongoing."

The case may not produce a frontal clash between the judiciary and the executive -- if the court decides that a recently enacted federal law on military commissions deprives it of jurisdiction to rule on Hamdan's case. Yet another possibility is that the court could reach an inconclusive 4 to 4 tie because Chief Justice John G. Roberts Jr. had ruled on the case while he was on a federal appeals court and must sit out now.

But if the court fears to tread on such difficult ground, it has given no sign of that. It has refused the administration's invitation to dismiss the case for lack of jurisdiction before hearing arguments, and, perhaps more important, it has already refused to defer completely to the president in two previous terrorism-related cases.

"There are so many issues in the case -- whether the president was authorized by the Constitution, or a statute, to set up the commissions -- right down to exactly how to fit this kind of a war into the existing laws of war," said Richard Lazarus, a law professor at Georgetown University who specializes in Supreme Court litigation. "Most cases have two or three or four issues. This one has 10 or 12, which makes it very hard to handicap."

Whether designating an American citizen as an "enemy combatant" subject to military confinement, denying coverage under the Geneva Conventions to detainees at Guantanamo Bay, or using the National Security Agency to eavesdrop on domestic communications, Bush has said that the Constitution and a

Advertisement

**ENVOY**  
AND NOW, A VALUE AS EXTRAORDINARY AS THE ENGINEERING.  
ENVOY: STARTING AT \$26,700 MSRP.\*  
\* MSRP. Tax, title, license, dealer fees, and optional equipment extra.  
COMPARE SIDE-BY-SIDE AT KBB.COM  
GMC WE ARE PROFESSIONAL GRADE™ CLICK HERE ▶

broadly worded congressional resolution passed three days after Sept. 11, 2001, empower him to wage war against terrorists all but unencumbered by judicial review, congressional oversight or international law.

Those assertions emerged in Bush's Military Order No. 1 of Nov. 13, 2001, which established the commissions and set off one of the first political debates in the United States over terrorism after two months of relative unity after the attacks.

The administration wanted a tough-minded alternative to the civilian court system that the Clinton administration had used against terrorists. Yet the swift and certain punishment that supporters of the commissions expected has not materialized. Though 10 of the 490 terrorism suspects currently held at the U.S. prison at Guantanamo Bay have been designated for trial, not a single case has been decided.

From the outset, the commissions have been plagued by questions about their fairness and workability. Critics argued that the commissions were flawed because, as Hamdan's brief, written by Georgetown University law professor Neal K. Katyal, puts it, they would try suspects "for crimes defined by the President alone, under procedures lacking basic protections, before 'judges' who are his chosen subordinates."

After lengthy internal debates, the administration modified the commissions, requiring that trials be public and that defendants be presumed innocent until proved guilty beyond a reasonable doubt.

But that did not persuade critics who pointed out that the executive branch would still be the only one deciding who is an "unlawful enemy combatant" eligible for trial in the first place.

Critics also argue that the Geneva Conventions require that each detainee should be given an individual hearing, with access to the federal courts through habeas corpus.

Historically, the courts have been reluctant to take on presidents during wartime. As a result, Lazarus said, Hamdan's supporters "need to make it clear there is a reason not to trust" Bush with unchecked power. That reason, Lazarus noted, may come from the allegations of torture at Guantanamo Bay and at Abu Ghraib prison in Iraq, which surfaced in 2004 and are discussed extensively in briefs on Hamdan's side.

Several members of the court are especially sensitive to international opinion, which has generally seen Guantanamo as a symbol of U.S. excesses in the war against al-Qaeda. The court has been bombarded by friend-of-the-court briefs urging it to think about the impact of the Hamdan case on the image of the United States abroad.

Two years ago, the Supreme Court ruled 6 to 3 that federal law gave U.S. courts the power to hear the prisoners' challenges to their detention at Guantanamo Bay. In a separate case involving an American citizen held there, a plurality of justices noted that the court would not give the president "a blank check" on national security matters.

That triggered a flood of habeas corpus petitions, including Hamdan's, from lawyers representing hundreds of Guantanamo Bay prisoners.

Hamdan's attorneys say that neither the broadly worded Sept. 14, 2001, House-Senate resolution that endorsed the use of force against al-Qaeda nor older statutes give Bush the clear legislative approval he needs to set up the commissions. They also contend that the commissions violate the Geneva Conventions,

which, they say, are enforceable by U.S. courts and entitle Hamdan to the same kind of trial a U.S. soldier would get from a court-martial.

The rules of the tribunals, which allow evidence that "would . . . have probative value to a reasonable person," provide no guarantee against the use of evidence gathered through torture, Hamdan's supporters say.

In response, the Bush administration notes that military commissions have a long history in war and were contemplated by the Sept. 14, 2001, resolution.

But the administration's brief, written by Solicitor General Paul D. Clement, also says that "even if Congress's support for the President's Military Order were not so clear, the President has the inherent authority to convene military commissions to try and punish captured enemy combatants in wartime -- even in the absence of any statutory authorization."

As for the Geneva Conventions, they are not enforceable by U.S. courts and do not apply to Hamdan because al-Qaeda is a terrorist network that has not signed the conventions and regularly violates them, the administration says.

So far, the administration has prevailed. Last year, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit, one of whose members was Roberts, upheld the administration's position, overruling a decision in Hamdan's favor by the U.S. District Court in Washington.

After the Supreme Court agreed to hear Hamdan's appeal of the D.C. Circuit's ruling, Congress stepped in.

The Detainee Treatment Act (DTA), enacted in December, reinforces the president's authority under the Sept. 14 resolution, the administration says. By modifying the rules related to the commissions, the measure implicitly accepts their legitimacy, the administration says.

The DTA stripped federal courts of jurisdiction over habeas corpus petitions from the Guantanamo Bay detainees "pending on or after" the date of its enactment -- and it provides an alternative military process for reviewing their enemy combatant status, to be followed by appeals to the D.C. Circuit court. Under the law, that court is the exclusive venue for appeals of military commission verdicts.

On Jan. 12, the administration asked the Supreme Court to dismiss the Hamdan case, arguing that it is covered by the "pending on or after" phrase. The proper time for his constitutional challenge is after his trial, the administration argued.

But Hamdan's attorneys contend that the DTA was a compromise intended to apply only to new cases, not to those that had already been filed. At a minimum, it does not provide a clear enough statement of congressional intent to deny Hamdan and others a day in court, they say.

The case is *Hamdan v. Rumsfeld*, No. 05-184. A decision is expected by July.

© 2006 The Washington Post Company

Ads by Google

[PeoplePC only \\$4.97/month](#)

Get the 1st 3 mos 1/2 price at only \$4.97/mo. Surf up to 5X faster

[www.PeoplePC.com](http://www.PeoplePC.com)

**[Registry Cleaner Download](#)**

Free Scan, increase PC performance & fix Registry Errors, 5 Star Rated

[www.pctools.com](http://www.pctools.com)

**[Free Internet Speed Check](#)**

Run our free Optimize scan to find out how to get a faster internet

[www.pcpitstop.com](http://www.pcpitstop.com)