

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
TESTIMONY OF SCOTT L. SILLIMAN ON
HAMDAN V. RUMSFELD: ESTABLISHING A CONSTITUTIONAL PROCESS

Tuesday, July 11, 2006

Mr. Chairman, Senator Leahy and members of the Committee. My name is Scott L. Silliman and I am a Professor of the Practice of Law at Duke Law School and the Executive Director of Duke's Center on Law, Ethics and National Security. I also hold appointments as an adjunct Associate Professor of Law at the University of North Carolina, and as an Adjunct Professor of Law at North Carolina Central University. My research and teaching focus primarily on national security law and military justice. Prior to joining the law faculty at Duke University in 1993, I spent 25 years as a uniformed attorney in the United States Air Force Judge Advocate General's Department.

I thank you for the invitation to discuss with the Committee my views on the Supreme Court's opinion in *Hamdan v. Rumsfeld* and what type of legislative response, if any, might now be needed in light of that ruling. Much has been said and written about the opinion in the last twelve days. Some hailed it for what they thought was a sharp rebuke of the President for overreaching his Constitutional authority, and for the Court's establishing that protections under Common Article 3 of the Geneva Conventions extend to everyone we hold in detention in the War on Terrorism, whether at Guantanamo Bay or elsewhere. On the other hand, some cited it as a refusal by the Court to give appropriate judicial deference to a "war fighting" Commander in Chief during a time of crisis in this country. I agree with neither claim and, as I will explain later, I view the opinion more narrowly than most. It is important, I submit, that we distinguish between what the Court actually ruled and the extent of that ruling, and what may be the more long term implications of the decision for other presidentially approved programs in the War on Terrorism. I'd like to start by discussing the topic of military commissions generally before giving my assessment of the opinion itself. Then, I'll end with my thoughts on the issue now before this Committee.

Military Commissions Generally

There is a rich historical tradition in this country involving the use of military commissions to try those accused of violations of the law of war, dating back to the Revolutionary War when Major John Andre, Adjutant-General to the British Army, was prosecuted in 1780 on a charge that he had crossed the battle lines to meet with Benedict Arnold and had been captured in disguise and while using an assumed name.¹

¹ See generally Scott L. Silliman, *On Military Commissions*, 36 Case W. Res. J. Int'l L. 529 (2005); Louis Fisher, *Military Tribunals and Presidential Power* (Univ. Of Kansas Press 2005).

Others were conducted during the Mexican and Civil Wars, but the two which are of greatest relevance to the challenged commissions at Guantanamo Bay were conducted during World War II². In the first, after the declaration of war between the United States and Germany, eight Nazi saboteurs disembarked from two German submarines at Amagansett Beach on Long Island and at Ponte Vedra Beach in Florida, respectively, and proceeded to bury their uniforms and don civilian attire. They thereafter set about to sabotage war industries and war facilities in this country, but were quickly captured and prosecuted by a military commission convened by President Roosevelt and held in Washington DC. All eight were convicted, and six of the eight were executed only five days after being sentenced to death by the commission. The Supreme Court, in the context of reviewing the district court's denial of petitions for habeas corpus, issued a carefully limited ruling affirming the government's power to detain and try the saboteurs by military commission under the circumstances presented.³ In the second, after the surrender of Germany but before the surrender of Japan, 21 German nationals were convicted by a military commission sitting in China of violating the laws of war by collecting and furnishing to the Japanese armed forces intelligence concerning American forces and their movements. They were sentenced to prison terms and relocated to occupied Germany to serve them. The Supreme Court, again in the context of a district court denial of petitions for habeas corpus, held that enemy aliens, who at no relevant time and in no stage of their captivity had been within our territorial jurisdiction, had no constitutional right to access to our courts. The Court also reiterated that a military commission is a lawful tribunal to adjudicate enemy offenses against the laws of war.⁴

The military commissions which gave rise to both the *Quirin* and *Eisentrager* cases, as well as the one used to prosecute General Yamashita, the Commanding General of the Imperial Japanese Army in the Philippines, were *war courts*, one of three types of military commissions.⁵ The other two types of commissions are *martial law courts*, such as those used during the Civil War in *Ex parte Milligan*⁶ and in World War II in *Duncan v. Kahanamoku*⁷; and *occupation courts*, such as the one used in *Madsen v. Kinsella*⁸ for the trial of an American dependent wife charged with murdering her husband in occupied Germany in violation of the German criminal code.

² *Id.*

³ *Ex parte Quirin*, 317 U.S. 1 (1942).

⁴ *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

⁵ Major Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, The Army Lawyer, March 2002, DA PAM 27-50-350, 19, 37.

⁶ 71 U.S. (4 Wall.) 2 (1866).

⁷ 327 U.S. 304 (1946).

⁸ 343 U.S. 341 (1952).

The military commissions which were established by President Bush for use at Guantanamo were of the first type, *war courts*.

The Court's Opinion in *Hamdan v. Rumsfeld*

As mentioned previously, it is important to understand the precise ruling in *Hamdan v. Rumsfeld*⁹, and resist the urge to read into the opinion more than what is actually there. This is vital in light of the perceived urgency for some legislative response.

The first issue facing the Court was jurisdictional—could it still rule on Hamdan's case since the Government argued that the Detainee Treatment Act, enacted on December 30, 2005, “stripped” the Court of the power to hear Hamdan's petitions for habeas and mandamus, even though they had been filed in the district court over two years earlier and the Supreme Court had granted certiorari on almost two months prior to the President signing the Act into law. In deciding that it still retained jurisdiction, the Court said that absent a clear statement by Congress to the contrary, the presumption was that the statutory restriction applied only to petitions filed after December 30th, and Hamdan's challenge came before that. The Court's ruling on this particular issue should also effectively defeat the Government's attempt to dismiss, based upon the same jurisdiction-stripping statute, more than 100 habeas challenges brought before December 30th by other detainees at Guantanamo Bay. Those cases are currently pending a ruling by the Court of Appeals for the District of Columbia on the jurisdictional issue. Predicated upon the Hamdan opinion, the Court of Appeals seems to have no other option but to let them proceed.

In contrast to the Court's handling of the jurisdictional issue, its ruling on the merits is more narrowly focused. With regard to the question of who is empowered to establish military commissions, the Court initially probed the interplay between the powers of the President and those of Congress in time of war, and then raised, but did not answer, a question left lingering from *Milligan*:

“Whether Chief Justice Chase was correct in suggesting that the President may constitutionally convene military commissions ‘without the sanction of Congress’ in cases of ‘controlling necessity’ is a question this Court has not answered definitively, and need not answer today.”¹⁰

It is also interesting to note that the Court described as “controversial” Chief Justice Stone's characterization in the 1942 German saboteur case, *Ex parte Quirin*¹¹, of Article 15 of the Articles of War (the predecessor of the current Article 21 of the Uniform Code of Military

⁹ *Hamdan v. Rumsfeld*, ___ S.Ct. ___, 2006 WL 1764793 (U.S.).

¹⁰ *Id.* at 20.

¹¹ *Quirin*, *supra*. note 3.

Justice) as being congressional authorization for military commissions.¹² To what purpose? I believe the Court was clearly not discounting, nor specifically affirming, the constitutional authority of the President to convene military commissions in time of necessity in the absence of any specific statutory authorization.¹³ What it did discount was the Government's assertion that the President's authority to convene military commissions flowed from statute, whether it be the Authorization for the Use of Military Force (AUMF), the Detainee Treatment Act, or the Uniform Code of Military Justice.¹⁴ Then, in one sentence of singular significance, albeit buried in a footnote, the Court clearly foreshadowed its principal holding:

¹² *Hamdan*, *supra* note 1, at 21.

¹³ The legislative history of Article 15 of the Articles of War, the predecessor of Article 21 of the UCMJ, is of interest in this regard. Army Brigadier General Crowder, then Judge Advocate General of the Army, testified before the Senate Subcommittee on Military Affairs on February 7, 1916, as follows:

“General Crowder: Article 15 is new. We have included in article 2 as subject to military law a number of persons who are also subject to trial by military commission. A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation “persons subject to military law,” and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced....It just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient....Yet, as I have said, these war courts never have been formally authorized by statute.

Senator Colt. They grew out of usage and necessity?

Gen. Crowder. Out of usage and necessity. I thought it was just as well, as inquiries would arise, to put this information in the record.”

Testimony of Brigadier General Enoch H. Crowder, United States Army, Judge Advocate General of the Army, on February 7, 1916, before the Subcommittee on Military Affairs, United States Senate, Revision of the Articles of War, S. Rep. No. 130, 64th Cong., 1st Sess. 40.

¹⁴ “The Government would have us dispense with the inquiry that the *Quirin* Court undertook and find in either the AUMF or the DTA specific, overriding authorization for the very commission that has been convened to try Hamdan. Neither of these congressional Acts, however, expands the President's authority to convene military commissions. ”....“Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the ‘Constitution and laws’, including the law of war.” (*Id.*). The Court's specific determination that the AUMF was not a statutory predicate for the commissions may, in future cases, put into question similar claims made by the Administration with regard to the AUMF and other presidentially approved programs in the War on Terrorism.

“Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations which that Congress has, in proper exercise of its own war powers, placed upon his powers. See *Youngstown Sheet and Tube Co. V. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). The Government does not argue otherwise.”¹⁵

The Court went on to discuss two statutory provisions which established just those limitations, Articles 21 and 36 of the Uniform Code of Military Justice, 10 U.S.C. §§ 821 and 836(b), respectively. In Article 21, said the Court, Congress had conditioned the President’s use of military commissions on compliance with the law of war, which includes the four Geneva Conventions including Common Article 3 of those conventions which applies in non-international conflict.¹⁶ One of the provisions of Common Article 3 requires the use of a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples”.¹⁷ Because the accepted definition of a regularly constituted court includes ordinary military courts (courts-martial) but excludes all special tribunals¹⁸, the President’s military commissions are not in compliance with Common Article 3 since he has demonstrated no practical need for deviating from courts-martial practice.¹⁹ A word of caution is appropriate here with regard to the breadth of this part of the ruling. The Court’s inclusion of Common Article 3 as being incorporated within the law of war was only within the context of how that phrase was used in Article 21 of the Uniform Code of Military Justice, an article which deals with military commissions and courts-martial. I do not join those who read the Court’s opinion more broadly as applying Common Article 3 to others at Guantanamo Bay or elsewhere who are being detained but who are not facing military commissions, and the majority clearly emphasized the limited nature of its holding²⁰. Further, the Court accepted the view expressed by all three judges in the Court of Appeals decision that the Geneva Conventions, standing alone, are not judicially enforceable in our courts.²¹ Thus, my view is that the Court’s

¹⁵ *Id.* n. 23.

¹⁶ *Id.* at 37.

¹⁷ *Id.* citing the Geneva Conventions of 1949, 6 U.S.T. at 3320 (Art 3(1)(d)).

¹⁸ *Id.* at 39.

¹⁹ *Id.*

²⁰ “It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government’s power to detain him for the duration of active hostilities in order to prevent such harm.” *Id.* at 40.

²¹ “We may assume that “the obvious scheme” of the 1949 Conventions is identical in all relevant respects to that of the 1929 Convention, and even that scheme would, absent some other provision of law, preclude Hamdan’s invocation of the Convention’s provisions as an independent source of law binding the Government’s actions and furnishing petitioner with any enforceable right. For regardless of the nature of the rights conferred on Hamdan, cf. *United*

determination as to the applicability of Common Article 3 affects Hamdan and the nine others who have been specifically charged with violations of the law of war and were facing military commissions, but because other possible applications of Common Article 3 were not before the Court, nor addressed in the opinion, that issue is obviously left for future cases.

In testing the President's military commissions against the other limiting provision of the UCMJ, Article 36, the Court arrived at a similar result. It first enumerated some of the military commission procedures which did not provide the same level of due process as courts-martial²², and then looked to the text of Article 36(b) itself²³, interpreting it to mean that procedures established for military commissions must be uniform with those established in the UCMJ for courts-martial unless the uniformity was not practicable.²⁴ The Court ruled that the President's determination that such uniformity was impracticable was insufficient to justify the variances from court-martial procedures.²⁵ Throughout this part of the opinion, the Court clearly implied that courts-martial, the type of military court used to prosecute members of our own armed forces, could appropriately and with judicial approval be used to prosecute those at Guantanamo Bay; and Justice Breyer, in his concurring opinion, specifically invited the Administration to work with the Congress in remedying the deficiencies the Court found in the military commission system.²⁶

As I see it, the sum and substance of the Court's ruling is that in unilaterally creating a system for military commissions, the President exceeded his authority by running afoul of the statutory limitations imposed by the UCMJ. Apart from the Court's treatment of the jurisdictional issue involving the interpretation of the Detainee Treatment Act, the opinion, including its discussion of Common Article 3 as being a part of the "law of war" referenced in Article 21, has direct impact only upon those currently facing military commissions. Although there may be implications as to how courts may rule in the future on the extent of protections under the Geneva Conventions or on other presidential programs in the War on Terrorism, those are issues

States v. Raucher, 119 U.S. 407 (1886), they are, as the Government does not dispute, part of the law of war. See Hamdi, 542 U.S., at 520-521 (plurality opinion). And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted." *Id.* at 37.

²² The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding which either the Appointing Authority or the presiding officer decides to close; and evidence (e.g. hearsay and unsworn statements) may be admitted which, in the opinion of the presiding officer, would have probative value to a reasonable person. *Id.* at 30.

²³ "All rules and regulations made under this article shall be uniform insofar as practicable." 10 U.S.C. § 836(b).

²⁴ *Hamdan*, *supra* note 1, at 33.

²⁵ *Id.* at 34.

²⁶ *Id.* at 40.

for another day. The Court did not address them here.

Establishing a Constitutional Process

Because I read the *Hamdan* decision as being quite narrow in scope, I urge the Committee, if it deems a legislative response necessary, to consider one that is carefully tailored to meet the specific issues raised in the opinion. For example, since the Court did not deal with the broader question of the President's authority to detain unlawful combatants at Guantanamo Bay until the cessation of hostilities, and because the Detainee Treatment Act already prescribes procedures for status review of those detainees, this is an issue that, at least for now, need not be addressed. Therefore, any proposed legislative response should be limited to addressing the Court's list of due process shortcomings in the military commission system.

If the Congress passes a law which merely gives legislative sanction to the prior system for military commissions—putting everything back in place the way it was—there is no assurance that it would pass judicial muster. With regard to the Court's determination that Common Article 3 was part of the "law of war" as referenced in Article 21 of the UCMJ, can Congress, by statute, nullify that requirement for compliance with international law as it applies to military commission procedures? Many legal scholars believe so, but it could well invite further challenges in the courts and years of further uncertainty. Merely giving Congressional sanction to the minimal level of due process in commissions which was criticized as inadequate by the Supreme Court and which fails to satisfy commonly recognized international legal standards is, I believe, imprudent.

Congress could also authorize a completely new system for military commissions which remedies most of the defects which the Court cited in its opinion, but which allows for a more flexible standard for the admission of evidence. For example, less reliable testimony such as unsworn statements or hearsay is not allowed in our federal and state courts, but could be admissible in military commissions if Congress made that the rule. Even under this more flexible standard, however, evidence acquired through coercive interrogation techniques should not be admissible. If there was some provision for a more substantial judicial review of a conviction, such as in the United States Court of Appeals for the Armed Forces which deals with military justice issues, and if a detainee was allowed to be present at all trial sessions unless he became disruptive, such a system would, I think, satisfy the objections of most. In other words, if virtually all the due process safeguards which currently apply in courts-martial, save the standard for admissibility of evidence, were grafted into a newly enacted military commission system, that type of legislative response would be, I suggest, a better option, but not the one I advocate.

What I urge the Committee to consider requires no new legislation. The Supreme Court in *Hamdan* clearly implied that courts-martial under the Uniform Code of Military Justice, the type of military trial system used to prosecute members of our own armed forces, could appropriately and with judicial approval be used to prosecute those at Guantanamo Bay. This is a fair and well-proven system of law, created by Congress some 56 years ago, that is more than adequate to

the task. Article 18 of the Code²⁷ gives general courts-martial jurisdiction to prosecute violations of the law of war, and the President need only make the policy decision to use them.

Some might argue that using the court-martial system, with its higher standard for admissibility of evidence and other due process rights found in our federal courts, would prevent the government from getting convictions in some cases. Although I do not accept the validity of that argument, the impact would be marginal even if true. There will probably be no more than 20 or so military commissions convened under any system because, although the standard for detaining an individual requires only an administrative determination that he was an enemy combatant in an armed conflict against the United States, the standard for bringing criminal charges in a military commission requires far more—credible evidence of a specific violation of the law of war. To those who suggest that we disadvantage ourselves by using courts-martial and that some of those 20 or so potential cases might not be able to be successfully pursued, I say that in the worldwide court of public opinion we would actually gain far more than we would lose. By adopting the same system of military trials for prosecuting terrorists that we use for our own service personnel, we send a loud and clear message to all that we have set the bar high, no matter what the enemy does. In light of recent allegations of atrocities committed in Iraq by our servicemen, such a decision would help to restore our international credibility by proving that we are, in practice as well as rhetoric, a nation under the rule of law.

Finally, I suggest that as this Committee and others weigh the legislative options for dealing with military commissions and other questions regarding detainees, you continue to solicit the counsel of those who are well versed and most familiar with the issues—military judge advocates, both active duty and retired. I believe their advice will be of great benefit to you in your deliberations.

Mr. Chairman, Senator Leahy, and members of the Committee, thank you again for inviting me to share my concerns with you. I look forward to answering any questions you might have.

²⁷ 10 U.S.C. § 818. That article reads, in part, “General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by military tribunal and may adjudge any punishment permitted by the law of war.”