

The High Court's Highest-Stakes Case

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Staff reporter
National Law Journal
03-20-2006

Washington-The Supreme Court next week will take up a potentially historic challenge raising vital questions about the allocation of power among Congress, the president and the federal courts in the war on terror. But first it must decide whether it has the authority to decide.

In one sense, accused enemy combatant Salim Ahmed Hamdan, whose Supreme Court case will be argued on March 28, is a bit player in the much larger drama unfolding in the nation: The Bush administration faces increasing scrutiny for policies-such as the use of torture in interrogations and a domestic surveillance program-pursued in the name of the war on terror.

Hamdan, allegedly Osama bin Laden's chauffeur, basically contends that the president did not have authority to establish military commissions to try Guantánamo Bay detainees for alleged war crimes. But underlying his challenge are issues fundamental to recent controversies: What are the limits, if any, on presidential powers during this unusual war? What role does Congress have in checking those powers and asserting its own? And what is the scope of federal courts' authority to protect individual rights here, whether based in domestic or international law?

Hamdan v. Rumsfeld, No. 05-184, was following the usual briefing track for high court cases until late last year. On Dec. 30, 2005, President Bush signed into law the Detainee Treatment Act of 2005 (DTA) and the stakes in the Hamdan case soared.

Although the main focus of DTA was to prohibit cruel, inhumane and degrading treatment of detainees, the new act also contained the so-called Graham-Levin-Kyl amendment, which the Bush administration contends stripped the federal courts of jurisdiction to hear habeas corpus petitions-here precommission appeals-by Guantánamo detainees, including Hamdan's and several hundred other detainees' appeals pending in Washington.

DTA is now the 800-pound gorilla in the Hamdan case. Whether the high court still has jurisdiction to hear his case has become Hamdan's first legal hurdle. Its scope and effective date have ignited controversy throughout the legal community.

This is the first case since *Ex parte McCordle* in 1868 involving a possible attempt by Congress to abolish retroactively the Supreme Court's jurisdiction over a pending appeal, said Burt Neuborne, legal director of the Brennan Center for Justice, who filed an amicus brief for himself and several other constitutional law professors supporting Hamdan. "There is real potential here for creating a serious constitutional crisis," Neuborne said.

There is no looming constitutional crisis and "no suspension of the Great Writ" of habeas corpus, countered Kent Scheidegger of the Criminal Justice Legal Foundation, who filed an amicus brief supporting the Bush administration in Hamdan. Congress can repeal the jurisdiction it previously granted by statute, he said.

Considering the magnitude of the issues at stake in Hamdan, it would be "surprising" if the Supreme Court did not find a way to keep jurisdiction over the case, said Scott Silliman, a former Air Force judge advocate and now executive director of the Center on Law, Ethics and National Security at Duke Law School. "The Supreme Court is perhaps the only court that can give us a definition of what is this war on terrorism and the parameters of presidential authority," he said. "I really don't care which way they go, but I tire of looking to World War II case law and trying to make it applicable to a very different time and a very different war."

Section 1005 of DTA, "Procedures for status review of detainees outside the United States," adds a new subsection to the general federal habeas statute, 28 U.S.C. 2241, which provides that "no court, justice, or judge" shall have jurisdiction to hear habeas corpus petitions by aliens held by the Department of Defense at Guantánamo Bay, or "any other action" against the United States or its agents relating to any aspect of an alien's detention at Guantánamo Bay if that alien is in military custody or has been determined to be an enemy combatant.

The act gives exclusive jurisdiction to the U.S. Circuit Court of Appeals for the District of Columbia to review final decisions-only final after the president signs off-by the Combatant Status Review Tribunals, which determine if someone in custody is an enemy combatant, and by the military commissions, which try those charged with war crimes.

The D.C. Circuit's review is limited to whether procedures and rules followed by those two tribunals conflict with the Constitution or laws of the United States, not with international law or treaties.

The DTA sections also specify that Guantánamo Bay is not within the United States for the purpose of those sections-a repudiation of the Supreme Court's 2004 holding in *Rasul v. Bush*, 542 U.S. 466.

The legal problem in the DTA being battled over in the high court concerns what appears to be two effective dates for these review provisions. One subsection, which withdraws federal habeas jurisdiction, states that in general, the section takes effect on the date of enactment, with no mention of pending claims. But a different subsection, referring to D.C. Circuit jurisdiction over challenges to commissions and status tribunals, states it applies to claims "pending on or after the date of enactment."

If the language in the act weren't complicated enough, the sponsors' conflicting statements about whether the provisions applied to pending cases heighten the difficulty.

During the congressional debate and after the act became law, Senator Carl Levin, D-Mich., consistently stated that Congress rejected White House attempts to apply the Graham-Levin-Kyl amendment retroactively to pending cases.

After the government moved to dismiss Hamdan and other pending cases based on DTA, Levin said in a statement, "The administration is now seeking to end-run the legislative process and achieve a result through the courts that it was unable to obtain in Congress. I hope and expect that the courts will reject this effort."

But Senator Jon Kyl, R-Ariz., offered his own analysis post-enactment that disputed Levin. He and Senator Lindsey Graham, R-S.C., also have filed an amicus brief in Hamdan, arguing that the act "by its clear terms" withdraws federal jurisdiction.

"This Court has long held that statutes conferring or ousting jurisdiction, as Section 1005(e)(1) does, apply to pending cases unless Congress provides an express reservation for pending cases," argues their counsel, Jeffrey A. Lamken of the Washington office of Houston's Baker Botts. "Congress provided no such reservation here."

That argument echoes the government's position in the high court. Solicitor General Paul Clement contends that the effect of DTA is neither unusual nor unconstitutional. The act, he says, would terminate only Hamdan's pretrial challenge to his military commission. If he is convicted by the commission, he may invoke DTA's review procedures.

No review

But under DTA's limited review provisions, no court would have jurisdiction to review Hamdan's principal claims that the president's order establishing his military commission lacks legislative authorization, and that his commission violates the Geneva Conventions, counters Hamdan's high court counsel, Neal Katyal of Georgetown University Law Center. And there may never be a "final decision" for court review because the president is not required to act finally.

The statutory text, he said, is decisive because the habeas-stripping provision makes no mention of pending cases. He and his amici supporters cite to Supreme Court precedents insisting that when Congress curtails the court's jurisdiction under its Article III power, it does so with unmistakable clarity.

"I think it's really quite unthinkable that Congress basically gave the keys to the courthouse to the president," said Katyal. "Maybe Congress wanted to do that, but that's not what the text of the act says."

In the end, this battle is about the most fundamental liberty—the right to be free from unjust incarceration, Katyal said. "The only time Congress has done something similar was after the Civil War, but it made sure to leave an open door. The statute at issue in *Ex parte McCordle* did not curtail the court's original jurisdiction, which is why the Supreme Court upheld it. "Here, Congress didn't necessarily leave that door open. Under the

government's reading of the statute, it's a really quite striking removal of federal court jurisdiction."

But Charles Shanor of Emory University School of Law said that the whole point of DTA was to take Guantánamo Bay detainee cases out of habeas corpus, and that is the most straightforward reading of the statute.

"I also doubt this is a suspension of the Great Writ," he said. "The Supreme Court has been very leery of confronting Congress on the extent to which Congress can control its jurisdiction. That's a confrontation the court would want to avoid."

If Hamdan gets beyond the jurisdiction issue, an army of amici, coordinated by David Remes of Washington's Covington & Burling, has buttressed every one of his claims, from the president lacking authority to establish military commissions to his single charge of conspiracy not being a war crime.

Duke's Silliman and Richard Rosen of Texas Tech University School of Law, a former Army judge advocate, hope the high court gets to the merits. And though sympathetic to his claims, they believe here, too, Hamdan faces high hurdles.

"Had the administration not determined by executive fiat that none of these people was entitled to P.O.W. status and had it allowed military lawyers to do what they are trained to do—conduct Article 5 tribunals in accordance with the Geneva Conventions, we wouldn't have had these types of difficulties," said Rosen.

But now the fundamental question the Supreme Court has to answer, Silliman said, is: Does the president himself have authority to create military commissions, or must there be some affirmative grant of authority by Congress?

"That question has never been answered, but my feeling is he does," added Silliman, with Rosen agreeing.

Based on the government's move to dismiss Hamdan and to have "dirty bomb" suspect Jose Padilla's claims of illegal detention declared moot now that he has been charged with a crime—on the eve of a possible grant of certiorari—Silliman said, "I think it's clear the government is trying very hard to keep the Supreme Court from making any decision on presidential authority in the war on terrorism.

"I cannot believe the Supreme Court is unaware of that. Maybe some justices are sensing that this is a momentous time for the court to address these issues."