

The following text may be printed, copy/pasted, or downloaded and emailed.

Driver for Bin Laden Tests War Tribunal

Osama bin Laden's driver is about to challenge President Bush's Military Commissions at the Supreme Court. At issue: Is the anti-terrorism court at odds with the U.S. Constitution?

CAROL ROSENBERG
Miami Herald
March 26, 2006

Five years ago, Salim Hamdan was living all but anonymously in Taliban-ruled Afghanistan, driving a Toyota pickup truck for Osama bin Laden on his Kandahar farm.

Tuesday, the tale of the wiry Yemeni with a fourth-grade education takes center stage at the U.S. Supreme Court as lawyers argue a landmark case on whether President Bush had the power to create a special war court to try Hamdan.

An extraordinary case for extraordinary times, Hamdan's constitutional challenge claims that the court the Pentagon constructed is unfair and un-American.

And he is joined in his argument by a celebrated cast of supporters -- a former secretary of state, retired federal judges and U.S. military officers, international jurists -- in a clash that is not lost on the captive.

"Are we going to be making history?" he asked his military lawyer, Navy Lt. Cmdr. Charles Swift, as the case headed for the high court.

"I don't want to make history," he added. "I just want to go home."

He will sit out the arguments in his seven-by-eight-foot cell, 1,300 miles away, at Guantánamo Bay.

At issue is not whether the United States has the power to detain the 36-year-old father of two at the Navy base, where he will have been held for four years by the time the justices rule this summer.

The core of the challenge is in what American court, if any, Hamdan can face a U.S. military charge of conspiracy as part of al Qaeda's world terrorism network.

Government lawyers say that Congress gave President Bush the power to create a new war court in its use-of-force resolution after the Sept. 11, 2001, attacks. They say that Hamdan should challenge the new panel system only after he is tried at Guantánamo Bay, and only if he is convicted.

Hamdan's advocates argue that he deserves to face an already established U.S. court -- not the first U.S. war crimes tribunal since World War II.

They also argue that the United States breached international treaty obligations by denying Hamdan the possibility of prisoner-of-war status under the Geneva Conventions.

"Not only do these military commissions betray our commitment to the rule of law, they damage our reputation abroad and undermine our ability to promote the global rule of law as an antidote to terrorism," said Yale Law School Dean Harold Hongju Koh in a brief for former Secretary of State Madeleine Albright and 20 other former U.S. diplomats.

Hamdan's case not only tests the limits of presidential powers over the 10 Guantánamo captives facing trial by a tribunal of U.S. military officers, called a Military Commission. Legal experts say that his case also has implications for the nearly 500 "enemy combatants" -- whether and how they can turn to civilian courts to intervene on their behalf in Pentagon detention processes.

Said attorney Scott Silliman, a retired Air Force colonel who now runs the DukeUniversityCenter on Law, Ethics and National Security:

``Hamdan gives the court the opportunity to define this war on terrorism, to give us a more current view of the constitutional authority of the president in this new type of war and the tools available to him in fighting it."

Bush advocates argue that America is facing an enemy unrivaled in U.S. history, so it has crafted a court that shields classified information from public view to allow prosecutions in a war with no end in sight.

Air Force Col. Moe Davis, the chief prosecutor, quoted the cartoon character Bart Simpson to explain the quandary of waiting until the war on terrorism ends to try captives:

"Damned if you do, damned if you don't," he said.

In a sense, Hamdan's roundabout road to the Supreme Court started in November 2001, two months before the United States established the prison camp in southeastern Cuba.

President Bush signed an order on Nov. 13, 2001, authorizing the secretary of defense to detain foreigners indefinitely -- and ordered him to prepare Military Commissions to try some of them.

Across the globe, the United States began to bomb Afghanistan, and Hamdan spirited his pregnant wife and 2-year-old daughter to safety in Pakistan.

His lawyer says he was returning a borrowed car when Afghan warlords captured him and handed him over to U.S. forces -- he believes for a bounty offered by U.S. agents for foreign Muslims.

By the time the United States inaugurated its offshore interrogation center with an 8,000-mile air bridge to Cuba in January 2002, Hamdan was already in U.S. hands.

He was brought to Cuba four months later, manacled and masked in a 27-hour trip long after the Bush administration had declared captives there "unlawful combatants" -- not prisoners of war.

ORDINARY CAPTIVE

Hamdan spent his first year at Guantánamo as an ordinary captive. Prison-camp controversies were still simmering to the surface -- and the Pentagon was showcasing its makeshift 21st century terrorism prison in weekly tours for journalists and members of Congress.

Tawdry tales of interrogation tactics -- sleep deprivation, sexual humiliation, outsourcing to Arab countries -- had yet to emerge.

Then, in December 2003, the military moved Hamdan into segregation and assigned Swift, a Navy lawyer, to him with the limited task of learning whether the prisoner would plead guilty.

Except that Hamdan told his lawyer he was not a war criminal.

Rather, he described himself as a privately paid driver who worked at the farm of bin Laden, the Saudi millionaire; his livelihood vanished when terrorists crashed those planes into the Pentagon and the WorldTradeCenter.

It took Hamdan's Navy lawyer two more months to get permission to talk about his client publicly - and only after military intelligence people went through talking points he planned to use in an interview with The Miami Herald.

On Feb. 10, 2004, the lawyer told his client's side of the story for the first time: The man who would challenge President Bush's war powers was an alleged foot soldier, not an al Qaeda architect. The United States planned to put Osama bin Laden's \$200-a-month driver in the dock of a war court fashioned for the circumstances.

So, rather than enter a guilty plea, Swift sued the United States by filing a habeas corpus petition in U.S. District Court in Washington, D.C.

Defense attorneys from all four services -- Army, Navy, Air Force and Marines -- call the war court unconstitutional. They charge that the Bush administration crafted an unfair court, rather than try Hamdan before civilian judges in the United States, or at a U.S. military court martial that would offer him the same rights and protections as an American soldier.

"It's a separation-of-powers, checks-and-balances issue," said Marine Col. Dwight Sullivan, the chief commissions defense counsel and a former lawyer with the American Civil Liberties Union.

Still, Sullivan cautioned that, whatever the Supreme Court decides, it is not being asked to rule in the larger debate over whether the United States should close its prison camp at GuantánamoBay.

Now the high court gets to decide -- or at least eight members of it. The chief justice of the United States, John Roberts, is recusing himself because, as an appeals court judge, he was part of the panel that unanimously upheld Bush's war powers in the Hamdan case.

Republican Sens. John Kyl of South Carolina and Lindsey Graham of Arizona argue that Hamdan's case should not be before the court in the first place. They championed a bill in Congress late last year that stripped Guantánamo captives of pretrial civilian review. Now the high court must decide how much of that law stands, too.

LAWSUITS ALLOWED

The Bush administration originally argued that, as enemy combatants held offshore, Guantánamo captives could not sue in civilian court. But the Supreme Court rejected that notion in June 2004, opening the way for federal courts to review the case of any detainee who sues for freedom.

"GuantánamoBay is a military base in a foreign country," the senators wrote in their brief, echoing the government's position. ``The military's mission of winning battles cannot be encumbered with a requirement that every enemy captured abroad be given a lawyer and a hearing."