

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

Detainee Case Will Pose Delicate Question for Court

LINDA GREENHOUSE
New York Times
March 27, 2006

WASHINGTON, March 26 -- The Supreme Court's announcement four months ago that it would rule on the validity of the military commission by which the Bush administration wants to try Osama bin Laden's former driver, on charges of conspiracy to commit terrorism, appeared to mark a resumption of a struggle for supremacy between the court and the White House.

That struggle initially played out in three cases on terrorism and civil liberties in June 2004. In accepting the new case, as in the previous ones, the justices rejected the administration's argument that the court should simply stay out and let the president conduct his fight against terrorism unconstrained by judicial oversight.

But no one foresaw back in November that the case of the driver, Salim Ahmed Hamdan, to be argued on Tuesday, would present the Supreme Court with an additional and perhaps even greater challenge.

In the face of a measure that Congress passed and President Bush signed into law in late December to strip the federal courts of jurisdiction over cases brought by detainees at the United States naval base at Guantanamo Bay, Cuba, where Mr. Hamdan has been held since 2002, the court must decide whether it retains the right to proceed with this case at all.

For a court that has been highly protective of its own prerogatives, but at the same time notably attentive to the often arcane limits on federal court jurisdiction, the question is one of great delicacy, infused with historical resonance. Not since the immediate aftermath of the Civil War, in a case that arose from the power struggles of the Reconstruction era, has the Supreme Court permitted Congress to divest it of jurisdiction over a case it has already agreed to decide.

In that case, *Ex Parte McCordle*, the court had already heard four days of argument in an appeal brought by a rabble-rousing Mississippi newspaper editor who had been taken into custody and charged by the military government with fomenting insurrection.

Fearful that a Supreme Court ruling in favor of the editor, William H. McCordle, could result in invalidating military control of the former Confederate states, Congress enacted a law over President Andrew Johnson's veto to deprive the court of jurisdiction. The court then dismissed the appeal, rejecting the argument by McCordle's lawyer that it was permitting Congress to usurp the judicial function.

In the new case, *Hamdan v. Rumsfeld*, No. 05-184, the Bush administration filed a motion with the court in early January, days after the Detainee Treatment Act was signed into law, urging immediate dismissal of Mr. Hamdan's appeal.

"It is well settled that statutes that remove jurisdiction apply to pending cases and ordinarily should be given immediate effect," the administration, citing the *McCordle* case, said in the brief accompanying its motion.

More than a month later, on Feb. 21, the court declined to act on the motion, announcing instead that it would take up the jurisdictional question as part of the argument on the merits of the case. It added 30 minutes to Tuesday's argument, originally scheduled for one hour, for that purpose.

The McCardle case has been seen by many modern legal scholars as problematic, a regrettable expression of judicial weakness. Mr. Hamdan's lawyers cite it as well, but for a different proposition. While Congress spoke clearly in the court-stripping amendment at issue in the McCardle case, their brief tells the court, the Detainee Treatment Act is ambiguous on its application to pending, as opposed to future, cases. The court should interpret the act as not applying to the Hamdan case to avoid the "grave constitutional questions" that would otherwise arise, they say.

A group of law professors who filed a brief on this point on Mr. Hamdan's behalf warn the court that to give up jurisdiction would be to yield to "an unconstitutional interference with access to courts and an attack on the fundamental structure of the Constitution."

The argument rests in part on the observation that according to the language of the Detainee Treatment Act, Guantanamo detainees who are tried by a military commission will have only a circumscribed right to a subsequent appeal in federal court, in which they could not raise the basic challenge to the commission's operation that Mr. Hamdan is presenting in his Supreme Court case. So if the justices cannot decide his case, or cases brought by some 150 of the other 500 Guantanamo detainees now pending in the lower courts, fundamental questions about this alternative system of justice will go unresolved.

There may be a separate obstacle in the Supreme Court's way. Only eight justices are participating in the case, raising the prospect of a 4-to-4 tie. Chief Justice John G. Roberts Jr. is recused because he was a member of the three-judge panel of the United States Court of Appeals for the District of Columbia Circuit that upheld the government's position in the Hamdan case last July, four days before Mr. Bush nominated him to the Supreme Court.

A tie vote in the Supreme Court ordinarily simply affirms the lower court decision, without issuing an opinion or setting a precedent. But in this case, there is no lower court opinion on the jurisdictional question, since there was no Detainee Treatment Act when the appeals court ruled last July.

It would require a majority, five of the eight votes, to grant the government's motion to dismiss the case, but the matter might not be as straightforward as that. Even if the government had not filed its motion, the court would still be obliged to assure itself that it has jurisdiction to proceed, in this as in any other case. Whether a tie favors jurisdiction or dismissal appears to be an open question of Supreme Court procedure.

Military commissions are not new; they were first used by Gen. Winfield Scott during the war with Mexico in the 1840's. But there have been none since the World War II era. If the court addresses the merits of the Hamdan case, it must decide whether Mr. Bush's military order of Nov. 13, 2001, establishing military commissions to try noncitizens for "acts of international terrorism," had proper authorization.

The administration argues that there were "multiple authorizations": from the Congressional resolution known as the Authorization for the Use of Military Force, adopted days after the terrorist attacks of Sept. 11, 2001; from the Uniform Code of Military Justice, which refers to military commissions and authorizes the president to prescribe rules for their operation; and from the president's inherent powers as commander in chief.

In addition, the administration argues that the Detainee Treatment Act itself ratified the establishment of military commissions when it circumscribed judicial review of their operations.

Mr. Hamdan's military and civilian lawyers, as well as the dozens of organizations and individuals supporting his appeal as "friends of the court," argue to the contrary that no Congressional enactment or inherent power authorized the president to set up what they call a "jerrybuilt

tribunal" that falls short of the procedural protections offered by American military law and required by the Geneva Conventions.

In addition, they argue, conspiracy, with which Mr. Hamdan has been charged, is not a war crime and is therefore not subject to trial by military commission.

The administration argues that the Geneva Conventions do not apply to the conflict with Al Qaeda and that their protections cannot, in any event, be invoked by individual detainees. These assertions have provoked a flood of counterarguments from international law specialists, former senior diplomats and federal judges, and human rights organizations.