

Tight Briefs

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## **The Government's Tricky Lawyering in the Guantanamo Bay Cases.**

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More than four years ago, President Bush asserted his power to try foreign detainees, among them Salim Ahmed Hamdan, before a special military commission. Out of that assertion spun *Hamdan v. Rumsfeld*, the Guantanamo Bay case that the Supreme Court will hear in March. Since its inception, the case has represented American justice at its most crabbed and crabby. This week, it also represented government lawyering at its most disingenuous.

In an effort to convince the Supreme Court to drop Hamdan's case, the government argued in a Feb. 13 brief that Hamdan, Osama Bin Laden's former driver, will have ample recourse to pursue his claims once he's been tried and convicted and the president has signed off on his sentence. The justices met to discuss the case on Feb. 17. Later that day, the government made public what it really means about the rights of the Guantanamo detainees. In a brief filed in the D.C. Circuit federal court of appeals in the cases of *Al Odah v. United States* and *Boumediene v. Bush*, which together involve more than 300 detainees, the government makes very clear that if the courts adopt its stance, some of Hamdan's (and the other detainees') most important claims won't be postponed. They'll be vaporized.

The government's stances in *Hamdan* and *Al Odah-Boumediene* don't directly contradict each other. The Bush administration's lawyers are smarter than that. But the dual arguments are incompatible. And they fit a pattern of "now this, now that" sleight of hand employed by the Justice Department in other major recent cases.

At issue in *Hamdan* is the reach of the Detainee Treatment Act of 2005, which Congress passed in December. The law cut off the habeas corpus claims of the Guantanamo detainees, the traditional route for challenging the constitutionality of a detention. The big question for *Hamdan*, *Al Odah*, and *Boumediene* is whether the DTA applies to pending cases—as its Republican co-sponsors, Sen. Lindsey Graham, R-S.C., and Sen. John Kyl, R-Ariz., say—or only to future habeas petitions—as its Democratic co-sponsor, Sen. Carl Levin, D-Mich., says. (Think Levin is sorry yet that he signed on with these guys?)

*Hamdan* argues that if the government's view of the DTA holds sway, then Congress has stripped the Supreme Court of its jurisdiction, or its power to hear the detainees' claims—specifically, whether the president's 2001 order establishing special military commissions violated their rights under the Constitution and particularly under treaties like the Geneva Conventions. Those are precisely the questions that the Supreme Court agreed to address when it decided to hear *Hamdan*'s case. Because it slams the door to the courthouse for an entire case or a set of claims, jurisdiction-stripping is a big deal. As a result, courts generally presume that it doesn't apply retroactively—to cases that have already been filed—absent a clear statement of Congress to the contrary. Following that rule, claims like *Hamdan*'s and those of the *Al Odah* and *Boumediene* detainees should be safe from the DTA, in which Congress made no such clear statement.

To get around this roadblock, the government backed away from the implications of its argument that the DTA fries *Hamdan*. "Petitioner errs in suggesting that he will be unable to advance constitutional and statutory challenges to his military commission in the event he is convicted," the government's Feb. 13 brief states. True enough. As the government recognizes, the DTA

allows detainees—after they've been convicted—to challenge before the D.C. Circuit "to the extent the Constitution and the laws of the United States are applicable, whether the use of" military commission standards and procedures "is consistent with the Constitution and the laws of the United States."

But what matters more, arguably, is what the government's Hamdan brief doesn't say. What does it mean for a military commission to operate consistently with the Constitution and U.S. law—if, that is, the Constitution and the law apply? Can a challenge on that basis include all the constitutional claims that a normal habeas petition can? And what about treaty-based rights? In *Al Odah and Boumediene*, the government quit hiding the ball and forthrightly stated what it thinks the DTA wipes out: "We do not believe that [the relevant provision of the DTA] permits review for treaty claims," the government's brief states. "Accordingly, this Court should dismiss petitioners' various treaty-based claims." No treaty claims means jurisdiction-stripping, because no court would ever be able to consider them. So, while the government shied away from saying so in Hamdan, its view of the DTA boots some of his claims out of court forevermore—claims that just happen to involve a significant and unsettled area of law.

It's not the first time the Justice Department has made arguments that seem designed to make a misimpression. As Lyle Denniston argued in *Slate*, the government tried to spin gold from dung by recasting two 2004 Supreme Court decisions that didn't go its way. The administration continued to claim "nearly limitless constitutional authority for the president to choose both the grand strategy and the particular tactics of waging war on terrorists, without intrusion by the courts," Denniston wrote. "And the administration insists the Supreme Court has endorsed this claim." Never mind that no one else thinks so.

Then there is the government's manipulation of Jose Padilla's case. For years and up and down the courts, the administration said it had the authority to detain Padilla indefinitely as an enemy combatant, even though he is an American citizen who was captured in the United States. Padilla was first accused of being involved in a dirty-bomb plot, then of seeking to blow up apartment buildings. And then the government changed its Padilla story yet again. Days before the Supreme Court was due to decide whether to hear Padilla's appeal, the government indicted him in ordinary federal court on a brand new set of small-fry criminal charges. The shift left the Fourth Circuit federal court of appeals, which had previously backed the government to the hilt, to splutter that it had been conned. Perhaps, Judge Michael Luttig wrote dryly, the Justice Department hadn't considered what all of its hopping around would mean "for the government's credibility before the courts in litigation."

One more entry for the list: DoJ's 42-page defense of the legality of the National Security Agency's warrantless domestic eavesdropping program. "Every federal appellate court to rule on the question has concluded that, even in peacetime, the President has inherent constitutional authority, consistent with the Fourth Amendment, to conduct searches for foreign intelligence purposes without securing a judicial warrant," the government's document states. Citations to four cases follow. The first is a 2002 decision of the appeals court established by the Foreign Intelligence Surveillance Act court, which merely assumed that the president had such power, in a passage that has no direct bearing on the court's holding. Two of the three remaining cases no longer have a smidgen of relevance. They predate FISA and were superseded by the statute—if you look up the cases in the Lexis database, they're displayed with trademark red stop signs. That means they no longer count as law.

So far, the government's slippery arguments and citations haven't found their way into law because the Supreme Court has not, in fact, endorsed them. On Tuesday, the court failed to grant the government's motion to kick Hamdan out of court in light of the DTA. But the justices didn't reject the government's argument, either—they postponed consideration of it until they hear the case in its entirety next month. It's up to the court to call the government on its questionable tactics. Otherwise, we won't just have bad briefs to worry about. We'll have very bad law.

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