

US judge rules Guantánamo military tribunal can proceed

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After holding a two-hour hearing Thursday, a federal judge brushed aside constitutional objections and refused to delay the July 21 start of the military tribunal at Guantánamo Bay for Salim Ahmed Hamdan, allegedly a driver for Osama bin Laden, on charges of conspiracy and providing support for terrorism.

Earlier in the day, at the US base in Cuba, the military judge presiding over the drumhead proceedings, Navy Captain Keith Allred, turned down a similar request for postponement, rejecting claims by Hamdan's military lawyers that his rights would be violated if he had to present a defense in a trumped-up judicial system that allows hearsay and statements obtained through torture to be used against an accused.

The rulings give the Bush administration a green light to make Hamdan, a citizen of Yemen, the first of the 265 remaining Guantánamo prisoners to be tried before a military tribunal, an extraordinary procedure widely denounced as violating numerous constitutional guarantees and international human rights treaties.

The rulings fly in the face of recent Supreme Court decisions, holding that both the US Constitution and the Geneva Conventions apply to Guantánamo Bay prisoners.

Hamdan denies that he participated in any terrorist conspiracies, claiming he was no more than a servant who for \$200 a month provided personal services to bin Laden. If convicted, Hamdan could receive a life sentence.

The US military has indicted another 18 prisoners as war criminals and announced plans to drag some 80 captives in all before the military commissions.

Hamdan's lawyers argued that before his "trial" the constitutionality of the tribunal's procedures should be determined because of the Supreme Court's June 12 decision in *Boumediene v. Bush*, which established that

the US Constitution applies to Guantánamo prisoners. (See: "US Supreme Court upholds habeas corpus for Guantánamo Bay prisoners," <http://www.wsws.org/articles/2008/jun2008/cour-j13.shtml>)

The highly anticipated ruling by Judge James Robertson, a 1994 Clinton appointee to the United States District Court for the District of Columbia, surprised some who expected that the Guantánamo tribunals would be brought to a halt while the constitutionality of the military commissions and their procedures are reviewed in US courts.

Robertson said, "Hamdan is to face a military commission designed by Congress acting on guidelines handed down by the Supreme Court." He argued that Hamdan could raise any objections to the military tribunal jurisdiction and procedures on appeal after the tribunal issued its verdict. Robertson emphasized that he was not finding any of the procedures constitutional, but did not want to delay the proceedings any further.

The notion that Hamdan's own request for a postponement should be denied to avoid further delay is preposterous, as the Bush administration has spent the last seven years doing everything in its power to prevent Guantánamo cases from being resolved quickly.

Hamdan was captured at a roadblock in Afghanistan during the October 2001 US invasion and has been imprisoned ever since. Bush issued an executive order in July 2003 declaring him eligible to be tried by a military commission for alleged war crimes, but charges were not leveled until July 2004, almost three years after his capture.

In late 2004, Judge Robertson ruled that the Bush administration's proposed military tribunals were illegal because they were not authorized by Congress. A Court of Appeals panel which then included the

current chief justice of the US Supreme Court, John G. Roberts, Jr., reversed Robertson, and the Supreme Court subsequently reversed the Court of Appeals, 5-3, reinstating the original ruling.

In response, the Bush administration and Congress, with significant Democratic legislative support, rammed through the Military Commissions Act of 2006 (MTA), authorizing the military tribunals and stripping Guantánamo prisoners of their habeas corpus rights so they could not go to any US court with legal challenges to the proceedings.

In *Boumediene*, the Supreme Court, after ruling that the Constitution applies to Guantánamo prisoners, struck down the MTA provision barring their habeas corpus petitions.

Hamdan's injunction sought to postpone his military tribunal until after his constitutional claims could be addressed. His motion papers raise a number of significant challenges to the proceedings, including the fact that he is charged with "conspiracy" and "material support for terrorism" based on the MTA, making the proposed charges unconstitutional under the Constitution's prohibition of "ex post facto" laws.

Other patent constitutional deprivations include the use of hearsay evidence, which violates the "confrontation clause" of the Fifth Amendment, and the fact that the MTA provides military tribunals only for non-US citizens, a clear violation of the Equal Protection clause guarantee that aliens receive equal treatment.

Captain Allred, the military judge, rejected all of Hamdan's constitutional claims with the legally absurd ruling that *Boumediene* did not give Guantánamo prisoners any constitutional protection beyond the right to habeas corpus.

The political charade behind the tribunals was exposed when Air Force Colonel Morris Davis, the former chief prosecutor at Guantánamo, resigned last October, claiming in a *Washington Post* interview that Bush administration officials pressured him to pursue "sexy" and "high interest" cases in the run-up to the 2008 elections, and in a subsequent interview with *The Nation* said that the trials were going to be rigged. Davis said that Pentagon general counsel William Haynes, who oversees the tribunals for the Defense Department, had told him "We can't have acquittals. If we've been holding these guys for so long, how can we

explain letting them get off? We can't have acquittals. We've got to have convictions."

The international opposition to the show trials was underscored by the unusual friend of the court (*amicus curiae*) brief filed in support of the injunction request by 375 current and former members of European parliaments, charging that the military tribunals contravene "the standards set by international humanitarian law and human rights law." The brief objects, in particular, to any trial on vague "conspiracy" charges, which are not recognized under international law except in the case of genocide, because of their potential for political abuse, and the admission of evidence obtained through torture.

Neal Katyal, the Georgetown University law professor who represented Hamdan, said after the hearing that no decision has yet been made whether to appeal the ruling to the Court of Appeals for the District of Columbia Circuit. Any such motion would have to be made immediately and, because of the short time involved, be acted upon before Monday.

A statement issued by Jameel Jaffer, director of national security matters for the American Civil Liberties Union, said: "It doesn't make sense to conduct a trial under rules that are likely to be found unconstitutional later on. Proceeding with this trial now will only draw out a legal process that has taken far too long already and further discredit a system that has been a disgrace from the start."

Robertson's ruling is a clear victory for the Bush administration, which is using Hamdan to clear a legal path for trying other Guantánamo detainees, including the death penalty trial of the alleged September 11 mastermind, Khalid Sheikh Mohammad, before the November presidential elections. The entire process is so legally deficient that that any court-ordered delay to allow judicial scrutiny could derail the military tribunals altogether.



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