2013

Guantánamo Military Commissions: "Judicial Approval and Guidance"

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participants," and the reporting of data regarding swaps to "swap data repositories," and, most important, by authorizing the Commodity Future Trading Commission and Securities Exchange Commission, to designate swaps which will be required to be cleared through derivatives clearing organizations, and executed on derivatives clearing markets or swap execution facilities. The statute also mandates regulation of and reporting by such clearing organizations, markets, and facilities. With regard to consumer protection, the statute enacted few new substantive protections, except for requirements concerning mortgages adopted by Title XIV of Dodd-Frank, but rather transferred virtually all consumer protection responsibilities vested in other agencies, most especially the Board and Federal Trade Commission, to a newly formed Consumer Financial Protection Bureau. This agency is nominally under the Board, but the Board's authority over it is strictly circumscribed, and its budget is protected from congressional interference.

But in both areas implementation of the law has not gone smoothly. The CFTC has identified 38 "areas" in which it will take regulatory initiatives. As of the end of 2012, the CFTC had issued 41 final regulations under Dodd-Frank, but in some of the 38 areas, it had issued more than one final rule, and in others it has yet even to propose any rules. It has encountered particular difficulty in connection with the critical requirement of clearing, which is afflicted with statutory exemptions the Commission has interpreted broadly, adding additional exemptions of its own. It has had special difficulty, too, with the international application of Dodd-Frank provisions.

Perhaps nothing has been more controversial or deeply divisive as the CFPB. As is well known, its startup was delayed when Senate Republicans made clear they would filibuster the nomination of the woman whose brainchild it is widely reputed to be, Elizabeth Warren (who of course responded by running for a Senate seat and winning), and in turn that they would filibuster the appointment of *any* Chair. President Obama responded with the "recess" appointment of Richard Cordray, but in January, the Court of Appeals for the District of Columbia invalidated similar appointment of NLRB members, in a decision that departs from the rulings of other courts of appeals and is almost certain to invite Supreme Court review. That review is unlikely to be completed before early summer 2014. While the CFPB has been active since Mr. Cordray's recess appointment, the invalidation of the appointment could undo all that has been done, leaving the law unsettled nearly four years after the enactment of Dodd-Frank.

One commentator has likened the regulatory activity under Dodd-Frank to an amusement park game of bumper cars, with toy vehicles constantly colliding and going nowhere. The comparison is hardly exaggerated. ■

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"Judicial Approval and Guidance"

By Christina M. Frohock

The use of military commissions to try alleged terrorists in Guantánamo Bay, Cuba, has attracted worldwide scrutiny and intense criticism. A military commission is a court convened before a military judge rather than an Article III judge, designed to try individuals accused of offenses during war. The U.S. Court of Appeals for the D.C. Circuit recently weighed in on the legitimacy of Guantánamo military commissions, and its opinion in *Hamdan v. United States* offers both approval and guidance.

The D.C. Circuit's opinion follows an earlier opinion from the Supreme Court concerning the same Guantánamo detainee, Salim Ahmed Hamdan. Hamdan is a Yemeni national who belonged to al Qaeda, transporting weapons and serving as driver and bodyguard for Osama bin Laden from 1996 to 2001. He was captured in Afghanistan and detained as an enemy combatant in Guantánamo. After more than two years in detention, Hamdan learned his charge: one count of conspiracy.

Facing trial by military commission, Hamdan filed a habeas petition to challenge the legality of the proceedings. In 2006, the Supreme Court in *Hamdan v. Rumsfeld* ruled in his favor. The Bush Administration's military commissions system was sparse at best, as a detainee could be excluded from his own trial

and convicted based on undisclosed evidence. The Supreme Court held that this system lacked congressional authorization and failed to adhere to both the Uniform Code of Military Justice and the Geneva Conventions. Exigency lent legitimacy to a military commission, but did not "justify the wholesale jettisoning of procedural protections." If the executive wanted to try detainees by military commission, it would have to afford "at least the barest of . . . trial protections." A plurality of four justices also decided that conspiracy was not an offense against the law of war triable by military commission.

Congress quickly responded by enacting the Military Commissions Act of 2006. The MCA restyled the military commissions system by codifying procedural safeguards for defendants and enumerating twenty-eight triable offenses. Among these, the MCA allowed punishment by military commission for anyone who "conspires to commit" substantive offenses and for anyone who provides "material support or resources" for terrorism.

With the MCA in hand and a more robust trial structure in place, the government prosecuted Hamdan anew—and added a charge of material support for terrorism to the original charge of conspiracy. This time around, Hamdan was tried by military commission in Guantánamo and received a mixed verdict. He was acquitted of conspiracy but convicted of providing material support for terrorism and sentenced to sixty-six months in prison. In January 2009, he was released to his home country of Yemen. Even after release, he continued to appeal his conviction.

In October 2012, Hamdan again prevailed in the American court system. The D.C. Circuit in *Hamdan v. United States* reversed and vacated his conviction. Congress had intended the MCA to be merely "declarative of existing law" allowing prosecution of crimes that occurred before enactment. The court found that the MCA did "codify some new war crimes, including material support for terrorism," and therefore could not authorize retroactive prosecution of these new crimes. Because the Act passed in 2006, its proscription of material support for terrorism could not apply to Hamdan's alleged activities supporting bin Laden and al Qaeda between 1996 and 2001. Accordingly, he could be convicted only if a prior law criminalized material support.

The court examined the relevant law on the books at the time of Hamdan's alleged misconduct and found it wanting. Specifically, 10 U.S.C. § 821 provides jurisdiction for offenses that "by the law of war may be tried by military commissions." Interpreting "law of war" offenses by reference to international law, the court found that certain forms of terrorism, including targeting civilians, are long recognized as international-law war crimes. Not so for material support for terrorism. Because there was no timely proscription of that offense, Hamdan's conviction could not stand.

The vacatur of Hamdan's conviction triggered an immediate and impassioned reaction in the media. Commentators portrayed the opinion as "the biggest blow yet" to the military commissions system in Guantánamo and "a powerful blow to the legitimacy of those trials." This "blockbuster opinion" from a conservative circuit served to rein in "executive branch officials [who] stubbornly sought to manipulate the rule of law."

Guantánamo is a sensitive topic. Contrary to its media depiction, the D.C. Circuit's *Hamdan* opinion poses no existential threat to Guantánamo military commissions. Quite the opposite: the opinion is good authority to convene future military commissions. While formal convening authority rests with the Secretary of Defense, courts offer the complementary authority of judicial review. The Supreme Court recognized exigency as lending legitimacy to military commissions. Now, the D.C. Circuit has recognized the trial process as lending further legitimacy. The court upheld the military commissions structure and guided prosecutors to charge defendants carefully for conduct before or after enactment of the MCA. Upon examination, the opinion is a typical appellate disapproval of a trial result—based not on the illegitimacy of the proceedings but on the misapplication of a new law.

Like any appellate court, the D.C. Circuit in *Hamdan* reviewed a lower-court criminal proceeding and found a fatal flaw. Promptly upon directing that "Hamdan's conviction for material support for terrorism be vacated," the court wrote a significant clarification: its opinion does *not* "preclude any future military commission charges against Hamdan—either for conduct prohibited by the 'law of war' under 10 U.S.C. § 821 or for any conduct since 2006 that has violated the Military Commissions Act." The opinion rejected Hamdan's conviction on a reasoned basis, but not the process that generated that conviction.

Thus, *Hamdan* invites trials by military commission and provides an appellate-sanctioned roadmap for the proceedings. Should the executive seek to try an individual by military commission for actions that were criminalized before he undertook them, it may do so—as in the ordinary course in Article III courts. For conduct before 2006, international-law war crimes have long included terrorism, aiding and abetting terrorism, and targeting civilians. For conduct after 2006, the MCA specifies a myriad of crimes including material support for terrorism.

Hamdan clarifies the military commissions procedure, and that clarity is legitimating. Yet, clarity should not be mistaken for simplicity. Any MCA charges of "new war crimes," including material support for terrorism, are vulnerable under the D.C. Circuit's timeliness analysis. While Guantánamo holds al Qaeda leaders directly involved in terrorist plots against the United States, many of the current 166 detainees are "low-level foreign fighters" who lacked a significant role in terrorist organizations. The task of swearing and proving charges remains difficult, and the stakes for both prosecutors and defendants remain high.

The stakes are particularly high in the military commission trial underway in Guantánamo against the September 11th defendants, most notably Khalid Shaikh Mohammad, the self-proclaimed "mastermind" behind the attacks. Mohammad and four co-defendants are charged under the MCA (as revised in 2009) with eight offenses, including conspiracy, murder in violation of the law of war, attacking civilians, and terrorism. The defendants do not face charges of material support for terrorism. *Hamdan* nonetheless weakens the charge of conspiracy, especially given the Supreme Court's earlier plurality opinion that rejected conspiracy as a war crime. Indeed, the government chose not to oppose defendants' motion to dismiss conspiracy, on the basis that dismissal would avoid "additional uncertainty and appellate risk" and allow the case "to proceed without unnecessary delay."

Dropping conspiracy would reduce the number of charges against the September 11th defendants, but not end the case. Applying the strictest reading of *Hamdan* and including only offenses that were established international-law war crimes before Congress passed the MCA, serious charges remain. Attacking civilians and terrorism are clear offenses against the law of war, and those charges suffice for trial by military commission.

The logic of *Hamdan* also applies to prior convictions obtained by military commission in Guantánamo: to the extent convictions for pre-2006 conduct were based on offenses recognized as war crimes, those convictions should stand. Seven detainees have been convicted through military commissions; four were subsequently transferred to other countries. In addition to Hamdan, one other detainee was convicted solely of providing material support for terrorism. Australian citizen David Hicks pleaded guilty in 2007 to one count of material support. He was sentenced to seven years, which by plea agreement was reduced to nine months' confinement in Australia. As part of the agreement, Hicks waived all appeals. Given this waiver, *Hamdan* undercuts Hicks' conviction in theory if not in practice.

In the end, far from undermining the legitimacy of Guantánamo military commissions, *Hamdan* fosters a richer understanding of the proceedings. By offering an ordinary appellate analysis in the extraordinary context of Guantánamo, the D.C. Circuit has placed a military commission judgment squarely in line with district court judgments and issued a reminder that principles of fairness apply in military and civilian trials alike. ■

This Article is co-published online by the National Security & Armed Conflict Law Review at Miami Law. An extended version of this Article appears in the Summer 2013 issue of the NSAC Law Review.

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Something of Race Remains:

Identity in Public Education

By Osamudia James

Summer of 2013 brought an opinion in one of the more controversial cases of the Supreme Court's 2012 term, Fisher v. University of Texas. In the case, Abigail Fisher, a white female who was denied admission to the University in Texas in 2008, challenged the University's use of race in its admissions process as unnecessary and, thus, unconstitutional, because the Texas Top Ten Percent (TTP) program produces a