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United States v. Salim Hamdan

The first trial by military commission in the so-called war on terror took place at the Guantánamo Bay Naval Station from July to August 2008. The accused was Salim Ahmed Hamdan, a Yemeni national who had been captured in Afghanistan in November 2001 and incarcerated at Guantánamo since late April 2002. He was charged with the alleged war crimes of "Conspiracy" and "Providing Material Support for Terrorism," based primarily on his admitted conduct in serving as a driver and auto mechanic for Osama bin Laden from 1996 until the fall of 2001.

The initial effort to try Mr. Hamdan before a military commission was scuttled in June 2006, when the United States Supreme Court ruled in *Hamdan v. Rumsfeld* that the military commission scheme established unilaterally by the executive branch (pursuant to President Bush's Military Order of November 13, 2001) had been stuck down on multiple grounds.

The Bush administration quickly mobilized to revive its plan to conduct trials by military commissions, introducing draft legislation into Congress for that purpose in September 2006. By mid-October 2006, without the benefit of any public hearings, and just prior to breaking for the mid-term elections, Congress passed the Military Commissions Act of 2006. This statute provided the legislative approval that had been missing from the President's initial scheme. While there were a few additional procedural protections for defendants (for example, the right not to be excluded from his or her own trial), the statute largely endorsed the pre-trial and trial procedures that had been put in place under the original plan promulgated by DOD regulations.

New criminal charges were sworn out against Mr. Hamdan in April 2007. In addition to "Material Support for Terrorism," the original charge of "Conspiracy" was reasserted, despite the fact that a plurality of the Supreme Court had determined that no such offense existed under the laws of war.

I first met Mr. Hamdan at Guantánamo in mid-April 2007, after traveling two days from Seattle to get to the base. After obtaining security badges, I proceeded to Camp Iguana, where I was ushered into a plywood hut with several chairs and a worn-out sofa pulled up to a single table in the middle of the room. Sitting at the table was Mr. Hamdan, in beige prison garb, with a shackle around his ankle secured to a large eye-bolt in the floor. I was there with one of my co-counsel, a paralegal from the Office of the Chief Defense Counsel, and our translator. Mr. Hamdan looked exhausted and wary, not at all like the one pre-capture photograph of him that I had seen previously. The swearing of charges meant that his case would likely move forward quickly. In addition to introducing me and reporting on procedural status, the purpose of our visit was to discuss generally the manner in which we proposed to defend Mr. Hamdan at trial. Unfortunately, we did not make much progress during that first visit. The isolation in which had been held for months, and the continuing uncertainty and stress of his indefinite detention made it virtually impossible for Mr. Hamdan to focus on substantive matters. After an initial period of rather disjointed discussion, which did not succeed in coming to grips with the many pressing issues that needed immediate attention, we were forced to sit silently with Mr. Hamdan as he struggled to contain his emotions arising out of the conditions of his confinement and the

apparently hopeless situation in which he found himself. It was immediately clear to me that there were huge obstacles to overcome before any effective defense could be presented in this case, obstacles that did not merely arise from the muddled state of the law embodied in the MCA, or from the paltry discovery provided by the government, but from the psychological condition of our client.

By May 2007, Mr. Hamdan's charges had been referred by the convening authority and a military judge had been appointed to preside over his trial. The arraignment was set for June 4, 2007. In May, during my second trip to Guantánamo, we filed our initial motion in the criminal case, a motion to dismiss for lack of personal jurisdiction. Pursuant to the MCA, military commissions only have jurisdiction over "unlawful enemy combatants," and the CSRT findings on which the government wholly relied to establish that status made no mention whatever of "unlawful" combatancy. The government argued, in essence, that the language of the MCA itself, as well as presidential findings, established that captured Taliban and al Qaeda fighters were "unlawful enemy combatants" by definition.

I argued this motion before the military commission on the afternoon of June 4, 2007, immediately following Mr. Hamdan's arraignment. To my great surprise, that very morning the military judge in the case of Omar Khadr had relied on the exact same arguments we had advanced in our jurisdictional motion to dismiss the charges against Khadr for lack of jurisdiction. In doing so, the Judge acted *sua sponte*, as Mr. Khadr at that point was without counsel representing him before the military commission. In the afternoon session in the Guantánamo Bay courtroom (built in the former air traffic control center on a hill above the old airfield), I argued that the government had failed to make the showing of personal jurisdiction necessary to allow the case to proceed, while the military prosecutor argued the opposite for the government. The military judge stated from the bench that he would recess for fifteen minutes, then return with a ruling. He came back into the courtroom and delivered an oral ruling in favor of the defense, dismissing all charges against Mr. Hamdan without prejudice.

Thus began a roller-coaster ride that was to last at least through the end of 2008 (and that indeed, as of this writing, is not entirely over). Later in 2007, after the *Khadr* decision was overturned by the newly appointed Court of Military Commissions Review, the government obtained reconsideration from the military judge in our case, and an evidentiary hearing on personal jurisdiction was held in December 2007 to give the government a second opportunity to show that Mr. Hamdan was an "unlawful enemy combatant." At that hearing, which ran until after 11:30 PM on the second day of proceedings, testimony was introduced by the government from law enforcement personnel who had interrogated Mr. Hamdan over a protracted period of time, extending to almost two years after his capture. There was also testimony from the officer who commanded U.S. forces at the site of Mr. Hamdan's capture. For its part, the defense request to interview a number of the alleged co-conspirators who were detained at Guantánamo was vigorously opposed by the government and was denied by the military judge as untimely (though the identification of these potential witnesses had been made in accordance with a schedule set by the court). Ultimately, the military judge ruled that Mr. Hamdan's capture in proximity to a battlefield, with evidence of weapons in his possession, was sufficient to establish his unlawful combatant status and permit the case to move forward. He rejected defense arguments that there was no showing of participation in hostilities, and that, even on the evidence adduced by the

prosecution, under Article 4 of the Third Geneva Convention Mr. Hamdan should be entitled to POW status as a civilian authorized to accompany armed forces.

There followed seven months of intense motion practice addressing a host of legal flaws with the charges, the government's evidence, and the military commission system, with oral argument at GTMO on multiple occasions through the spring of 2008. The defense also renewed efforts (largely unsuccessful) to obtain adequate discovery from the government, including for example, the right to interview the "high value detainees" (HVDs) who were alleged co-conspirators of Mr. Hamdan. Direct access to those detainees was never afforded to the defense, though the military judge did permit written questions—duly screened by a security officer—to be submitted. Ultimately, several of the HVDs responded in writing, providing exculpatory evidence that was later submitted at trial.

By early February, the defense also filed a motion seeking relief for Mr. Hamdan from the harsh conditions of confinement that were interfering with his ability to assist in his own defense. The debilitating conditions under which Mr. Hamdan was being held were on display most dramatically during a hearing in late April 2008. The parties had gathered at that point to address a number of defense motions, including most notably a motion to dismiss due to "unlawful command influence," and motion seeking a ruling on the date of the start of the "war," which would have the effect of excluding evidence and dismissing specifications based on "pre-war" conduct. While we got through the unlawful command argument, we never made it to the start of the war issue. Instead, on the second day of proceedings, Mr. Hamdan leaned forward and spoke into the microphone at counsel table:

"Your Honor, this is Hamdan. May I speak to you for a few minutes?"

The Military Judge readily assented. Mr. Hamdan continued:

Last night I told you that I did not want to come to this court because there is no such thing as justice here. The law is clear. The law in America is clear. The international law is clear. If you ask me what the color of this paper is, I will tell you the color is white. You say, no, it's black. I say white. You say black. I say, fine, it's black. Then you say, no, it's white. This is the American Government. Do you understand what I have just said, your Honor?

Thus began one of the most remarkable events I have ever witnessed in a courtroom: a colloquy between the prisoner and the military judge that lasted thirty to forty minutes, characterized by the utmost courtesy, personal consideration, and restraint on both sides. Mr. Hamdan asked how, despite winning a case in front of the Supreme Court, he could still be subjected to a legal proceeding that deprived him of basic rights. He continued:

These words are not directed to you personally; I am talking about the American government.... If you want to try me, you can try me before the civil law, with any law that is recognized. It has been four years now that we are in this court.... We fought to the Supreme Court and the Court made a decision. Then the government went to the Congress and they changed the law. Why did they change the law? Just for my case?

The military judge responded to this appeal for justice with great humanity, expressions of understanding, reassurances about the right to a fair trial, and explanations about the procedures that would play out over the coming weeks.

I understand your frustration, Mr. Hamdan. I know that you have been held as a detainee for six or seven years now. I know that the government has tried three times to try you for the offenses it believes you committed. Twice they have done it wrong.... I believe you are entitled to a fair trial. I want you to have a fair trial.

The Military Judge also urged Mr. Hamdan to allow his lawyers to defend him before the commission.

Mr. Hamdan, I think you should have great faith in American law because you have already been to the Supreme Court of the United States,...and the Supreme Court of the United States said to the president: 'You cannot do that to Mr. Hamdan.' And you were the winner. Your name is printed in our law books. You beat the United States once, in our system with these attorneys here with you today.

At the end of this extraordinary exchange, however, Mr. Hamdan respectfully told the Court that he would not return, and that he would not permit his defense team to defend him in his absence. In addition, he initially refused to speak with defense counsel following that hearing. We flew back to the States not knowing whether we would be allowed to continue our efforts on Mr. Hamdan's behalf. At that point, trial was one month away.

There followed a period of great uncertainty as to whether any meaningful trial would occur. Would the government present its case unopposed? Would it forcibly compel Mr. Hamdan to attend the trial? Would defense counsel be required to sit mute in the courtroom? In the face of these questions, we were able to obtain a continuance of the trial to await the Supreme Court's decision in *Boumediene*, which could have significant implications for Mr. Hamdan's case. In the meantime, I returned to Guantánamo with my co-counsel and partner, Harry Schneider. Thankfully, we were successful in our objective of persuading Mr. Hamdan that his best interests required that we be permitted to defend him.

Ultimately, after a three-week trial at Guantánamo, Mr. Hamdan was acquitted of the more serious conspiracy charge, and convicted of one count of material support for terrorism. The commission members, after hearing all the evidence (including an unsworn statement from Mr. Hamdan during the sentencing phase in which he apologized if, unwittingly, he had done anything to injure anyone) imposed a sentence of sixty-six months confinement, having been informed by the military judge previously that Mr. Hamdan would be given sixty-one months and eight days credit for pre-trial confinement. Thus, the sentence amounted to less than five additional months of confinement. The military judge addressed himself to Mr. Hamdan at the end of the last day of trial, after the commission members had been dismissed. He said, in substance:

I do not know what is going to happen, Mr. Hamdan. But I hope that after you serve your sentence you are able to return to Yemen to be reunited with your family, to live peacefully, and to support your wife and daughters.

"Inshallah," said Mr. Hamdan, standing at counsel's table.

"Inshallah," said the military judge, from the bench.

After the commission members and judge had retired, and as three U.S. Marines escorted him from the courtroom, Mr. Hamdan turned one last time to address those still in the courtroom (defense counsel, the prosecution team, the press, and others). Waving both hands in the air and smiling broadly, he said, "Bye-bye, everybody!"

The question then became whether the government would indeed release Mr. Hamdan after the completion of his sentence, or whether it would continue to hold him as an alleged enemy combatant. Our inquiries to the government on that point were not answered until, in late November 2008, we were abruptly told that Mr. Hamdan would be returned to his native Yemen, "to serve the remainder of his sentence." Within seventy-two hours of our receiving that message, and after one hastily arranged phone call with us, Mr. Hamdan was on a flight to Yemen.

In the second week of January 2009, Mr. Hamdan was released from the custody of Yemeni authorities, and reunited with his family, including the seven-year-old daughter he had never met. His ordeal at Guantánamo is over, but there remains for him the challenge of recovering his health and rebuilding his life and relationships in his native land.

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