
UNITED STATES OF AMERICA

v.
vi.

SALIM AHMED HAMDAN

)
)
) DEFENSE MOTION TO
) ABATE PROCEEDINGS
)
)
) 1 October 2004

1. Timeliness. This motion is submitted within the time frame established by the Presiding Officer's order during the initial session of Military Commissions on 24 August 2004.

2. Relief Sought. That the Military Commission issue a statement to abate the current proceedings to permit a ruling on the issues of jurisdiction, constitutionality, compliance with international law, and speedy trial raised in Mr. Hamdan's petition for mandamus and habeas by the Federal District Court in Washington D.C.

3. Overview. The Military Commission's hearing of this case without a decision from the federal courts that it is the appropriate forum makes the proceedings illegitimate.

4. Facts.

a. On 13 November 2001, President Bush issued a military order pursuant to the authority vested in him as President of the United States and Commander in Chief of the Armed Forces of the United States by the Constitution and laws of the United States vesting in the Secretary of Defense the authority to try by military commission those persons that the President determined were subject to the order.

b. Subsequent to the President's Military Order of 13 November 2001, Mr. Hamdan was taken XXXX in late November 2001, XXXX and has been detained by the United States Government ever since.

c. On 3 July 2003, the President of the United States determined that Mr. Hamdan was subject to his military order of 13 November 2001.

d. On 6 April 2004, Mr. Hamdan filed suit in the federal courts of the United States seeking review of the Military Commission.

f. On 28 June 2004, the Supreme Court of the United States ruled that U.S. Federal Courts had jurisdiction to here petitions from persons detained by the United States within U.S. Naval Station Guantanamo Bay, Bay Cuba.

g. On 13 July 2004, a charge of conspiracy to commit terrorism against Mr. Hamdan was referred to this Military Commission.

h. Briefing in Mr. Hamdan's will be completed by 14 October 2004 with oral argument and a decision expected soon after.

5. Law.

a. This Commission Should Hold Everything in Abeyance Until the Civil Courts Rule,

Before filing this action, Mr. Hamdan sought all relief possible from the military process. He requested a speedy charge so that he could raise the constitutional and legal challenges to the commission process. Without a commission, there was no place to raise them. Yet the request was denied. At that time, it appeared that no legal process whatsoever would be forthcoming for Mr. Hamdan and that he would just stay in confinement. But after the Supreme Court's June 28, 2004, decision in *Rasul*, the Government had to do something. The Supreme Court handed the Government a huge defeat, stating that it could not indefinitely detain people on Guantanamo without violating the Constitution and laws and treaties of the United States. So a fortnight later, the Government decided to try to charge Mr. Hamdan. Now they are trying to force this Commission to rush to a decision despite the fact that a federal lawsuit was filed in this very case on April 6, 2004. They are trying to make the federal proceeding irrelevant by rushing decisions from the commission. But history and logic require the prosecution's rush for requested judgment to fail.

b. Quirin Conclusively Establishes That This Commission Should Abstention .

1. In *Quirin*, the case involving Nazi Saboteurs, Attorney General Biddle explained why abstention and exhaustion would be futile. Responding to the defense's claim that "the order of the President creating this court is invalid and unconstitutional," Biddle opened the commission proceedings:

In the first place, I cannot conceive that a military commission composed of high officers of the Army, under a commission signed by the Commander-in-Chief, would listen to argument on the question of its power under that authority to try these defendants. In the second place, let me say that the question of the law involved is a question, of course, to be determined by the civil courts should it be presented to the civil courts. Thirdly, this is not a trial of offenses of law of the civil courts but is a trial of the offense of the law of war, which is not cognizable to the civil courts. It is the trial, as alleged in the charges, of certain enemies who crossed our borders, crossed our boundaries, which had then been described by the military and naval authorities, and who crossed in disguise in enemy vessels and landed here. They are exactly and precisely in the same position as armed forces invading this country. I cannot think it conceivable that any commission would listen to an argument that armed forces entering this country should not be met by the resistance of the Army itself under the Commander-in-Chief or that they have any civil rights that you can listen to in this proceeding. Transcript

¹ The government's jurisdictional standard is ["at the time of filing"—need quote from venue brief]. As it has itself conceded, events after that time do not go to jurisdiction. See *id.*, at ___.

available at http://www.soc.umn.edu/~samaha/nazi_saboteurs/nazi01.htm
 (“Saboteur Tr.”) (emphasis added).

2. Biddle’s claims about the futility of exhaustion and the propriety of civil adjudication were integral to *Quirin*. Indeed, the commission stopped proceeding so that the federal case could be filed, argued, and decided.²

3. In *Quirin*, the parties recognized that it would be inappropriate, even during a World War, to have a commission pronounce guilt when a legal cloud of uncertainty existed over the proceedings. Antecedent civilian review avoided the problem of asking a court to set aside a military verdict, which would have truly threatened comity. That is precisely why the Nixon Administration’s Department of Defense Report in the midst of thousands of casualties in Viet Nam, concluded that an early adjudication would *benefit* the Government. A Presidential Order to establish commissions would allow the “defendants to sue for a writ of habeas corpus immediately upon being placed under restraint, and it might result in a pretrial judicial determination on the question of jurisdiction. Such an early decision on the jurisdictional question would seem to be in the interest of both the Government and the defendants.” **U.S. Dep’t of Defense, Military Commissions 9 (1970)**. In the years since 1942 and 1970, the legal problems with military commissions have grown. For commissions to proceed under this state of affairs, a state of affairs that is completely unlike that of our honorable military system of courts-martial, contravenes precedent as well as the interests of both the United States and Mr. Hamdan.

c. The Federal Courts Have Said that They Should Decide These Issues First.

1. It is commonly understood that federal courts must rule first when someone has “raised substantial arguments denying the right of the military to try them at all.” *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975). A standard abstention exception exists when someone claims that the government “had no constitutional power to subject them to the jurisdiction of courts-martial.” *Id.*³ It is not limited to civilians (and Mr. Hamdan in any event claims to be one, unlike Mr. Councilman, for whom there was “no question that he is subject to military authority,” *id.*, at 759). A “person need not exhaust remedies in a military tribunal if the military court has no jurisdiction over him.” *New v. Cohen*, 129 F.3d 639, 644 (D.C. Cir.1997). “The policies that limit military tribunals to trial of service-connected offenses, and to jurisdiction over people who in fact are in service, represents vitally important limits that deserve prompt and effective protection.” *Murray*, 16 M.J. 74, 76 (CMA1983). *See also Hammond v. Lenfest*, 398 F.2d 705, 714 (2d Cir. 1968) (“[A]lthough the government maintains that [the plaintiff] should present his claim as a defense to a court martial, it fails to explain wherein lies its power to convene the court martial”); *Andrews v. Heupel*, 29 M.J. 743, 747(AFCMR1989) (“[P]etitioner

² See Rehnquist, *All The Laws But One* 137 (1998); *Saboteur Tr.*, at 2765 (adjourning commission for a number of days so that defendants could proceed in Supreme Court); *id.*, at 2935 (remarks of the lead prosecutor, the Judge Advocate General, that the Supreme Court “probably will straighten out the question as to whether this is a theater of operation.”); *id.*, at 2963 (remarks of Judge Advocate General)

³ Furthermore, the Supreme Court’s decision in another military commission case, *Ex Parte Yamashita*, suggests that challenges should be brought before the trial, stating that Congress “has not foreclosed” the accused their “right to contend that the Constitution or laws of the United States withhold authority *to proceed* with the trial.” 327 U.S. 1, 9 (emphasis added).

has raised a substantial argument denying the right of the military to try him at all. Thus, the normal procedures for appellate review within the military justice system may be bypassed.”); *United States ex rel. Guagliardo v. McElroy*, 259 F.2d 927, *928, (C.A.D.C. 1958) (stating that cases requiring exhaustion from the military are “inapposite, for there court-martial jurisdiction over the accused unquestionably existed since he was a member of the United States Army” and “[h]ere, in contrast, the question is whether appellant is subject to court-martial jurisdiction at all.”), *aff’d* 361 U.S. 281 (1960).

2. Federal courts are, as one would expect, very sensitive to the needs not to interfere with *courts-martial*. And so there have been any number of decisions, including *Councilman* itself, in which the courts have said that due respect for the judgments of Congress in promulgating the UCMJ require courts-martial to occur first. But that is precisely what the prosecution tries to ignore by throwing out the lessons of courts-martial altogether. The prosecution cannot use these very same sources to argue that courts should defer when the President unilaterally sets these very same structures aside. *See Councilman*, 420 U.S. at 759-60 (advocating deference to “a system *established by Congress and carefully designed* to protect not only military interests but [the defendant’s] legitimate interests as well”).

3. Indeed, Mr. Hamdan is afforded none of the protections of the rule of law which accompany legitimate military proceedings. Normally, “it must be assumed that the military court system will vindicate servicemen’s constitutional rights.” *New*, 129 F.3d at 643, The Government has argued that this case is different because Mr. Hamdan has no constitutional rights whatsoever. Indeed, the prosecution’s litigating position raises serious questions about whether it can be trusted with the deference that is normally accorded to tribunals bound by the Constitution. To the extent that jurisprudence requires abstention, it is built on the rock of a fair system established by Congress. Those key features are woefully lacking here.

4. Courts have made clear that federal courts should rule when the defendant is challenging the adequacy of the process he is to receive. “[E]xhaustion has not been required where the challenge is to the adequacy of the agency procedure itself, such that “the question of the adequacy of the administrative remedy ... [is] for all practical purposes identical with the merits of [the plaintiff’s] lawsuit.” *McCarthy*, 503 U.S. at 148 (citation omitted). *See also Johnson v. Robison* 415 U.S. 361, 368 (1974) (“[A]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.” (internal quotations omitted)); *McNeese v. Board of Ed. for Community Unit School Dist. 187*, 373 U.S. 668, 675 (1963) (students seeking to integrate public school need not file complaint with school superintendent because the “Superintendent himself apparently has no power to order corrective action” except to request the Attorney General to bring suit).

5. The Supreme Court has also held that civilian courts should rule first when there is “an unreasonable or indefinite timeframe for administrative action.” *McCarthy* at 147. The Government has kept Mr. Hamdan in solitary confinement for over eight months while denying him the UCMJ and Geneva Conventions’ protection of a speedy charge. The Government has only recently filed formal charges—and only after Mr. Hamdan filed suit in federal court for relief. As *McCarthy* and the cases it cites illustrate, the Government cannot

keep a plaintiff in permanent limbo by requiring him to exhaust remedies that it has failed to provide in a timely manner.⁴

6. In the end, this case raises legal questions that are squarely within the expertise of civilian Article III courts that are trained to evaluate precisely these difficult questions of constitutional and statutory dimensions. As the Supreme Court of the United States put it, we do “not believe that the expertise of military courts extend[] to the consideration of constitutional claims” *Noyd*, 395 U.S. at 89 n.8.⁵

7. Indeed, no case has said that a commission should rule ahead of a civilian court. Even in the more lenient court-martial cases, the civil courts have always announced an exception when “a particular plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim.” *McCarthy*, 503 U.S. at 146. There has already been a finding by a federal Judge that the excessive delay in this case has injured Mr. Hamdan psychologically.

8. Mr. Hamdan has waited and waited for these proceedings to begin. If this were a military court following American military law, the proceedings would have been dismissed a long time ago. The fact that we are at Guantanamo, instead of some other place, does not change the result. The prosecution’s newfound desire to get the commission process underway comes far too late. An enormous legal cloud now hangs over these proceedings, a cloud that requires federal courts to say what the law is. It is notable that dozens of law professors in America, two Retired Generals, two Retired Admirals, 271 members of the British and European Parliaments, and various others, have all filed briefs in Mr. Hamdan’s case stating that these proceedings are illegal. To proceed under this state of uncertainty is precipitously unwise. Instead, this Commission should do what the commission did in World War II and what the Pentagon recommended during the Administration of President Nixon, wait for the federal courts to review these difficult issues before changing the course not only of one man’s life, but the nation as a whole.

6. Oral Argument. Is requested. The Rules for Commission permit the Presiding Officer to determine whether or not to grant an abatement of proceedings. Prior to this ruling the Defense intends to call Prof XXXX as a fact witnesses and to incorporate his testimony into this motion via oral argument.

7. List of Legal Authority Cited.

- a. *Rasu v. Bush*, 124 S.Ct. 2711, June 28, 2004

⁴ See *Gibson v. Berryhill*, 411 U.S. 564, 575, n. 14 (1973) (administrative remedy deemed inadequate “[m]ost often ... because of delay by the agency”). See also *Coit Independence Joint Venture v. FSLIC*, 489 U.S. at 587 (“Because the Bank Board’s regulations do not place a reasonable time limit on FSLIC’s consideration of claims, Coit cannot be required to exhaust those procedures”); *Walker v. Southern R. Co.*, 385 U.S. 196, 198 (1966); *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587, 591-592 (1926) (claimant “is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief”).

⁵ The Supreme Court has consistently held that fighting wars and staging trials are discrete tasks. “Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should occasion arise.” *Toth*, 350 U.S. at 17. See also *Reid v. Covert*, 354 U.S. 1, 35 (1957) (plurality).

- b. *Ex Parte Quirin*, 317 U.S. 1 (1942)
- c. Transcript of argument in *Quirin* available at http://www.soc.umn.edu/~samaha/nazi_saboteurs/nazi01.htm
- d. *Schlesinger v. Councilman*, 420 U.S. 738 (1975).
- e. *New v. Cohen*, 129 F.3d 639 (D.C. Cir.1997).
- f. *Murray*, 16 M.J. 74 (CMA1983).
- g. *Hammond v. Lenfest*, 398 F.2d 705 (2d Cir. 1968)
- h. *Andrews v. Heupel*, 29 M.J. 743 (AFCMR1989)
- i. *U. S. ex rel. Guagliardo v. McElroy*, 259 F.2d 927 (C.A.D.C. 1958)
- j. *McCarthy*, 503 U.S. at 148 (citation omitted).
- k. *Johnson v. Robison* 415 U.S. 361 (1974)
- l. *McNeese v. Board of Ed. for Community Unit School Dist. 187*, 373 U.S. 668 (1963)
- m. *Noyd*, 395 U.S. at 89

8. Witnesses and/or Evidence Required. The Defense intends to call Prof XXXX as a fact witness. Prof XXXX while serving as judge advocate participated in an analysis of the potential to try war crimes associate with the Vietnam War before Military Commissions. Prof. XXXX will testify that do to developments in both military law and international law that the conclusion of this analysis was that Federal Court review of the legality prior to any commission was recommended as sound public policy and prudential judicial decision making. If Prof. XXXX is unavailable, then they intend to call XXXX, a Professor at XXXX who is an expert on military law.

9. Additional Information. The defense request that prior to resolving this issue that the Presiding officer consult the other members of the Commission. The other members as lay persons are required to decide the issues of law presently being considered in Federal Court. The defense requesting that the Presiding Officer consider their views in the advisability of abating while the Federal Judiciary considers the novel issues of law before the Commission.

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