

Blind Justice?

Fair trials for Salim Hamdan here and Saddam Hussein in Iraq can't be based on secret evidence. The world is watching us.

BY OWEN BONHEIMER

Salim Ahmed Hamdan, the former driver for Osama bin Laden now detained at Guantánamo Bay, stands charged with conspiring with al Qaeda. In his appeal to the U.S. Supreme Court, Hamdan is challenging the Guantánamo Commission rules that permit the use of secret evidence against him at trial. Three times already the Supreme Court has delayed a decision on whether to hear his appeal in *Hamdan v. Rumsfeld*.

The Iraqi Special Tribunal, which last week began proceedings in the trials of Saddam Hussein and members of his former regime, has a similar problem: It has rules that seem to permit the use of secret evidence against the accused.

Countries around the world see at work in both the Iraqi Special Tribunal and the Guantánamo Commission the policy of the United States on prosecuting war and other heinous crimes. So if the Supreme Court does not address this fatal flaw in the Guantánamo rules now, we will be sending the wrong message about American justice to the Iraqi tribunal and to the world.

DON'T TELL THE ACCUSED

As written, the Guantánamo Commission rules permit the federal government to convict Hamdan on the basis of secret evidence that he will never see and that his lawyers will never fully understand. Under these rules, not only can the government introduce secret evidence at trial that is withheld from the accused and his civilian lawyers, but the government can redact “state secrets” from the evidence given to the accused’s military defense counsel who have security clearances.

The rules also place no meaningful limitations on what evidence can be cloaked in this veil of secrecy. Evidence admitted at trial is treated as secret (or, in the language of the rules, as “pro-

tected information”) when it falls into one of five broad categories: classified; protected by a law or rule; raising concern for the safety of a participant; revealing of intelligence sources, methods, or activities; or involving “other national security interests.” As such, the rules can block meaningful access to virtually any evidence introduced against the accused.

A recent revision to the rules does allow the presiding military officer—who acts as both judge and juror—to exclude some secret evidence. But this only applies if the presiding officer finds that admitting this particular evidence would make a full and fair trial for the accused *impossible*. An exclusionary rule with such a high bar still leaves ample room to convict someone on the basis of evidence that he and his lawyers can never examine or rebut.

The Supreme Court’s decision in the Hamdan case—whether to take the case at all and then whether to limit secret evidence—inevitably will send a message to the Iraqi Special Tribunal because of the remarkable similarities between the tribunal and the military commissions. Both are ad hoc courts established pursuant to the authority of President George W. Bush as commander in chief and pursuant to congressional authorizations of the use of force since Sept. 11, 2001. Both are set to try persons captured by the United States on the battlefield of war. Both are trying individuals who have been declared a threat to U.S. security. Both are governed by a statute that requires the accused be afforded the fundamental rights to be present and to confront evidence against him.

Yet both tribunals, operating under significant influence from the Bush administration, have adopted evidentiary rules that, in fact, fail to guarantee the accused the rights to be present and to confront evidence against him.

The U.S.-led occupation government in Iraq, the Coalition Provisional Authority (CPA), was on strong ground when it authorized a December 2003 statute requiring the Iraqi Special Tribunal to try the accused “in his presence.” So said New York

University law professor Noah Feldman, who served as legal adviser to the CPA. In an amicus brief filed with the U.S. Court of Appeals for the D.C. Circuit in the Hamdan case, Feldman explained that the CPA understood requirements in the statute to be mandated by international law and necessary for the security of Iraq.

Yet, just weeks after the D.C. Circuit decided on July 15, 2005, that it could not overturn the Guantánamo Commission rules permitting the use of secret evidence against Hamdan, the Iraqi Special Tribunal issued similar rules permitting evidence to be hidden from the accused.

Iraqi Special Tribunal Rule 60 may be invoked in the current pretrial phase to withhold evidence against Hussein from him “for any reason” found to be in the national security or public interest of Iraq, the United States, or any other country. As written, Special Tribunal Rule 71 also permits closed sessions as needed to protect those same interests. The right of the accused to be present at such sessions is not made clear in that rule.

SADDAM'S SHOW

And yet the need to discourage the use of secret evidence against any criminal defendant, including Hussein, is paramount. One need only recall the Guantánamo hearing at which a detainee was asked to defend himself against allegations that he had met with a certain individual, but the name of the individual was kept secret from the detainee. As the U.S. District Court for the District of Columbia observed on appeal, the interrogation of the detainee about that alleged meeting would have been comical, if it were not so deadly serious. Based on that example, the judge concluded that the detainee could not, in any meaningful way, defend himself against the accusation that he was a terrorist.

Permitting this type of problem to occur in Iraq will only give Saddam Hussein and his former colleagues in tyranny the opportunity to convert their trials into a circus—which, judging from his performance last week, Hussein is making every effort to do. Hussein’s lawyers are already complaining that the evidence turned over to them contains many blank pages. Using secret evidence unnecessarily gives a master manipulator the opportunity to elicit sympathy for himself and raise suspicions about the integrity of his accusers.

But the United States no longer exerts any formal, legal control over the Iraqi Special Tribunal. The best way for the United States to ensure the integrity and legitimacy of the trial of Hussein, then, is to lead by example in the conduct of the Guantánamo Commission.

The desire—indeed, the need—to prevent this and future war crimes proceedings from devolving into mere show trials should motivate the Supreme Court to do what U.S. law requires anyway in the Hamdan case: interpret an ambiguous U.S. statute consistently with the Geneva Conventions.

The conflicting interpretations of the Uniform Code of Military Justice (UCMJ) in the Hamdan case so far demonstrate that the statute is ambiguous. The District Court read the UCMJ as requiring the rights of presence and confrontation for Hamdan. The D.C. Circuit read the UCMJ as not requiring those protections in the context of the military commissions.

Under the two-centuries-old Supreme Court precedent of *Murray v. The Schooner Charming Betsy* (1804), a statute that is amenable to more than one interpretation must be interpreted consistently with treaties that bind the United States. Thus, the UCMJ must be construed consistently with the Geneva Conventions.

Common Article 3 of the Geneva Conventions requires that the United States not try persons captured on the battlefield without affording them “all the judicial guarantees which are recognized as indispensable by civilized peoples.” In the recent case of *Crawford v. Washington* (2004), Justice Antonin Scalia, writing for the majority, held that the right of the accused to confront evidence against him lies at the core of a civilized adversary process.

The fact is that the United States in the 1990s tried and convicted accused terrorists without eliminating this fundamental right. The law governing the use of classified evidence against accused terrorists in U.S. courts ensures that the accused can see the version of the evidence that is shown to the finder of fact. By not ensuring the same right before the Guantánamo Commission, the United States takes the unprecedented step of permitting state secrets to be used as a sword against the accused. There is nothing about our current fears of terrorism that justifies this.

Although the Bush administration denies that the Geneva Conventions apply to individuals that the administration accuses of terrorism, and the D.C. Circuit decision implies that U.S. courts may not interpret ambiguous statutes by resort to non-self-executing treaties (i.e., treaties that require implementing national legislation), these are both legal conclusions that are far too novel and controversial to go unreviewed by the Supreme Court.

THE WORLD IS WATCHING

The majority on the Supreme Court are already increasingly aware of the global context in which their decisions operate. It is critical that in the Hamdan case, they consider the message they will send to Iraq and the rest of the world.

Leaving the D.C. Circuit decision unreviewed will foster a worldwide weakening of the fabric of international law. Left untouched, the Hamdan decision could serve as a precedent for other countries to violate the rights not only of Saddam Hussein and his admittedly unsympathetic cohorts, but also of our troops—as retired U.S. generals and admirals have explained in their amicus brief filed before the Court. Foreign tribunals also might use the Hamdan case to justify the introduction of secret evidence against private U.S. contractors captured in the theater of war.

The Supreme Court has another chance to take the Hamdan case this week. Let’s hope the Court seizes its opportunity to prevent the dissipation of the rule of law by ensuring that Hamdan receives blind, but not secret, justice at Guantánamo.

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