Hamdan post-mortem posting

Salim Hamdan's 66-month sentence for providing material support for terrorism hardly marks closure to this first chapter in the sorry history of the Bush administration's military commissions. A slew of questions remain: Was his trial legal? Will he be freed once he serves his five remaining months? And, having floundered in this first attempt, will the administration be foolish enough to use this deeply-flawed system to try the people it accuses of actually planning and putting into execution the September 11th attacks?

To begin with, his trial violated two of the most fundamental principles accepted by the criminal justice systems of all civilized nations: the prohibition on the use of coerced evidence, and the prohibition on retroactive criminal laws. While the military judge excluded most of the evidence from Hamdan's interrogations at Bagram – a place whose lawlessness makes Gtmo look tame in comparison – the judge allowed the military jurors to hear evidence from his interrogations in Gtmo, which were accompanied by abusive treatment (prolonged solitary confinement, sleep deprivation, sexual humiliation, etc.), and took place with no lawyers for Hamdan present, in total, indefinite isolation from the outside world. (While Hamdan admitted working as a driver for Bin Laden, some of these coerced "admissions" were quite important because the prosecution needed to prove that Hamdan knowingly supported Bin Laden's terrorist aims – at least for the "material support" counts on which Hamdan was convicted.)

The retroactivity problem is even more fundamental. Hamdan was tried for crimes created by the Military Commissions Act in 2006, five years after he was captured. (If "conspiracy" and "material support" were already illegal under the laws of war, arguably the MCA would simply have been declaratory of those preexisting prohibitions. The problem – as four justices of the Supreme Court noted in a 2006 opinion in Hamdan's case – is that conspiracy never was a traditional war crime (as this post spells out); its close cousin "material support" is an even newer animal.) The Constitution's prohibition on retroactive crimes applies everywhere, in military commissions as well as in ordinary domestic courts.

Unfortunately, Hamdan will have served his entire sentence before a non-military court ever hears these arguments. Perversely, most of his 66-month sentence has already been served: the father of two small children has been in Gtmo for 61 months. Since just before his charges were announced in February 2007, he has served that time in solitary confinement. From a defense lawyer's perspective, clients in solitary are incredibly difficult to work with. Not a single study of the effects of solitary has ever failed to show serious mental problems after 90 days in isolation, and clients tend to obsess over ending the isolation and be unable to focus on their defense, something Hamdan's lawyers told the court was happening with him. In Gtmo, it seems, the ordinary order of things is turned upside down: first you serve your sentence, then you're driven crazy, then you're tried.

Hamdan himself might at least take some comfort from the fact that he now has a definite end date to his sentence. Unfortunately, that doesn't mean he will be freed: the military has always asserted that even an acquittal by the military jury does not mandate release. Hamdan might be kept in Gtmo as an "enemy combatant" long after his remaining 4 months and 22 days are up;

indeed, the U.S. has been unwilling to return to Hamdan's native Yemen even other Yemeni detainees never charged with anything and formally cleared for release.

If they do choose to release Hamdan at the end of his sentence, the government will surely argue that Hamdan's appeals are moot. I say "choose to" because, again, this administration insists it does not ever have to release anyone tried by military commission after their sentence is served – or after acquittal. Moreover, keeping Hamdan for an extra month would mean that the question of his ultimate release would be left as a problem for the next president to chew on. (I can see the *N.Y. Post* headline now: "Noob Prez allows convicted terrorist to be released after 5 months.")

Why try such a little fish first? Put to one side that Hamdan was a cooperator from early on in his detention, and that the fact we abused him and tried him after he tried to help us catch Bin Laden will make this sort of cooperation from others less likely in the future. The only charges that stuck were that he took $200 a month to be Bin Laden's driver. (And for all the Nuremburg analogies drawn by the government, they didn't try Hitler's driver.) There were intimations that Hamdan was some sort of bodyguard, but it came out in the trial that the actual head of Bin Laden's personal security detail was at Guantanamo – and was released.

Senator McCain's statement on the convictions noted that "The jury found … that Hamdan had aided terrorists by supplying weapons to Al Qaeda and Taliban forces in Afghanistan," but that's actually entirely incorrect: all the charges relating to the missiles in the trunk of the vehicle Hamdan was in when captured were rejected by the military jurors (not only the conspiracy charges, but also the material support charges related to the missiles (Specifications 3 and 4 in Count II)).

In the end they convicted him for being the chauffeur to a rich terrorist. John Wesley Hall, President of the National Association of Criminal Defense Lawyers, put it best: "The Pentagon must be very proud of itself today. It was able to obtain a conviction of arguably the least-culpable among the 80 detainees it intends to prosecute as war criminals. It convicted a truck driver of being guilty of driving a truck."

So the question remains: why start with this guy? In their defense, the prosecutors will argue that this test-run primed the system for the trials of the September 11th conspirators sometime later in the year. Has it, though? To be certain, some kinks were worked out: The government, for instance, figured out how to get Hamdan's pants to him on time from the military laundry during the course of the trial. But the major issues – retroactivity, the constitutionality of the MCA provisions allowing coerced evidence to be used – remain unresolved, and they will remain open questions until the appeals (first to the Court of Appeals for the Military Commissions, then to the D.C. Circuit and possibly the Supreme Court) are complete. That could easily take two years, and even after those appeals are finished, the process will never be seen as legitimate by the world.

This first trial run of the commissions system has proved nothing except that the system itself should be scrapped. Terrorism-related crimes should be tried in the time-tested domestic criminal justice system, a system whose rules have been designed over the centuries with one goal: to seek out the truth. That system has proven that it works – both at sorting out the guilty from the

innocent, and at convincing the world that those verdicts are worthy of respect. And this is where Senator Obama is wrong to suggest that the 9/11 conspirators might properly be tried in military courts-martial under pre-9/11 law. Khalid Sheikh Mohammed – the biggest (alleged) fish currently facing trial in the commissions – desperately wants to be seen as a military figure: he announced last spring before his military CSRT panel that while he felt sorrow for the women and children who died on 9/11, they were just the sort of collateral damage that always happens in war. He's wrong. They were victims of mass murderers. We could try those accused of these monstrous crimes in the federal courts as common criminals. Instead, if we try them in this – or any other less-deeply flawed – military system, they are the only ones who stand to gain legitimacy at the end of the day.

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