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After You, Says the President

Recent remarks show Bush bowing to the Supreme Court's role in the war on terror.

By Abner J. Mikva and James E. Pfander

President George W. Bush made a remarkable comment earlier this month in a German television interview: He said that he wanted to close the Guantánamo Bay facility and put the detainees on trial. As for where the trials should occur, President Bush noted the availability of civilian courts and military tribunals. The decision about where to proceed was, according to the White House's own transcript of the president's remarks, for the Supreme Court to resolve.

It's hardly news that the Supreme Court has before it a case that questions the legality of the government's use of military commissions to try those detained at Guantánamo. But it was news to learn that President Bush sees a role for the Court in sorting out the dispute.

In its submissions in *Hamdan v. Rumsfeld*, the federal government has argued that the Court lacks jurisdiction to rule on the legality of military commissions or should abstain from doing so. In urging the Court to dismiss the case, the government continued its pattern of resisting judicial determination of the legality of its detainee program.

Now President Bush has signaled, obliquely to be sure, that he and the administration may welcome the Court's speedy and final resolution of the matter.

THE APPROPRIATE TRIBUNAL

To understand the significance of the president's remark, one must take a short detour into the contested world of enemy-combatant detention. A few weeks after the Sept. 11 attacks, the president issued an executive order setting forth the policy of detaining and trying enemy combatants before military commissions and pointedly declaring that the federal courts were to have no role in reviewing the legality of such proceedings. The government's litigation posture since that date has been entirely consistent with the view that the courts should stay out.

So far, the courts have largely disagreed. Most importantly, the Supreme Court ruled in 2004 that the federal courts were authorized to review the legal status of detainees at Guantánamo (*Rasul v. Bush*) and that enemy combatants were entitled to certain due process protections (*Hamdi v. Rumsfeld*).

Today, more than four years after the president's executive order, not a single detainee has been tried before a military commission. Some detainees have tried to contest their detention in the district courts. Others, including Salim Hamdan, the former driver for Osama bin Laden, have challenged their proposed trial before a military commission. Many of these proceedings have been placed on hold pending resolution of the Hamdan case.

Hamdan's appeal, from a lower court order clearing the way for his trial, was complicated in December 2005 by Congress' passage of the Detainee Treatment Act, which restricts the jurisdiction of the lower federal courts to review claims by Guantánamo detainees. Although the statute does not explicitly foreclose review by the Supreme Court and does not appear to apply to pending cases, the government argues that the legislation stripped the Court of jurisdiction over Hamdan's appeal. The government also presses an abstention argument, asking the federal courts to stay out until the military commissions complete their work. In effect, the government contends that all challenges must take place after trial, not before.

Hamdan's attorneys contest the proposed dismissal on a variety of grounds, arguing that military commissions would violate international and domestic law and that the Supreme Court retains jurisdiction.

CAN'T BE FENCED OUT

As for the jurisdictional issues, much remains uncertain about the scope of Congress' power to strip away federal court jurisdiction, but it seems unlikely that the Supreme Court will conclude that it cannot hear the Hamdan case.

Congress does have the power under Article III of the Constitution to fashion exceptions to and regulations of the Court's appellate jurisdiction. But this power likely does not give Congress carte blanche to deny the Court any role.

In the past, the Court has upheld acts of Congress that cur-

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tailed its appellate jurisdiction, most memorably in *Ex parte McCardle,* a Reconstruction-era case that was pending before the Court when Congress acted to withdraw jurisdiction. But the *McCardle* decision was not unqualified: The Court noted that an alternative mode of review was available, and thus it sidestepped the problems that might have arisen if the statute purported to deprive the Court of *any* role in the matter. Later cases exercised the jurisdictional alternative and pointedly observed that Congress could not compel the federal courts to participate in a denial of citizens' vested rights by manipulating jurisdictional laws.

The limits of *McCardle* and arguments about the distinctive role of the Supreme Court have produced an outpouring of scholarship on the scope of congressional power. Some scholars celebrate the existence of congressional control as a popular check on the judiciary. Others emphasize the need for judicial independence and the threat that legislation may pose to the Court's role as the ultimate arbiter of the meaning of the Constitution.

The Court's very status as the nation's "supreme" tribunal may limit congressional authority. Articles I and III require that all courts and tribunals established by Congress remain inferior to the nation's only Supreme Court. The combined requirements of supremacy and inferiority may obligate Congress to respect the Court's power to oversee the work of inferior bodies. Even if inferiority does not require appellate review in every case, it may require oversight sufficient to enable Supreme Court protection of constitutional rights and to foreclose reliance on improper tribunals.

The Court, for its part, has often dodged the issue of congressional power, preferring to conclude that Congress has not acted with the clarity necessary to foreclose appellate review. That was its strategy in *Felker v. Turpin,* a 1996 case in which a state death-row prisoner challenged the constitutionality of statutory restrictions on the Court's appellate jurisdiction in habeas proceedings. The majority ducked the constitutional issue, invoking an alternative source of jurisdiction and concluding that Congress had not spoken with the requisite clarity.

A similar strategy in the Hamdan case would avoid the constitutional question again. Whatever one might say about the Detainee Treatment Act, it contains no clear statement restricting the Court's appellate jurisdiction, and the petitioner has wisely invoked the Court's alternative sources of jurisdiction.

CHOOSE TO ABSTAIN?

Abstention presents a different question. In 1975, the Court ruled in *Schlesinger v. Councilman* that the federal courts should ordinarily abstain from actions to enjoin an ongoing proceeding before a court-martial, at least in circumstances where the court-martial could hear the service member's legal challenges to the prosecution and where avenues of post-conviction review remained available. The government has invoked this abstention doctrine in urging the Court to delay any decision in the Hamdan case pending his trial by a military commission.

But although the *Schlesinger* Court established a general preference for exhaustion of remedies, it linked the exhaustion rule to the long-accepted competence of courts-martial to resolve run-of-the-mill disputes over the applicability of military law to individuals unquestionably subject to military discipline. Anything but run-of-the-mill, the Hamdan case poses serious questions as to the competence of military commissions to punish individuals under the laws of war and the Geneva Conventions.

President Bush's comments this month underscore the inapplicability of the abstention doctrine and the need to resolve the Hamdan question sooner rather than later. By recognizing that the nation awaits the Court's wisdom on how to try Hamdan, Bush nicely distinguished it from the Schlesinger case. By calling for a decision this term, Bush recognized that the nation looks to the Court to resolve our deepest conflicts over the Constitution. By acknowledging a decisive role for the nation's top court, he appears to have finally accepted that constitutional doubts about the war on terror are for the Supreme Court to resolve.

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