

4TH CIRCUIT ERRORS IN HAMDI V. RUMSFELD

by Charles B. Gittings Jr.

There are reversible errors in the 4th Circuit's opinion in *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002).

To wit:

(1) The Court states:

"The standards and procedures that should govern Hamdi's case on remand are not for us to resolve in the first instance. It has long been established that if Hamdi is indeed an "enemy combatant" who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one. See, e.g., *Quirin*, 317 U.S. at 31, 37 (holding that both lawful and unlawful combatants, regardless of citizenship, "are subject to capture and detention as prisoners of war by opposing military forces"); *Duncan v. Kahanamoku*, 327 U.S. 304, 313-14 (1946) (same); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) (same)."

This is a fallacy of composition. The fact that enemy combatants may be detained by the government in an armed conflict is trivial: no one disputes that a belligerent may capture and detain enemy combatants. The issue is whether or not Hamdi's detention conforms to the law, and the conditions of his present detention are unlawful regardless of his actual status; be it combatant, civilian, or unindicted felon.

Further:

- Only POWs are subject to indefinite detention as combatants.
- The government in fact claims that Hamdi is NOT a POW.
- "Illegal combatants" are merely accused criminals, and as such, they are entitled to due process of law. The only the exceptions are those specified by Geneva 4.
- The handling of all prisoners is governed by Geneva 3 and 4, and much of the government's current policy is prohibited by those treaties.
- The Geneva conventions ARE military law, and the government's arguments concerning military customs are absurd— it is a miscarriage of justice to give priority to custom in regard to matters explicitly codified, especially in the case of an international treaty which is almost universally recognized and represents over one hundred years of diplomacy.

(2) The Court goes on to say:

"Separation of powers principles must, moreover, shape the standard for reviewing the government's designation of Hamdi as an enemy combatant. Any standard of

inquiry must not present a risk of saddling military decision-making with the panoply of encumbrances associated with civil litigation."

This ignores the fact that the procedures for handling prisoners in an armed conflict are comprehensively defined by Geneva 3, Geneva 4, the UCMJ, and US military regulations in effect on 9/11/2001. The issue here is precisely that the government is not following those procedures, and our military forces are fully capable of handling such matters expeditiously— it's one of their basic responsibilities in a war.

And under Geneva 3:

- POWs must be provided the same legal process as our own forces.
- Prisoners may only be tried according to the laws and procedures in effect at the commencement of hostilities.

(3) The Geneva conventions specifically state that they apply to armed conflicts "in all circumstances"; that all parties are bound to give the conventions full force in their national laws; and that no party may absolve itself from violations.

(4) Geneva has full precedence over the President's discretionary powers, including his powers as commander in chief. Treaties are adopted by the authority of the President acting as head of state with the consent of the Senate, exercising a fundamental power of US sovereignty. Hence, Geneva is in essence a binding contract, and all treaties entail the government entering into agreements by which they voluntarily limit discretionary power they would otherwise be able to exercise freely.

There is no constitutional question here: the treaty power is a fundamental power of government expressly granted by the Constitution; and in such cases, including those in view here, the discretionary powers of the President as commander in chief are fully subordinate to the presidential authority as head of state.

(5) The administration relies very heavily in all this upon the *Authorization for Use of Military Force* enacted by Congress on September 14, 2001; but by the provisions of the Geneva conventions, the Congress has no power to suspend or modify the conventions. The Geneva conventions are binding on the United States for the duration of the present armed conflict, and for a minimum of one year thereafter.

(6) 18 USC 2441 makes it a federal offense for any US citizen to commit a war crime. The statutory definitions of war crimes applicable in this case are 18 USC 2441(c)(1) & (c)(2):

(c) Definition. –

As used in this section the term "war crime" means any conduct –

- (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
- (2) prohibited by Article 23, 25, 27, or 28 of the *Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land*, signed 18 October 1907...

(7) Among the acts defined as grave breaches, Geneva 3 includes:

"wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention". [Article 130]

And Geneva 4 includes:

"unlawful deportation or transfer or unlawful confinement of a protected person"

"wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention". [Article 147]

(8) According to Geneva 3, Article 5:

"Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

The government's claim that there is no doubt as to the status of any prisoner under this article is fraudulent. The clear intent of the article is that any combatant captured in an armed conflict is presumptively a POW unless the detaining authority can raise a substantial doubt that they are entitled to such a classification, and that in such cases a final determination can only be made under due process by a competent tribunal.

The notion that adversaries in a war may simply make such determinations by decree is absurdly contrary to any rational concept of law. The wording of the article makes it unreasonable to suppose that the government's pretended "determination" is valid. Clearly, depriving a combatant of a fair hearing on this question is a grave breach of Geneva 3.

And if Hamdi is not a combatant, Geneva 4 has controlling authority.

(9) Article 23, Hague IV Annex (1907), states in significant part:

"[I]n addition to the prohibitions provided by special Conventions, it is especially forbidden – ... "To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party."

In the case of Hamdi and the other prisoners, the government has literally denied that they have any legal rights at all.

(10) Geneva 3, Geneva 4, the UCMJ, and 18 USC 2441 are all more recent than Quirin. In 1942, when Quirin was decided, there was no Geneva convention protecting civilians, and Geneva 3 (1929) and Hague IV (1907) applied. Hence, Quirin is presumably obsolete; and while it must be acknowledged that some of the new enactments correspond to those in effect in 1942, it is equally certain that not all do, and these are precisely the ones in question *supra*.

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