



Panel: International Law in the U.S. Courts: Current Issues, Future Trends

Professor Edward T. Swaine

Summary and Reference Materials

## National Security and Separation of Power Issues

### I. Hamdan v. Rumsfeld and International Law: Overview

A. In the main, Hamdan concerned issues of federal statutory law: (i) whether the jurisdictional limits adopted in the Detainee Treatment Act of 2005 applied to pending cases; (ii) whether abstention was appropriate, notwithstanding a congressional grant of jurisdiction, in pending cases involving military justice (other than those involving courts-martial against service members); (iii) whether the military commissions were authorized by Congress; and (iv) whether the commissions satisfied the prerequisites of the Uniform Code of Military Justice. And there is no question but that clearer congressional authorization would have resolved the issues addressed by the Court.

B. The Court also fell one vote short of a majority on two questions of international law: (i) whether the government had failed to charge Hamdan with a war crime, because the offense of conspiracy was not a recognized violation of the laws of war; and (ii) whether the military commission procedures satisfied the requirement that they comply with “all the guarantees . . . recognized as indispensable by civilized peoples” under Common Article 3 of the Geneva Conventions.

- C. Nonetheless, the Court confronted and resolved questions of significance under international law, including: (i) whether the military commissions were justified under the laws of war, including the subordinate question of whether conspiracy was a war crime; (ii) whether the Geneva Conventions were judicially enforceable; and (iii) whether the Geneva Conventions applied to Hamdan.

## II. Lessons from Hamdan and Contemporary Decisions

- A. International law may have the capacity to confer authority on the President. Examples for discussion:

1. Hamdan (invoking the laws of war as a basis for adopting military commissions)
2. Medellin v. Dretke (dismissing grant of certiorari based in part on presidential memorandum implementing decisions of the International Court of Justice)

- B. At the same time, the President may be due relatively little deference in matters of statutory or treaty interpretation, even on matters involving national security. Examples for discussion:

1. Hamdan (declining to defer to President's interpretation of, *inter alia*, Common Article 3)
2. Sanchez-Llamas v. Oregon (Breyer, J., dissenting) (declining, on behalf of himself and three other justices, to defer to President's interpretation of the Vienna Convention on Consular Relations)

### III. Some Unresolved Questions

- A. The President's ability to invoke exigent circumstances to justify departures from domestic or international law sometimes appears to be limited, and sometimes less so. Examples for discussion:
1. Hamdan (demanding higher showing of military necessity for departures from rules governing courts-martial)
  2. Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal (declining to treat compliance with international convention as compelling interest for purpose of the Religious Freedom Restoration Act)
  3. Sosa v. Alvarez-Machain (identifying potential bases for denying enforcement of rights arising under international law)
  4. El-Masri v. Tenet (dismissing on basis of state secrets privilege claims of illegal detention, torture, and inhumane treatment violating U.S. and international law)
  5. Gonzalez-Vera v. Kissinger (upholding dismissal of Torture Victim Protection Act claims under political question doctrine)
- B. The significance of international authority in construing international and domestic obligations, particularly as against domestic alternatives, is unpredictable. Examples for discussion:

1. Hamdan (invoking variety of international and domestic materials concerning the laws of war)
  2. Sanchez-Llamas v. Oregon (declining to follow decisions by the International Court of Justice construing the Vienna Convention on Consular Relations)
  3. NRDC v. EPA (limiting legal force of decisions of the parties to the Montreal Protocol)
  4. City of New York v. Permanent Mission of India to the United Nations (adverting to European Convention on State Immunity, and United Nations Convention Jurisdictional Immunities of States and Their Property, in preference to executive branch interpretation of FSIA)
  5. Military Commissions Act, § 6(a)(2) (barring reference to foreign or international sources of law)
- C. Individual rights established under international law may have a substantial influence on the relative authority of the courts and the political branches in foreign affairs – but they are subject to limitation. Examples for discussion:
1. Hamdan (noting, without resolving, claim that Geneva Conventions were enforceable by individuals in domestic courts)
  2. Sanchez-Llamas v. Oregon (assuming, without deciding, that the Vienna Convention on Consular Relations grants individual rights enforceable in domestic courts)

3. *Jogi v. Voges* (upholding private right to damages for enforcement of treaty rights under the Vienna Convention on Consular Relations, under either Alien Tort Statute jurisdiction or 28 USC 1331)
  4. Military Commissions Act, *passim*
- D. The limits of political branch authority: will Hamdi and Hamdan resemble *Curtiss-Wright*, or *Steel Seizure*?

### Reference Materials

#### I. Key Cases Referenced

- *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (holding that military commissions are illegal under the Uniform Code of Military Justice and the Geneva Conventions)
- *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (upholding refusal to afford suppression remedy and application of procedural default rules to claims arising under the Vienna Convention on Consular Relations)
- *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211 (2006) (enjoining enforcement of the Controlled Substances Act against use of hallucinogenic tea in religious ceremonies)
- *Medellin v. Dretke*, 544 U.S. 660 (2005) (dismissing certiorari as improvidently granted in case involving Vienna Convention on Consular Relations)

- *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (upholding jurisdiction under Alien Tort Statute over narrow class of international law violations)
- *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that due process requires opportunity to challenge detention as enemy combatant)
- *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (emphasizing role of the President in foreign affairs)
- *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (emphasizing congressional primacy in the area of foreign relations)
- *Natural Resources Defense Council v. Environmental Protection Agency*, 464 F.3d 1 (D.C. Cir. 2006) (declining to give legal effect in U.S. law to a decision of the conference of the parties to the Montreal Protocol on Ozone Depletion)
- *City of New York v. Permanent Mission of India to the United Nations*, 446 F. 2d 365 (2<sup>nd</sup> Cir. 2006) (upholding jurisdiction to hear action by New York City to recognize property tax liens against properties owned by foreign missions to the United Nations)
- *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006) (upholding dismissal of Torture Victim Protection Act claims under political question doctrine)
- *Jogi v. Voges*, 425 F.3d 367 (7<sup>th</sup> Cir. 2005) (upholding jurisdiction over action against county law enforcement officials under Alien Tort Statute for failing to inform him of his right under Vienna Convention on Consular Relations)

- El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006) (dismissing Bivens and ATS claims on state secrets grounds)

## II. Key Statutes Referenced

- Alien Tort Statute, 28 U.S.C. § 1350 (ATS)
- Torture Victim Protection Act, 28 U.S.C. § 1350 (note) (TVPA)
- Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (DTA)
- Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 (MCA)

## III. Key Treaties Referenced

- Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 (VCCR)
- Geneva Conventions: e.g., Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364
- United Nations Convention on Psychotropic Substances, Feb. 21, 1971, 32 U.S.T. 543, T.I.A.S. No. 9725
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85

- Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331

#### IV. Illustrative Secondary Sources

- Louis Henkin, *Foreign Affairs and the United States Constitution* (2d ed. 1996)
- Gregory E. Maggs, *Terrorism and the Law: Cases and Materials* (2005)
- Peter Raven-Hansen et al., *National Security Law* (3rd ed. 2002)
- *Restatement (Third) of the Foreign Relations Law of the United States* (1987) (2 vols.)