SUPREME COURT OF THE UNITED STATES

No. 05–184

SALIM AHMED HAMDAN, PETITIONER *v.* DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 29, 2006]

JUSTICE ALITO, with whom Justices SCALIA and THOMAS join in Parts I–III, dissenting.

For the reasons set out in JUSTICE SCALIA's dissent, which I join, I would hold that we lack jurisdiction. On the merits, I join JUSTICE THOMAS' dissent with the exception of Parts I, II–C–1, and III–B–2, which concern matters that I find unnecessary to reach. I add the following comments to provide a further explanation of my reasons for disagreeing with the holding of the Court.

I

The holding of the Court, as I understand it, rests on the following reasoning. A military commission is lawful only if it is authorized by 10 U. S. C. §821; this provision permits the use of a commission to try "offenders or offenses" that "by statute or by the law of war may be tried by" such a commission; because no statute provides that an offender such as petitioner or an offense such as the one with which he is charged may be tried by a military commission, he may be tried by military commission only if the trial is authorized by "the law of war"; the Geneva Conventions are part of the law of war; and Common Article 3 of the Conventions prohibits petitioner's trial because the commission before which he would be tried is not "a regularly constituted court," Third Geneva Conven-

tion, Art. 3, ¶1*(d),* Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3316, 3320, T. I. A. S. No. 3364. I disagree with this holding because petitioner's commission is "a regularly constituted court."

Common Article 3 provides as follows:

> "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> "(1) . . . [T]he following acts are and shall remain prohibited . . . :
>
> "(d) [T]he passing of sentences and the carrying out of executions without previous judgment pronounced by *a regularly constituted court* affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.,* at 3318–3320 (emphasis added).

Common Article 3 thus imposes three requirements. Sentences may be imposed only by (1) a "court" (2) that is "regularly constituted" and (3) that affords "all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.,* at 3320.

I see no need here to comment extensively on the meaning of the first and third requirements. The first requirement is largely self-explanatory, and, with respect to the third, I note only that on its face it imposes a uniform international standard that does not vary from signatory to signatory.

The second element ("regularly constituted") is the one on which the Court relies, and I interpret this element to require that the court be appointed or established in accordance with the appointing country's domestic law. I agree with the Court, see *ante*, at 69, n. 64, that, as used in Common Article 3, the term "regularly" is synonymous

with "properly." The term "constitute" means "appoint," "set up," or "establish," Webster's Third New International Dictionary 486 (1961), and therefore "regularly constituted" means properly appointed, set up, or established. Our cases repeatedly use the phrases "regularly constituted" and "properly constituted" in this sense. See, *e.g., Hamdi* v. *Rumsfeld,* 542 U. S. 507, 538 (2004) (plurality opinion of O'Connor, J.); *Nguyen* v. *United States,* 539 U. S. 69, 83 (2003); *Ryder* v. *United States,* 515 U. S. 177, 187 (1995); *Williams* v. *Bruffy,* 96 U. S. 176, 185 (1878).

In order to determine whether a court has been properly appointed, set up, or established, it is necessary to refer to a body of law that governs such matters. I interpret Common Article 3 as looking to the domestic law of the appointing country because I am not aware of any international law standard regarding the way in which such a court must be appointed, set up, or established, and because different countries with different government structures handle this matter differently. Accordingly, "a regularly constituted court" is a court that has been appointed, set up, or established in accordance with the domestic law of the appointing country.

II

In contrast to this interpretation, the opinions supporting the judgment today hold that the military commission before which petitioner would be tried is not "a regularly constituted court" (a) because "no evident practical need explains" why its "structure and composition . . . deviate from conventional court-martial standards," *ante*, at 11 (KENNEDY, J., concurring in part); see also *ante*, at 69–70 (Opinion of the Court); and (b) because, contrary to 10 U. S. C. §836(b), the procedures specified for use in the proceeding before the military commission impermissibly differ from those provided under the Uniform Code of Military Justice (UCMJ) for use by courts-martial, *ante*, at

52–62 (Opinion of the Court); *ante*, at 16–18 (KENNEDY, J., concurring in part). I do not believe that either of these grounds is sound.

A

I see no basis for the Court's holding that a military commission cannot be regarded as "a regularly constituted court" unless it is similar in structure and composition to a regular military court or unless there is an "evident practical need" for the divergence. There is no reason why a court that differs in structure or composition from an ordinary military court must be viewed as having been improperly constituted. Tribunals that vary significantly in structure, composition, and procedures may all be "regularly" or "properly" constituted. Consider, for example, a municipal court, a state trial court of general jurisdiction, an Article I federal trial court, a federal district court, and an international court, such as the International Criminal Tribunal for the Former Yugoslavia. Although these courts are "differently constituted" and differ substantially in many other respects, they are all "regularly constituted."

If Common Article 3 had been meant to require trial before a country's military courts or courts that are similar in structure and composition, the drafters almost certainly would have used language that expresses that thought more directly. Other provisions of the Convention Relative to the Treatment of Prisoners of War refer expressly to the ordinary military courts and expressly prescribe the "uniformity principle" that JUSTICE KENNEDY sees in Common Article 3, see *ante*, at 8–9. Article 84 provides that "[a] prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been

committed by the prisoner of war." 6 U. S. T., at 3382. Article 87 states that "[p]risoners of war may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts." *Id.*, at 3384. Similarly, Article 66 of the Geneva Convention Relative to the Treatment of Civilian Persons in Time of War—a provision to which the Court looks for guidance in interpreting Common Article 3, see *ante* at 69—expressly provides that civilians charged with committing crimes in occupied territory may be handed over by the occupying power "to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country." 6 U. S. T. 3516, 3558–3560, T. I. A. S. No. 3365. If Common Article 3 had been meant to incorporate a "uniformity principle," it presumably would have used language like that employed in the provisions noted above. For these reasons, I cannot agree with the Court's conclusion that the military commission at issue here is not a "regularly constituted court" because its structure and composition differ from those of a court-martial.

Contrary to the suggestion of the Court, see *ante*, at 69, the commentary on Article 66 of Fourth Geneva Convention does not undermine this conclusion. As noted, Article 66 permits an occupying power to try civilians in its "properly constituted, non-political military courts," 6 U. S. T., at 3558. The commentary on this provision states:

> "The courts are to be 'regularly constituted'. This wording definitely excludes all special tribunals. It is the ordinary military courts of the Occupying Power which will be competent." 4 Int'l Comm. of Red Cross, Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War 340 (1958) (hereinafter GCIV Commentary).

The Court states that this commentary "defines '"regularly constituted"' tribunals to include 'ordinary military courts' and 'definitely exclud[e] all special tribunals.'" *Ante*, at 69 (alteration in original). This much is clear from the commentary itself. Yet the mere statement that a military court *is* a regularly constituted tribunal is of no help in addressing petitioner's claim that his commission *is not* such a tribunal. As for the commentary's mention of "special tribunals," it is doubtful whether we should take this gloss on Article 66—which forbids an *occupying power* from trying *civilians* in courts set up specially for that purpose—to tell us much about the very different context addressed by Common Article 3.

But even if Common Article 3 recognizes this prohibition on "special tribunals," that prohibition does not cover petitioner's tribunal. If "special" means anything in contradistinction to "regular," it would be in the sense of "special" as "relating to a single thing," and "regular" as "uniform in course, practice, or occurrence." Webster's Third New International Dictionary 2186, 1913. Insofar as respondents propose to conduct the tribunals according to the procedures of Military Commission Order No. 1 and orders promulgated thereunder—and nobody has suggested respondents intend otherwise—then it seems that petitioner's tribunal, like the hundreds of others respondents propose to conduct, is very much regular and not at all special.

B

I also disagree with the Court's conclusion that petitioner's military commission is "illegal," *ante*, at 62, because its procedures allegedly do not comply with 10 U. S. C. §836. Even if §836(b), unlike Common Article 3, does impose at least a limited uniformity requirement amongst the tribunals contemplated by the UCMJ, but see *ante*, at 35 (THOMAS, J., dissenting), and even if it is as-

sumed for the sake of argument that some of the procedures specified in Military Commission Order No. 1 impermissibly deviate from court-martial procedures, it does not follow that the military commissions created by that order are not "regularly constituted" or that trying petitioner before such a commission would be inconsistent with the law of war. If Congress enacted a statute requiring the federal district courts to follow a procedure that is unconstitutional, the statute would be invalid, but the district courts would not. Likewise, if some of the procedures that may be used in military commission proceedings are improper, the appropriate remedy is to proscribe the use of those particular procedures, not to outlaw the commissions. I see no justification for striking down the entire commission structure simply because it is possible that petitioner's trial might involve the use of some procedure that is improper.

III

Returning to the three elements of Common Article 3—(1) a court, (2) that is appointed, set up, and established in compliance with domestic law, and (3) that respects universally recognized fundamental rights—I conclude that all of these elements are satisfied in this case.

A

First, the commissions qualify as courts.

Second, the commissions were appointed, set up, and established pursuant to an order of the President, just like the commission in *Ex parte Quirin,* 317 U. S. 1 (1942), and the Court acknowledges that *Quirin* recognized that the statutory predecessor of 10 U. S. C. §821 "preserved" the President's power "to convene military commissions," *ante*, at 29. Although JUSTICE KENNEDY concludes that "an acceptable degree of independence from the Executive is necessary to render a commission 'regularly constituted'

by the standards of our Nation's system of justice," *ante* at 9–10, he offers no support for this proposition (which in any event seems to be more about fairness or integrity than regularity). The commission in *Quirin* was certainly no more independent from the Executive than the commissions at issue here, and 10 U. S. C. §§821 and 836 do not speak to this issue.[1]

Finally, the commission procedures, taken as a whole, and including the availability of review by a United States Court of Appeals and by this Court, do not provide a basis for deeming the commissions to be illegitimate. The Court questions the following two procedural rules: the rule allowing the Secretary of Defense to change the governing rules "'from time to time'" (which does not rule out mid-trial changes), see *ante*, at 70, n. 65 (Opinion of the Court); *ante*, at 9–10 (KENNEDY, J., concurring in part), and the rule that permits the admission of any evidence that would have "'probative value to a reasonable person'" (which departs from our legal system's usual rules of evidence), see *ante*, at 51, 60 (Opinion of the Court); *ante*, at 16–18 (KENNEDY, J., concurring in part).[2] Neither of these two rules undermines the legitimacy of the commissions.

Surely the entire commission structure cannot be stricken merely because it is possible that the governing rules might be changed during the course of one or more

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[1] Section 821 looks to the "law of war," not separation of powers issues. And §836, as JUSTICE KENNEDY notes, concerns procedures, not structure, see *ante*, at 10.

[2] The plurality, but not JUSTICE KENNEDY, suggests that the commission rules are improper insofar as they allow a defendant to be denied access to evidence under some circumstances. See, *ante*, at 70–72. But here too, if this procedure is used in a particular case and the accused is convicted, the validity of this procedure can be challenged in the review proceeding in that case. In that context, both the asserted need for the procedure and its impact on the accused can be analyzed in concrete terms.

proceedings. *If* a change is made and applied during the course of an ongoing proceeding and *if* the accused is found guilty, the validity of that procedure can be considered in the review proceeding for that case. After all, not every midtrial change will be prejudicial. A midtrial change might amend the governing rules in a way that is inconsequential or actually favorable to the accused.

As for the standard for the admission of evidence at commission proceedings, the Court does not suggest that this rule violates the international standard incorporated into Common Article 3 ("the judicial guarantees which are recognized as indispensable by civilized peoples," 6 U. S. T., at 3320). Rules of evidence differ from country to country, and much of the world does not follow aspects of our evidence rules, such as the general prohibition against the admission of hearsay. See, *e.g.,* Blumenthal, Shedding Some Light on Calls for Hearsay Reform: Civil Law Hearsay Rules in Historical and Modern Perspective, 13 Pace Int'l L. Rev. 93, 96–101 (2001). If a particular accused claims to have been unfairly prejudiced by the admission of particular evidence, that claim can be reviewed in the review proceeding for that case. It makes no sense to strike down the entire commission structure based on speculation that some evidence might be improperly admitted in some future case.

In sum, I believe that Common Article 3 is satisfied here because the military commissions (1) qualify as courts, (2) that were appointed and established in accordance with domestic law, and (3) any procedural improprieties that might occur in particular cases can be reviewed in those cases.

B

The commentary on Common Article 3 supports this interpretation. The commentary on Common Article 3, ¶1(d), in its entirety states:

> "[A]lthough [sentences and executions without a proper trial] were common practice until quite recently, they are nevertheless shocking to the civilized mind. . . . Sentences and executions without previous trial are too open to error. 'Summary justice' may be effective on account of the fear it arouses . . . , but it adds too many further innocent victims to all the other innocent victims of the conflict. All civilized nations surround the administration of justice with safeguards aimed at eliminating the possibility of judicial errors. The Convention has rightly proclaimed that it is essential to do this even in time of war. *We must be very clear about one point: it is only 'summary' justice which it is intended to prohibit.* No sort of immunity is given to anyone under this provision. There is nothing in it to prevent a person presumed to be guilty from being arrested and so placed in a position where he can do no further harm; and it leaves intact the right of the State to prosecute, sentence and punish according to the law." GCIV Commentary 39 (emphasis added).

It seems clear that the commissions at issue here meet this standard. Whatever else may be said about the system that was created by Military Commission Order No. 1 and augmented by the Detainee Treatment Act, §1005(e)(1), 119 Stat. 2742, this system—which features formal trial procedures, multiple levels of administrative review, and the opportunity for review by a United States Court of Appeals and by this Court—does not dispense "summary justice."

* * *

For these reasons, I respectfully dissent.