Chapter Five

With Military Tribunals for All?:
The Case of Salim Hamdan

Introduction

On 13 November 2001, two short months after the 9/11 terror attacks, President George W. Bush issued a military order authorizing the use of military tribunals to try certain noncitizen terror suspects. Former White House legal strategist John Yoo described the president’s order as the “most practical, yet least successful antiterrorism initiative.” Despite the fact that the use of military tribunals to try suspected terrorists was supported by a majority of the public at the time, criticism of the president’s order poured in from all quarters. As a result, we are more than six years removed from the creation of the tribunals, and they have produced only one negotiated guilty plea, that of Australian David Hicks, an individual more frequently described as a “soldier-of-fortune wannabe” than a dangerous terrorist. No full tribunal hearings have been completed.

The desire to try certain noncitizen terror suspects with military tribunals is an idea that the administration has stubbornly clung to over time in the face of a variety of obstacles. Not the least of these was the Supreme Court’s 2006 decision in Hamdan v. Rumsfeld. In Hamdan, the Supreme Court invalidated the military tribunal system erected by the Bush administration in the wake of 9/11. Although such an adverse decision might appear to have been a crushing blow for the president’s approach to fighting the War on Terror, the administration’s reaction was anything but one of docile acceptance. As this chapter illustrates, the Bush administration took aggressive action to mitigate the potential effects of what it considered an unfavorable decision. The results are a testament to the power of a determined executive in the implementation process that follows a significant judicial decision.
Military Tribunals

The use of military tribunals is not unprecedented in American history. In fact, their use dates back to the earliest days of the country. The military tribunal was inherited from the British and used during the Revolutionary War. Andrew Jackson also convened military tribunals when in command of U.S. forces in New Orleans during the War of 1812. They reappeared during the Mexican-American War when they were employed by commanding General Winfield Scott against American soldiers and Mexican civilians as a tool to maintain order. Tribunals were also used during the Civil War, most notably to try those who conspired in President Abraham Lincoln’s assassination.

Military tribunals reemerged in response to events that transpired during World War II. Shortly after the attack on Pearl Harbor the Governor of Hawaii, Joseph Poindexter, assumed vast executive powers that included the formation and use of military tribunals for non-citizens and citizens alike. This state of emergency lasted almost an entire year. In a separate matter shortly after the war, three Japanese leaders were tried by military tribunals and convicted of various war crimes committed in the Pacific theatre of action.

Two other World War II precedents, *Ex Parte Quirin* (1942) and *Johnson v. Eisentrager* (1950), served as the legal foundation relied upon by the Bush administration as it defended its right to authorize military tribunals in the fight against terrorism. The first case involved the use of military tribunals to try eight German saboteurs who attempted to sneak into the United States in June 1942. This case is important because the Bush administration modeled a great deal of its own military order authorizing military tribunals after Roosevelt’s 1942 order, the one that authorized a military tribunal for the saboteurs. Another World War II precedent was equally important for the Bush administration. In *Johnson v. Eisentrager* (1950), the Supreme Court was asked to determine whether enemy aliens captured in China and held overseas in allied-occupied Germany were eligible to file a habeas corpus petition in the U.S. judicial system to challenge the legality of their detention. The detainees argued that since they were being held by the U.S. government, they were entitled to the protections of the U.S. Constitution. The Supreme Court declined to entertain the habeas petitions in question. Unlike the Nazi saboteurs in *Quirin*, the Court reasoned, the captives in question had never lived in or even been in the United States, and they could not avail themselves of the constitutional protections that flowed from being on American soil.