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Two Subplots in Guantánamo's Long Legal Story

By [WILLIAM GLABERSON](#)

The long legal story of the Bush administration's effort to prosecute detainees at [Guantánamo Bay](#), Cuba, now has two fast-moving subplots. Either one could soon write something of a final chapter.

One plot will proceed in a federal courthouse in Washington, where lawyers for a detainee filed papers on Thursday seeking an injunction that, if granted, could be the death knell for the Bush administration's military commissions at Guantánamo.

The other will play out in a makeshift courtroom overlooking Guantánamo Bay itself, where military prosecutors are pressing ahead with plans for what, later this month, would be the first of the trials the administration has been seeking for nearly seven years.

Either one could be decisive.

"This is a critical moment for the proceedings," said Joanne Mariner, a lawyer at [Human Rights Watch](#).

A completed trial would be the success the administration has sought to bolster its argument that the detainees are dangerous terrorists, and that its beleaguered system for trying them works. Pentagon officials note that charges have been brought in 20 cases.

But critics say an injunction barring one trial, particularly after the defeat for the administration's detention policy last month in the [Supreme Court](#), could effectively bring the entire war-crimes system to a halt.

The White House spokesman, [Dana Perino](#), said at a briefing on Thursday that administration discussions about the Guantánamo detainees had been going on "more intensively" since the court decision. But, Ms. Perino said, "There's no imminent decision that's going to be announced from the White House."

The detainee at the center of both subplots is Salim Hamdan, a onetime driver for [Osama bin Laden](#) who was, depending on one's viewpoint, either a Qaeda loyalist with high-level ties or little more than an errand boy.

In an odd twist of history, Mr. Hamdan was also the subject of a previous case that derailed the Bush administration's original plans for military trials. In the first hours of his trial in 2004, a theatrically timed federal court injunction brought the proceedings to a halt.

The 2004 case had begun with a filing by the same lawyers who sought an injunction on Thursday from the same Federal District Court judge, James Robertson, a former civil rights lawyer appointed by President [Bill Clinton](#).

On Thursday, Judge Robertson set an accelerated schedule that would allow him to rule on the request on the eve of Mr. Hamdan's trial, now set by a military judge in Guantánamo for July 21. Judge Robertson's 2004 injunction

led to the 2006 Supreme Court decision, *Hamdan v. Rumsfeld*, which overturned the first system for military commissions.

In that case, the Supreme Court ruled against the administration partly because Congress had played no role in drafting the commission system.

In the current case — *Hamdan II*, some lawyers are calling it — Mr. Hamdan's lawyers are arguing that the new system is also flawed. "The trial is flatly illegal, and it should be put on hold while the federal court in Washington considers the legal arguments," said Neal K. Katyal, a Georgetown law professor who spearheaded both *Hamdan v. Rumsfeld* and the filing on Thursday.

The Justice Department said after Thursday's filing that "the military commission proceedings are constitutional" and "should go forward without interruption." The new *Hamdan* case claims that the Supreme Court's most recent pronouncement on Guantánamo, *Boumediene v. Bush*, set the stage for broad challenges to the war crimes prosecutions.

That ruling did not directly involve the military commissions. Instead, the justices rejected an administration argument and ruled that the detainees have the constitutional right to challenge their detention in federal court through [habeas corpus](#) cases.

Mr. Hamdan's lawyers argue that the Supreme Court ruling suggests that detainees have other constitutional rights as well, which they say would be violated if he were tried in the military commissions system.

In filings in Washington and Guantánamo, their list of constitutional rights they say are violated by the commissions is long, including Mr. Hamdan's right against self-incrimination and his right to confront the witnesses against him.

[John Yoo](#), one of the architects of the administration's original detention policy, now a law professor at the University of California, Berkeley, said federal courts usually waited for a trial to play out before evaluating its fairness. But, he said, after the "overreaching" by the Supreme Court decision, "any form of judicial micromanagement is possible."

As detainees' lawyers are attacking the military system in federal court, the Pentagon is pressing ahead in Guantánamo. Hearings are scheduled next week before a military judge at Guantánamo for five detainees charged with the attacks of Sept. 11, 2001. Pretrial hearings in Mr. Hamdan's case are scheduled for the following week. On Monday, military prosecutors filed charges against a Saudi detainee charged as a planner of the attack on the [Navy](#) destroyer *Cole* in 2000 that killed 17 sailors.

"The military commissions are going to move forward," Brig. Gen. Thomas W. Hartmann said in announcing the *Cole* charges.

But administration critics say history may be repeating itself.

"This is déjà vu," said Ben Wizner, a lawyer with the [American Civil Liberties Union](#) who has been an observer at Guantánamo. "Once again the executive branch is pressing forward to begin Mr. Hamdan's trial even though constitutional questions have yet to be resolved. This is exactly what happened before."

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