

ARTICLE

MILITARY COMMISSIONS AND TERRORIST ENEMY COMBATANTS

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In my remarks, I will argue that the President has statutory authority, subject to certain limitations, to use military commissions in the war on terrorism. My argument will focus on two grants of authority from Congress rather than on inherent presidential power. The issue of presidential authority to use military commissions is currently before the Supreme Court in the *Hamdan* case, which concerns the government's effort to use a military commission at the Guantanamo naval base to try someone who allegedly was Osama bin Laden's driver and bodyguard.

By way of background, it is important to note that presidents have used military commissions throughout U.S. history for a variety of purposes, including the trial of enemy combatants for violations of the laws of war. Military commissions have been used in both formally declared wars and in other military conflicts, such as the Civil War and conflicts with Indian tribes.

In a World War II decision, *Ex parte Quirin*, the Supreme Court expressly held that the President had the authority to use military commissions to try enemy agents for violating the laws of war.¹ In that case, President Roosevelt used a military commission to try a group of Nazi agents who had entered the United States with plans to carry out acts of sabotage. The Court unanimously concluded that the President had statutory authority to use the military commission. The Court placed particular emphasis on what was then Article 15 of the Articles of War, which provided that, in creating jurisdiction for courts martial, the Articles of War should not be construed as depriving military commissions of concurrent jurisdiction with respect to offenders who by statute or by the law of war are triable by such commissions.

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1. *Ex parte Quirin*, 317 U.S. 1 (1942).

Although Article 15 was phrased as if it were merely a recognition of the historical authority of the President to use military commissions, the Supreme Court in *Quirin* construed it as congressional *authorization* for such commissions. The Supreme Court stated: “By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases,” and the Court further stated that “Congress [in Article 15] has authorized trial of offenses against the law of war before such commissions.”²

What was then Article 15 of the Articles of War was recodified in 1950, in what is now Section 821 of the Uniform Code of Military Justice (UCMJ). Section 821, like Article 15, provides that the UCMJ provisions do not deprive military commissions of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions.³ The legislative history of Section 821 notes that Congress was preserving the language of Article 15 because it had already been interpreted in *Quirin*. The Court in *Quirin*, as I have noted, interpreted that language as authorizing presidential use of military commissions. As a result, Section 821 appears to authorize presidential use of military commissions.

This authorization is reinforced in the war on terrorism by the Authorization for the Use of Military Force (AUMF) that Congress enacted a week after the September 11 attacks. This AUMF grants the President the authority to use “all necessary and appropriate force” against those nations, organizations, and individuals responsible for the September 11 attacks, and it states that it constitutes specific statutory authorization within the terms of the War Powers Resolution.⁴

In the Supreme Court’s *Hamdi* decision in 2004, which concerned the military detention of a U.S. citizen as an enemy combatant, the Court held that the AUMF’s reference to “all necessary and appropriate force” implicitly was an authorization to detain the enemy, since detention is a fundamental incident of waging war.⁵ Importantly, the Court cited and quoted from *Quirin* and stated that the “capture, detention, and *trial*” of unlawful combatants are incidents of war.

The recently-enacted Detainee Treatment Act of 2005, by regulating judicial review of military commission decisions, further shows congressional authorization of these commissions.⁶ Congress has been on notice of these commissions and the President’s reliance on congressional authorization for these commissions for several years, and in addressing them all that it has done is to

2. *Id.* at 28, 29.

3. 10 U.S.C.A. § 821 (2006).

4. S.J. Res. 23, 107th Cong. (2001) (enacted).

5. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

6. H.R. 2863, 109th Cong. (2005).

limit judicial review of their decisions. In this sense, I view the military commissions issue as essentially at the opposite end of the spectrum from the recently-revealed NSA spying program, where the President has been acting contrary to a specific congressional directive.

That there has not been a formal declaration of war against al Qaeda is not material, just as it was not material in *Hamdi* to the issue of whether Congress had authorized detention. First, historical practice has not limited the use of military commissions to formally declared wars.⁷ Second, there are a few statutes out there that are triggered only by a declaration of war, but neither Section 821 nor the AUMF refer to a declaration of war. Third, Congress has often authorized war without issuing a formal declaration of war, and the AUMF is essentially as broad as the authorizations in other conflicts that have been considered wars, such as the Vietnam War, the first Gulf War, and the current Iraq War. Finally, modern international law does not require a declaration of war in order for the international laws of war to apply. Rather, all that is required is the existence of an armed conflict.

There is an argument, which has been made in the *Hamdan* case, that the Third Geneva Convention prohibits the use of military commissions, at least in the form authorized by President Bush. The Third Geneva Convention, which the U.S. has been a party to since the mid-1950s, does provide that a prisoner of war can be validly sentenced “only if the sentence has been pronounced by the same courts *according to the same procedure* as in the case of members of the armed forces of the Detaining Power.”⁸ If applicable to the detainees in the war on terrorism, it would mean that the U.S. would be required to use only its court-martial process for trials.

Members of al Qaeda, however, do not qualify as “prisoners of war” under this Convention, for two reasons. First, the Convention applies only to conflicts between parties to the Convention or with a power that accepts the Convention, and al Qaeda is neither a party to the Convention nor accepts the Convention. Second, individuals who are not part of the regular armed forces of a state may qualify for prisoner of war status only if they wear uniforms, carry arms openly, and follow the laws of war, and al Qaeda does none of those things.

It is true that the Third Geneva Convention provides that, if doubt should arise concerning a person’s status, they should be treated as a prisoner of war until their status has been determined by a competent tribunal.⁹ However, it is not clear what the basis for doubt as a legal matter would be with respect to al Qaeda, and it is worth noting that each of the detainees at Guantanamo has received a combatant status review process to verify the factual determination

7. See Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249 (2002).

8. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 87, 6 U.S.T. 3317.

9. *Id.*, art. 5.

that they are affiliated with the enemy. For Mr. Hamdan, that process determined that he is affiliated with al Qaeda. That process is also now subject to procedural review in the D.C. Circuit, under the new Detainee Treatment Act of 2005.

The final international law argument is that, even if the detainees do not qualify as prisoners of war, they are entitled to the minimum protections outlined in Common Article 3 of the Geneva Conventions. By its terms, however, this Article applies only to armed conflicts “not of an international character,” such as a civil war, whereas the conflict with al Qaeda is global in scope. This is also how the original Red Cross commentary on Common Article 3 construed it. On the other hand, you could argue that Common Article 3 encompasses any conflict not between states, in which case it might apply to the conflict between the U.S. and al Qaeda. This is what Judge Williams argued in his concurrence in the *Hamdan* case.

In any event, it is not clear that the military commissions that have been set up at Guantanamo are in conflict with the Third Geneva Convention. This Article does prohibit “the 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.”¹⁰ It is not clear what these indispensable guarantees are, but presumably they are less than what is available in the court-martial process, since that is the process that must be used for prisoners of war. The Red Cross commentary to Common Article 3 says that only “summary” justice is prohibited.¹¹ Also, the procedures that currently exist for the military commissions at Guantanamo are quite extensive and include, among other things, notice of the charges, a presumption of innocence, the assistance of a lawyer, a right not to testify at trial, and a beyond a reasonable doubt standard for conviction. Moreover, the procedures were modified in 2005 to further address complaints relating to access to evidence.

There are nevertheless limits on the authority of the President to use military commissions in the war on terrorism. First, the authority granted in the AUMF applies only to the nations, groups, and individuals responsible for the September 11 attacks. While that includes members of al Qaeda, such as Mr. Hamdan, it does not include everyone suspected of being a terrorist. Second, based on both historical practice and the language of Section 821 of the UCMJ, the crimes charged must be either offenses punishable under the international laws of war or the two statutorily prescribed crimes set forth in the UCMJ for military commissions—spying and providing aid to the enemy. Indeed, this is how the Supreme Court in *Quirin* distinguished the Civil War decision, *Ex*

10. *Id.*, art. 3.

11. International Committee of the Red Cross, Commentary on the Third Geneva Convention 39-40 (Jean S. Pictet ed., 1960).

parte Milligan,¹² where the Supreme Court had disallowed a military commission: the Court in *Quirin* said that the *Milligan* case was different because it involved the detention and trial of someone who was not associated with enemy forces and was thus not triable under the laws of war.¹³ The President appeared to recognize this limitation in his November 2001 order authorizing military commissions, since the order limits the use of the commissions to “offenses triable by military commission,”¹⁴ and the crimes that have been prescribed for the commissions are specifically derived from the international laws of war. Finally, it is quite possible that the Supreme Court will hold that the Constitution requires some minimal due process rights at Guantanamo, and those rights would have some bearing on the process that must be used in military commissions. As with the Common Article 3 argument about indispensable judicial guarantees, it is not clear that the procedures currently in place for military commissions are problematic under this standard. But this due process issue will be something that the D.C. Circuit can review after a military commission trial under the new detainee legislation.

12. 71 U.S. 2 (1866).

13. *Ex parte Quirin*, 317 U.S. at 45-46.

14. Military Order Concerning the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism § 4(a) (Nov. 13, 2001).

