

## Issues in *Hamdan v. Rumsfeld*

### Separation of Powers

What are the powers of the President and Congress during the time of war? Has the President overstepped his boundaries? Does the AUMF symbolize Congressional blessing for the military commissions the President has established?

### LAW

#### US Constitution: *Article I Section 8 (Legislative powers)*

The Congress shall have power...

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

#### UCMJ: Article 21 (1950)

Jurisdiction of courts-martial not exclusive

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

### LEGAL PRECEDENT

#### *Ex Parte Milligan, 1866*

In this case the Court addressed whether an alleged member of the Sons of Liberty who had lived in Indiana for over 20 years as a civilian could be tried by military commission for charges of conspiracy against the North. The court found that a military commission would be unconstitutional in Milligan's case because Indiana was not under martial law at the time. Therefore, proper jurisdiction was within Indiana's criminal courts. Furthermore, Milligan was not a member of the enemy's armed forces, but an alleged member of an organization that did not qualify as a belligerent under the laws of war.

Justice Stevens cited the *Milligan* opinion's description of separation of powers: "The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President . . . Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature." (p. 77 in packet)

#### *Ex Parte Quirin, 1942*

In this case the court ruled that 8 Nazi saboteurs were not entitled to a trial by jury because they were unlawful combatants and that Roosevelt's military commissions were legal in this case. The *Hamdan* court acknowledged the special character of this type of commission as **having a jurisdiction limited to wartime offenses** and to serve as a factfinding mission.

Justice Stevens cited *Quiring* in regards to whether Congress had authorized President to convene military commissions: "Rather, the *Quirin* Court recognized that Congress had simply preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions -- with the express condition that the President and those under his command comply with the law of war." (p. 77 in packet)

Justice Stevens also notes in a footnote that in *Quirin*, the Court used Article 15 (now Article 21) because they needed to look beyond Congress' declaration of war and authorization for use of force. Thus, the AUMF cannot be read alone to authorize such commissions. Likewise, *Quirin* is not a sweeping mandate.

### ***Youngstown Sheet & Tube v. Sawyer, 1952***

This case clearly outlined the nature of Presidential powers and how they interact with Congress: “Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. n4 Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”

Justice Stevens uses *Youngstown* to argue that the President is acting within the 3<sup>rd</sup> category by exceeding the limits placed upon him in the UCMJ (sections 836 and 821). Thomas’s dissent uses *Youngstown* to back his contention that the AUMF is Congressional authority for the President, who would be acting within category 1.

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### **Is Hamdan’s military commission justified? What is its jurisdiction? Is it being run legally?**

The Hamdan military commission falls under the third category of commissions: “incident to the conduct of war” (outlined on p.78 of your course packet). Historically, the most recent and similar type of commission was the one in *Quirin*, and that’s why the gov’t relies upon it. In that case the Court found the secret military tribunal that FDR established as legal.

**There are 4 sub-issues that the Court has to deal with in regards to military commissions:**

- **what type of offenses can be tried?**
- **who can be tried?**
- **when did the offenses have to occur?**
- **what procedures should be followed?**

### **Conspiracy, or, what type of offenses can be tried?**

The Court identifies the standard that must be met for a crime to be identified as a “war crime:” Congress, through Article 21 of the UCMJ, has "incorporated by reference" the common law of war, which may render triable by military commission certain offenses not defined by statute. When, however, neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be **plain and unambiguous**. To demand any less would be to risk concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution...At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war.

Justice Stevens explains that in *Quirin*, the standard was met – there was precedent both nationally and internationally that the laws of war had been broken. Furthermore, the *Quirin* Court emphasized the importance of the *completion* of the offense. The plurality states that there is no precedent for conspiracy to be considered as a war crime. Justice Thomas argues that membership in an organization has been considered a war crime during the Nuremberg trials (Stevens argues that this is only in reference to intent to commit genocide) and extends charges beyond simply conspiracy to include those acts that al Qaida committed (Stevens argues that you can't go beyond the charges stated). Thomas also argues that the Lincoln Conspirators were tried by military commission for conspiracy (Stevens points out that they were also charged with murdering the president).

### **Who can be tried?**

This issue has to do with the distinction the gov't draws between POWs and enemy combatants. This distinction goes back to the *Quirin* court:

“...the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. **Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.** The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.”

The designation of “enemy combatant” is still an open question. It was defined in the Presidential Military Order of November 13, 2001. Whether or not the president can define what an enemy combatant is also debatable. There's some complicated logic inherent in this issue – I would recommend looking into law review articles that discuss this if you're interested. Related to this issue is whether or not the War on Terrorism is a *real* war.

Interestingly, Hamdan argues that Article 5 of the Geneva Conv. “requires that if there be “any doubt” whether he is entitled to prisoner-of-war protections, he must be afforded those protections until his status is determined by a ‘competent tribunal.’”

### **When did the offenses have to take place?**

The Hamdan court acknowledges the special character of this type of military commission as **having a jurisdiction limited to wartime offenses**. Justice Thomas argues in his dissent that war began when bin Laden declared war on the US in August 1996. The plurality points out that not even the gov't makes this claim and acknowledges that “wartime” at the earliest began with the AUMF (9/18/2001).

### **What procedures have to be followed?**

This is a pretty major sub-issue. I would lump the issue of “military necessity” and “uniformity” under this heading. This is discussed in section VI of the plurality's opinion in which they outlined the procedures set forth in Commission Order No. 1 (available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>).

The plurality uses Article 36 of the UCMJ to argue that procedures that military commissions must follow are to be **uniform** with those followed by court-martials:

### **§836. ART 36. PRESIDENT MAY PRESCRIBE RULES**

(a) Pretrial, trial, and post trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, **so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts**, but which may not be contrary to or inconsistent with this chapter.

**(b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.**

So, the question before the Court is whether it is practicable for the gov't to follow court-martial procedures (which in turn should follow those procedures followed in criminal trials). The plurality argues that there is no evidence that this would be impracticable. Thomas' dissent argues otherwise and cites press statements made by the President's cabinet members. See Kennedy's concurring opinion for more elaboration. Justice Thomas says there is military necessity in this instance because of grave concerns for national security. A good research topic could deal with the balancing of national security and civil rights, as this is fundamental to this case.

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## **Are the Geneva Conventions and other international sources relevant?**

The Geneva Conventions are four treaties that were written and signed in Geneva, Switzerland, (thus the name), and form the base for international law governing human rights. The First Convention was first adopted in 1864 (signed by US in 1882 with Clara Barton as a main proponent) – the first three were last revised in 1949, the same year that the Fourth Geneva Convention was adopted. Three protocols have since been adopted.

### **US Constitution Article VI (power/jurisdiction of international treaties)**

This Constitution, and the laws of the United States which shall be made in pursuance thereof; **and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land;** and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Here's a factoid: Alberto Gonzales (now our Attorney General) counseled the president immediately following September 11 that he did **not** have to adhere to the Geneva Conventions while members of the State Department disagreed.

The gov't argues that this is an international conflict, and that Common Article 3 of the Geneva Convention does not apply in this instance. The plurality argues that "international conflict" refers to a conflict between at least two nation-states or sovereigns. Because al Qaeda is not a sovereign entity, the US clash with it cannot be characterized as an international conflict. The plurality then turns to the commentary on the GC (expository writings that accompany the actual text) to show that Common Article 3 should default to a wide reach rather than a narrow one. Thomas argues that "international" does not have to refer to sovereign entities, but only has to take place in more than one national territory. Although not included in the course packet, if you want to run with this issue, I would recommend looking at Alito's dissent in which he argues that the military commissions as prescribed by the Bush Administration are lawful under Common Article 3 because he thinks they are "regularly constituted courts."