The Balance of Power: The Supreme Court's Decision on Military Commissions and the Competing Interests in the War on Terror

Josiah Ramsey Fricton

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THE BALANCE OF POWER: THE SUPREME COURT'S DECISION ON MILITARY COMMISSIONS AND THE COMPETING INTERESTS IN THE WAR ON TERROR

Josiah Ramsey Fricton†

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I. INTRODUCTION

When the Framers of the Constitution set forth the balance of power between the branches of the federal government and the rights of individuals, the central concern was the concentration of power in the hands of one person. The United States Supreme Court voiced this opinion by stating: "[w]icked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate." 1 This language illustrates the United States history of fearing excessive power in one individual.

The military implicates one of the most difficult issues regarding this balance of power. While the President is the Commander in Chief and must be afforded all the powers and abilities to effectively manage the military, Congress has the power to both declare war and enact legislation to fund and govern the military. 2 This balance was tested in Hamdan v. Rumsfeld, which examined the President’s ability to try certain individuals in a military tribunal. 3 This note will first examine the history and authority for military commissions. 4 Then, with this background as a foundation, it will examine the substantive issues raised

1. Ex parte Milligan, 71 U.S. (4 Wall.) 2, 125 (1866).
4. See infra Part II.
in Hamdan. The substantive issues include whether the President has the power to enact military commissions, whether the military commissions have the power to try Hamdan, and whether the procedures authorized by the President invalidate the military commissions.

II. HISTORY AND AUTHORITY OF THE MILITARY COMMISSIONS

A. Historical Development

Military law is a specialized area which is similar in form to civil law yet in many ways a separate legal system. The body of military law consists of a written code enacted by Congress, as well as a body of common-law that the courts and military custom have created.

The traditional tribunal for military law in the United States is the court-martial. The court-martial itself is not a constitutional Article III court, but is a power Congress grants to the President to maintain the effectiveness of the military. Because the court-martial tribunal takes all of its power from Congress, the tribunal is bound by the rules set forth by Congress. In the past, the jurisdiction of the court-martial was very limited, consisting of only military personnel and civilians for a very limited number of military offenses. In 1916, however, the Articles of War expanded the jurisdiction of the court-martial to encompass all “persons subject to military law,” which is still in effect today.

When President Bush ordered the reinstatement of military commissions, he created a tribunal that dates back to the nineteenth

5. See infra Part III.A–B.
6. See infra Part III.
9. In 1775, the Continental Congress recognized the court-martial as the tribunal for the military. See id. at 47.
10. See id. at 49; see also U.S. CONST. art. I, § 8, cl. 14 (providing Congress with the power “[t]o make Rules for the Government and Regulation of the land and naval Forces”).
century, but which had not been used since World War II.\textsuperscript{13} Military commissions traditionally have been used in four different situations. The first two uses are to provide a forum for U.S. soldiers outside of the United States’s borders, and for foreign civilians in territories controlled by the United States.\textsuperscript{14} Third, military commissions serve as a tribunal for civilians and military personnel when martial law is declared within a United States territory.\textsuperscript{15} Finally, military commissions are used to try violations of the laws of war, which is the specific use employed in \textit{Hamdan v. Rumsfeld}.\textsuperscript{16}

William Winthrop, the preeminent military historian, outlined the requirements to institute military commissions.\textsuperscript{17} First, the military commissions can only have jurisdiction over offenses within the “field of the command of the convening commander,” which eliminates jurisdiction of offenses committed where there is no theater of war.\textsuperscript{18} Second, the offenses heard by the military commissions must have been committed during the period of a war.\textsuperscript{19} Third, the military commissions

\begin{enumerate}
\item See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001); see also Glazier, \textit{supra} note 12, at 31, 66.
\item See \textit{WINTHROP, supra} note 8, at 832–33. The term “military commission” was coined by General Winfield Scott during the Mexican-American War, and was used as a forum for military personnel and civilians in territories outside the United States boundaries where the court-martial jurisdiction did not extend. Glazier, \textit{supra} note 12, at 31–32. When General Scott created the military commissions, his goal was not to create a summary tribunal and eliminate procedural safeguards, but to fashion an equivalent for the court-martial tribunal. \textit{See id.} at 32–33. General Scott did this by ordering the military commission’s procedures to be the same as the procedures of a court-martial, and restricting the jurisdiction to areas cognizable by a court-martial. \textit{Id.} at 33. General Scott’s order depicts this goal, stating: “[e]very military commission, under this order, will be appointed, governed and limited, as prescribed by the 65th, 66th, 67th, and 97th, of the said rules and articles of war . . . provided, that no military commission shall try any case clearly cognizable by any court-martial.” \textit{Id.}
\item See \textit{WINTHROP, supra} note 8, at 846, 853–55. One example of this use occurred at the beginning of World War II when martial law was declared in Hawaii, and General Walter Short instituted military commissions to replace the local Hawaiian courts that were still open and viable. Glazier, \textit{supra} note 12, at 67. In \textit{Duncan v. Kahanamoku}, the U.S. Supreme Court struck down the military commissions, holding that the military shall always yield to the civilian laws, and therefore the military commissions were invalid where courts were open and viable. 327 U.S. 304, 322–24 (1946).
\item See \textit{WINTHROP, supra} note 8, at 832–33.
\item William Winthrop has been called the “Blackstone of Military Law,” and his treatise \textit{Military Law and Precedents} is considered the leading military authority among legal scholars. See \textit{Hamdan v. Rumsfeld}, 126 S. Ct. 2749, 2777 (2006) (quoting \textit{Reid v. Covert}, 354 U.S. 1, 19 n.38 (1957)).
\item \textit{WINTHROP, supra} note 8, at 836.
\item \textit{Id.} at 837. “As in the ordinary criminal law one cannot legally be punished [sic] for what is not an offence at the time of the sentence, so a military commission cannot . . .
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can only have jurisdiction over a select group of people, which includes individuals who have been charged with violations of the laws of war, people who are located in a country “occupied and held by the right of conquest,” and individuals subject to martial law. Finally, the offenses cognizable by military commissions are limited. For martial law and occupied territory military commissions, all offenses “cognizable by [s]tate or [f]ederal courts” may be heard. However, for law of war violations, military commissions can hear only “[v]iolations of the law and usages of war.” The military commission’s procedures generally conform to those of a court-martial.

B. Common-law Military Commissions

The type of military commission used in *Hamdan v. Rumsfeld* was a commission designed to handle violations of the laws of war. The leading example of this military commission is *Ex parte Quirin*, which occurred during World War II. In this case, two groups of German soldiers secretly landed on the shores of New York and Florida dressed in civilian clothes, attempting to blow up different military installations. The individuals were eventually captured, and pursuant to President Roosevelt’s Order, tried by a military commission.

The *Quirin* Court held that the President did have the power to appoint military commissions to try the saboteurs. The Court pointed to Article 15 of the Articles of War, which stated that a “[m]ilitary tribunal shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases.” The Court used this statutory authority to show that Congress had authorized the President to create military commissions wherever offenses against the laws of war were alleged. The Court went on to state that the United States had adopted
all of the laws of war by reference. This case is significant because President Bush based his authority for military commissions on the Court’s holding in *Ex parte Quirin*.

C. Statutory Authority Governing Military Commissions

There are two different codes governing military commissions, the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions. Both of these codes establish different limits and authority governing the use and procedural protections of military commissions.

1. The Uniform Code of Military Justice

The UCMJ, which Congress enacted after the Articles of War, is the statutory authority governing the military. Through the Articles of War and UCMJ, Congress authorized both the jurisdiction and procedures of the courts-martial and military commissions.

Originally, military commissions were not authorized by Congress, but were used by the President as a common-law tribunal to hear cases where a court-martial did not have jurisdiction. In 1916, however, Congress expanded the jurisdiction of the court-martial. This expansion worried some because the original reason for the existence of military commissions—that of providing a tribunal where courts-martial jurisdiction was lacking—ceased to exist. To allay these fears, Congress enacted Article 15 of the Articles of War, which became Article 21 of the UCMJ. Under this statute, military commissions still had jurisdiction over all cases where it previously exercised jurisdiction, despite the creation of concurrent jurisdiction with the court-martial.

The current statutory authority allows the President to use military

31. *Id.* at 30.
34. *See* Articles of War, 14 U.S.C. § 2308a art. 15, 18 (1916).
35. *See, e.g.*, supra note 14 and accompanying text (explaining the history of the Mexican-American War military commissions); *see also* WINTHROP, supra note 8, at 831.
36. *See* Glazier, supra note 12, at 49–57; *see also* Articles of War, 14 U.S.C.A. § 2308a arts. 2, 15 (West 1916).
commissions, but limits their use to the common-law restrictions. 40

Prior to 1916, Congress had not enacted any general statutes regarding the procedures of the courts-martial or military commissions. 41 However, in 1916, Congress enacted Article 38 into the Articles of War, allowing the President to "prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals: Provided, That nothing contrary to or inconsistent with these articles shall be so prescribed . . . ." 42

In 1950, Congress created the UCMJ and moved the prior language into the new Article 36. 43 This new Article 36 also contained a few additions. It instructed the President to use "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts," as far as he deems "practicable." 44 It also provided that "[a]ll rules and regulations made in pursuance of this article shall be uniform insofar as practicable." 45 Based on the evolution of the language, Congress has intended to provide more guidance on the procedures of courts-martial and military commissions, specifically adherence to district court procedures.

2. The Geneva Conventions

After World War II, the United States became a signatory to the 1949 Geneva Conventions. 46 The Third Geneva Convention, which went into effect on October 21, 1950, has become the major authority for the treatment of prisoners of war. 47 One of the most expansive articles

40. See supra text accompanying notes 17–23.
41. See WINTHROP, supra note 8, at 313 n.2.
42. Articles of War, 14 U.S.C.A. § 2308a art. 38 (West 1916). During General Crowder's testimony before Congress on this article, he testified that he wanted some statutory authority to give guidance to military officers on technical rules of evidence, and he never envisioned any substantial departure from the procedures of the district courts. Glazier, supra note 12, at 61.
43. See Uniform Code of Military Justice, Pub. L. No. 81-506, ch. 169, art. 36, 64 Stat. 107, 120 (1950) (codified as amended at 10 U.S.C. § 836 (2000)). According to the title of the Act creating the UCMJ, the purpose of its codification was to unify the Articles of War, Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard into one body of law.
44. Id. art. 36(a).
45. Id. art. 36(b). The purpose of this language was to provide uniformity among all the branches of the military. See Glazier, supra note 12, at 77.
47. See ALLAN ROSAS, THE LEGAL STATUS OF PRISONERS OF WAR: A STUDY IN
concerning potential parties to a military commission is Article 3 of the Geneva Conventions, which pertains to the rights of persons taken into custody within an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." 48 Under this Article, a party may not convict or sentence a person "without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." 49 According to the accompanying commentary, the reason for the creation of Article 3 was that the Geneva Conventions were "concerned with people as human beings, without regard to their uniform, their allegiance, [or] their race or their beliefs...." 50 Thus, the Geneva Conventions mandate that both signatories and non-signatories provide procedural protections and regularly constituted courts to all persons involved in armed conflict no matter their affiliation. 51

Both common-law and statutory authority provide a framework for the violation of laws of war military commission, which is the type of tribunal at issue in Hamdan. To create the military commission, a violation of the laws of war must be alleged both during the period of war and within the theater of war. In addition, once the military commissions are established, the procedures may not violate any protections in either the UCMJ or the Geneva Conventions.

III. ANALYSIS

The central issue presented to the Supreme Court in Hamdan was how to maintain a balance of power within the federal government that is consistent with both the intent of the Constitution and legal precedent when the nation is at war. First, the Court appropriately ruled that the President has the power to enact military commissions. Second, the Court incorrectly ruled that President Bush could not use military

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48. Geneva Convention, supra note 46, art. 3. This article is found in all the Geneva Conventions and has been dubbed "Common Article 3." See Int'l Comm. of Red Cross, Commentary, Geneva Convention relative to the Treatment of Prisoners of War art. 3 cmt. 3, Aug. 12, 1949, available at http://www.icrc.org/IHL.nsf/WebList?ReadForm&id=375&$t=comm [hereinafter Geneva Convention Commentary].
49. Geneva Convention, supra note 46, art. 3(1)(d).
50. Geneva Convention Commentary, supra note 48, art. 3 cmt. 3.
commissions to try Hamdan. Finally, the Court accurately held that the procedures utilized in President Bush’s military commissions violated both the UCMJ and the Geneva Commissions.

A. The President Has the Power to Enact Military Commissions

The framework for determining whether the President has the power to enact military commissions is found in Justice Jackson’s concurrence to Youngstown Sheet & Tube Co. v. Sawyer. Under this framework, when Congress has authorized the President to act, the President possesses the broadest amount of power possible under the Constitution. Therefore, as long as the Constitution has authorized the federal government to perform an action and Congress has approved the President to perform that action, then the President has the full authority of “the federal sovereignty” to act. Article I, section 8 of the Constitution grants Congress the power to regulate military commissions by giving Congress the power “[t]o make rules for the government and regulation of the land and naval forces,” which means that the President must have authorization from Congress to enact military commissions.

President Bush’s military commissions are common-law war courts, meaning that, at the time of Hamdan, there was no specific authorization from Congress. Despite this common-law status, the President had authority to use military commissions because Congress had enacted, by reference, all the common-law rules regarding the use of military commissions in Article 21 of the UCMJ. Therefore, because Congress

52. 343 U.S. 579, 634–655 (1952) (Jackson, J., concurring).
53. Id. at 635. Justice Jackson went on to state that, “[i]n these circumstances, and in these only, may [the President] 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.” Id. at 635–37.
54. See id.
56. See Yamashita v. Styer, 327 U.S. 1, 20 n.7 (1946) (quoting General Crowder’s testimony before Congress, “[a] military commission is our commonlaw [sic] war court. It has no statutory existence, though it is recognized by statute law”).
57. See UCMJ art. 21, 10 U.S.C. § 821 (2000). “Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common-law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter . . . .” Ex parte Quirin, 317 U.S. 1, 30 (1942). These common-law rules give the President the power to
has authorized the President’s war powers through the AUMF, the President has the power to create military commissions, limited by the common-law restrictions and other statutes enacted by Congress as outlined above.

B. The Military Commissions Have the Power to Try Hamdan

Even if the President has congressional authority to create military commissions, Hamdan’s circumstances must lend themselves to trial by military commission under the common-law restrictions. In Hamdan, the Court should have ruled that Hamdan could be tried by military commission because not only does the charge allege a violation of a law of war, but also the alleged offense occurred both during the time of war and within the theater of war, thus giving the military commission jurisdiction over Hamdan.

1. The Government Charged Hamdan with a Violation of the Laws of War

The President’s complaint against Hamdan begins with a single heading—“Charge: Conspiracy”—and then supports that charge by laying out the factual basis for the allegation. The Court stated in its opinion that there was no authority to support the assertion that conspiracy is a violation of the laws of war. Justice Thomas argued in his dissent, however, that the complaint against Hamdan contained allegations of two separate and distinct violations of the laws of war—conspiracy and joining an illegal group. Although Justice Thomas correctly argued that the Government had alleged a violation of the laws of war, his reasoning was flawed because the Government only charged create military commissions, but also restrict their use through the restrictions outlined by William Winthrop. See discussion supra Part II.A.


59. See generally discussion supra Part II.A.

60. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2761 (2006). The complaint alleged that Hamdan “willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with [named members of al Qaeda] to commit the following offenses triable by military commission: attacking civilians . . . and terrorism.” Id.

61. See id. at 2779–85.

62. Id. at 2830–31 (Thomas, J., dissenting).
Hamdan with one violation of the laws of war—joining an illegal organization.

a. The Government Charged Hamdan with Joining an Illegal Organization

The Government charged Hamdan with conspiracy, and although conspiracy might not appear to be a violation of the laws of war, the elements of this crime, as described in the Code of Federal Regulations, do constitute a violation of the laws of war. The central element of the conspiracy crime charged in Hamdan is as follows: "The accused entered into an agreement between one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved ... the commission ... of one or more substantive offenses triable by military commission." 63

When the Court looked at whether conspiracy was a violation of the laws of war, it only used the title of the charge to reason that conspiracy was not a law of war violation. 64 Whatever title the President applies to the crime, the elements are what dictate the prosecution of the crime and should have been the focus of the Court's analysis. 65 Supreme Court precedent has echoed this opinion by repeatedly holding that military tribunal charges need not be stated with precision. 66 Thus, imprecise

64. See Hamdan, 126 S. Ct. at 2780–81. When the Court referenced the conspiracy definition in the Code of Federal Regulations, it discounted it as being “defined not by Congress but by the President,” thus implying the definition had no weight. See id. at 2778 n.30. In civilian criminal law, the fact that Congress did not enact the elements of a crime is of consequence because Congress dictates the criminal code. That the President defined the elements of conspiracy is of no matter because the common laws of war are not codified by Congress, but are applicable only by reference. See supra note 57 and accompanying text.
66. See Collins v. McDonald, 258 U.S. 416, 420 (1922) (“It is not necessary that the charge in court-martial proceedings should be framed with the technical precision of a common-law indictment . . . .”); see also Yamashita v. Styer, 327 U.S. 1, 17 (1946) (“Obviously charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common-law indictment . . . .”).
titling of a charge should not affect how the elements of the crime are pursued. Based on this distinction, the focus of the law of war analysis should not be on the title of the charge, but rather should concentrate on the substance of the charge. Therefore, the elements of the President’s charge sufficiently allege that Hamdan joined an organization that violated the laws of war.

b. Joining an Illegal Organization Is a Violation of the Laws of War

The Government alleged that Hamdan joined an illegal organization, namely al Qaeda.67 As discussed by Justice Thomas, this alleged action by Hamdan was a violation of the laws of war, which gave a military commission jurisdiction to try the case.68 Joining an illegal organization is a law of war violation because both primary and secondary authority recognizes it as such.

A primary authority supporting this argument is the Geneva Conventions, which considers membership in a group that violates the laws of war a violation in and of itself. The Geneva Conventions consider attacks on civilians, like the one that occurred on September 11, 2001, as a violation of the laws of war.69 Under the Geneva Conventions, a person is entitled to prisoner of war status, and considered a lawful combatant, only if they are a member of a group that does not commit any violations of the laws of war.70 Based on this language, membership in an organization that violates the laws of war is the crucial requirement to being considered a lawful or unlawful combatant, and, if unlawful, subject to jurisdiction of a military commission.71

A secondary authority supporting this argument is William Winthrop, who defines guerillas or unlawful combatants as “[i]rregular armed bodies or persons not forming part of the organized forces of a belligerent.”72 Based on this authority, any individual who is a member

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68. *Id.* at 2832–33 (Thomas, J., dissenting).
69. See Geneva Convention, *supra* note 46, art. 3.
70. See Geneva Convention, *supra* note 46, art. 4 (using the term “member” to designate who qualifies for protection).
71. See *Ex parte* Quirin, 317 U.S. 1, 30–31 (1942).
72. WINTHROP, *supra* note 8, at 783. In Winthrop’s discussion of guerillas, he states that guerillas “are not in general recognized as legitimate troops,” and have been subject to trial for violations of the laws of war. *Id.* at 783–84. Winthrop goes on to state that one characteristic of a guerilla group is participation in the “killing . . . of peaceable citizens.” *Id.* at 784.
of a group that has violated the laws of war constitutes a violation by that individual person. Therefore, since the Government charged Hamdan with joining al Qaeda, the Government has satisfied the first common-law requirement for a military commission’s jurisdiction.

2. The Government Alleged an Offense Within the Theater and Period of War

Regarding the location and date of the alleged offense, the Court incorrectly reasoned that the military commission did not have jurisdiction over Hamdan because the Government did not allege any overt acts by Hamdan within the theater or period of war. Here, the charge alleged that Hamdan was a member of al Qaeda until he was detained in November of 2001, two months after Congress enacted the AUMF. Thus, the military commissions have jurisdiction over Hamdan because he was detained in Afghanistan, the theater of war, after the enactment of the AUMF, within the period of war.

C. The Procedures Authorized by the President Invalidate the Military Commissions

While the President does have the power to enact military commissions and try Hamdan, the President cannot ignore required procedural protections. Throughout history, military commissions have traditionally used the same procedures as the courts-martial. Congress and the Geneva Conventions both recognized this tradition and subsequently enacted rules mandating these procedures. Therefore, the Court correctly ruled that the procedures fail to meet the requirements of both the UCMJ and the Geneva Conventions, invalidating the military commissions.

1. The Military Commissions’ Procedures Violate the Uniform Code of Military Justice

As stated above, Article 36 of the UCMJ requires the procedures of

73. Hamdan, 126 S. Ct. at 2778.
75. See Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (holding that persons captured in Afghanistan are the individuals Congress intended to target when it enacted the AUMF).
76. See Winthrop, supra note 8, at 841.
77. See UCMJ art. 36, 10 U.S.C. § 836 (2000); Geneva Convention, supra note 46, art. 3.
both courts-martial and military commissions to reflect district court procedure as much as practicable and to not contradict any provision within the UCMJ. Based on Article 36, Congress has expressly directed the procedures for both courts-martial and military commissions. By expressly limiting the President, Congress acted within its constitutional authority and limited any power the President possessed to dictate the procedures of the military commissions as common-law courts. The Court was correct to rule that the procedures violate the UCMJ because the Government does not possess enough need for a departure from the courts-martial procedures and the procedures violate protections specifically guaranteed by the UCMJ.

a. The Government Does Not Possess Enough Practicable Need to Depart from the Courts-Martial Procedures

The procedures of the military commission render this tribunal invalid because there are not enough practicable reasons to vary from the court-martial procedures. The Government cited the exigencies of war and the protection of intelligence secrets as reasons for a practicable need for divergent procedures. This reasoning fails because historical and contemporary authorities hold differently.

i. The Exigencies of War Are Not a Practicable Need

A few of the reasons given for the divergent procedures were that the indefinite length of the war on terrorism and the Government’s desire not to impede the war effort necessitated the departure from the court-martial procedures. While these concerns are valid, they were not the

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78. UCMJ art. 36, 10 U.S.C. § 836 (2000). Because the procedures of a court-martial are consistent with the UCMJ, the military commissions must mimic the court-martial when practicable. According to the legislative history of Article 36, subsection (b) only applies to uniformity among the military branches. See supra note 45.

79. See UCMJ art. 36, 10 U.S.C. § 836 (2000); see also supra note 57. After Congress expressly limited the President to enact procedures for the courts-martial and military commissions, the President’s power is at “its lowest ebb.” See Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring). The President must act consistently within Congressional legislation because the Constitution has expressly granted the power of regulating the government of the military to Congress. See U.S. CONST. art. I, § 8, cl. 14.

reasons contemplated when the language of Article 36 was enacted. General Enoch Crowder, who Congress consulted when it enacted the language of Article 36, testified that the reason for allowing the President to proscribe the procedures was to permit technical procedural differences, not to give the President the power to make significant changes to the procedures of military commissions. Under this reasoning, Congress did not intend to give the President the power to depart from the general framework of the courts-martial procedures. Based on this authority, the military commissions are invalid because the procedures vary significantly from the courts-martial procedures.

Other military leaders who have faced the difficulties and exigencies of war share this view of Article 36’s construction. General Winfield Scott, the creator of military commissions, was the first United States commander to fight a war completely outside the borders of the United States, and because of this, faced many difficulties such as fighting a considerably larger army and relying on the local population for supplies. Despite these significant difficulties, he mandated that his military commissions use the courts-martial procedures.

During the beginning of the Civil War, the deadliest war in United States history, General Henry Halleck wrote in a general order why the military commissions needed to provide the same protections as the court-martial procedures. “Military commissions must be . . . conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise.” Both of these military leaders recognized that despite the exigencies of war, the military commission’s purpose is not for procedural flexibility, but to provide a competent tribunal where none exists.

ii. The Protection of Intelligence Secrets Is Not a

81. See Glazier, supra note 12, at 61–62. One commentator added that the Army General Staff’s War College Division agreed with General Crowder and deleted from its draft the language in Article 36 that allowed the President to change the procedures, “fearing the language could be read broadly enough to allow ‘the President the power to alter the more essential rules of evidence.’” Id. at 62 (quoting Letter from the Secretary of the War to the Chairman of the Senate Committee of Military Affairs (Jan. 3, 1916)).

82. See infra Part III.C.1.b (explaining the differences between military commissions and court-martial procedures).

83. See Glazier, supra note 12, at 31–33.

84. Id. at 33.

Another reason given for the different procedures is the preservation of intelligence secrets.86 This reasoning is flawed. The trial of Zacarias Moussaoui demonstrates that a court can provide all the procedural protections guaranteed by the Constitution, while preserving the national security interests of the Government. Although numerous issues created challenges for all the parties and judges involved with United States v. Moussaoui, the trial was successfully completed.87 One example of a constitutional procedural problem solved in Moussaoui involved the Government's refusal to allow defense counsels access to witnesses who had connections to international terrorism.88 The District Court for the Eastern District of Virginia attempted to solve this problem by admitting substitute statements from Khalid Sheikh Mohammed and others for the jury to weigh, instead of allowing complete access by the defense.89 This case shows that despite the necessary difficulties of preserving national security interests, compromises between the rights of the accused and national security are possible. Whether it means substituting names and places to protect information, redacting sensitive information, or reducing access to witnesses, a federal district court has...
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solved these problems. Based on this solution, it is practicable for the military commissions to resolve these competing interests and provide the same procedural protections afforded defendants in court-martial proceedings.

b. The Procedures Violate Sections of the UCMJ

Even if the President finds that there are practical reasons to depart from the court-martial standard, the procedures cannot contradict any sections of the UCMJ.\(^\text{90}\) The effect of this language is to preclude the President, regardless of the circumstances, from varying military court rules prescribed by Congress.\(^\text{91}\) President Bush’s military commissions violate a few significant sections of the UCMJ, making the military commissions invalid. One of the military commissions’ procedures stated that all evidence is admissible if it is probative to a reasonable person.\(^\text{92}\) This rule is in direct conflict with Article 50 of the UCMJ, which states that evidence from a court of inquiry is admissible in a courts-martial proceeding if, among other restrictions, it complies with the rules of evidence, such as the rule of hearsay.\(^\text{93}\) Additionally, while the military commissions allow unsworn testimony, the UCMJ requires all witnesses to be under oath.\(^\text{94}\) Under the UCMJ, a specific appellate process is set up to hear appeals from every case, and the judges are appointed by the President and confirmed by the Senate to ensure their impartiality.\(^\text{95}\) However, under the review process for all but the most serious military commission cases, the President is the final authority on each case.\(^\text{96}\) Finally, the most significant discrepancy is that the military

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91. See Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring). Since Congress possesses the sole power to regulate the military, the President cannot enact procedures that contradict any section in the UCMJ. See U.S. CONST. art. I, § 8, cl. 14.
92. “Evidence shall be admitted if, in the opinion of the Presiding Officer, . . . the evidence would have probative value to a reasonable person.” 32 C.F.R. § 9.6(d)(1) (2006).
94. Compare 32 C.F.R. § 9.6(d)(2)(ii) (2006) (“The Commission may still hear a witness who refuses to swear an oath or make a solemn undertaking; however, the Commission shall consider the refusal to swear an oath or give an affirmation in evaluating the weight to be given to the testimony of the witness.”), with UCMJ art. 42, 10 U.S.C. § 842(b) (2000) (“Each witness before a court-martial shall be examined on oath.”).
95. “Each judge of the court shall be appointed from civilian life by the President, by and with the advice and consent of the Senate . . . .” UCMJ art. 42, 10 U.S.C. § 942(b) (2000).
96. After each trial, a review panel not confirmed by the Senate but merely
commissions’ procedures allow the presiding officer to close the proceeding from the defendant and his or her counsel whenever the presiding officer deems it necessary. The UCMJ prescribes the opposite by dictating that the defendant and counsel always be present at the proceeding. These differences show that the military commissions completely disregard the rules of the UCMJ specifically set up to protect the defendant. Because these significant disparities substantively violate Article 36(a), the military commissions are invalid.

2. The Procedures of the Military Commissions Violate Article 3 of the Geneva Conventions

The Geneva Convention provisions concerning the treatment of prisoners of war are in part a codification of the laws of war, as well as an agreement concerning the treatment, including adjudication, of prisoners of war. The Court correctly ruled that Article 3 of the Geneva Conventions applies to Hamdan, and that procedures of proper military commissions require more procedural protections than are afforded by these military commissions. Article 3 applies “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” Article 3 provides that a High Contracting Party may not judge any non-combatant without “previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

Article 3 applies to this case because the war on terror is a conflict occurring within the territory of a High Contracting Party, one of the Parties is a High Contracting Party, and the conflict is not of an

appointed by the Secretary of Defense reviews the record of the trial. 32 C.F.R. § 9.6(h)(4) (2006). “After review by the Secretary of Defense, the record of trial and all recommendations will be forwarded to the President for review and final decision . . . .” Id. § 9.6(h)(6).

97. Id. § 9.6(b)(3).

98. “Proceedings under subsection (a) shall be conducted in the presence of the accused, the defense counsel, and the trial counsel . . . .” UCMJ art. 39, 10 U.S.C. § 839(b) (2000).

99. Id. § 836(b).

100. See Geneva Convention, supra note 46, pmbl. “The Geneva Conventions form part of what are generally known as the laws and customs of war, violations of which are commonly called ‘war crimes.’” Geneva Convention Commentary, supra note 48, art. 129 Historical Background.


102. Geneva Convention, supra note 46, art. 3.

103. Id. See Berndt & Huyser, supra note 51, for a discussion of further requirements in Article 3.
The Balance of Power

international character. First, the United States, a High Contracting Party, is fighting the War on Terror against al Qaeda in Afghanistan, thus, the conflict is occurring within the territory of a High Contracting Party, Afghanistan. This conflict is not of an international character, because, as described by the Court, Article 3 refers to conflicts where one party is not a nation or country.

By looking at the term “international” and comparing it to the context of the Geneva Conventions, the precise meaning emerges. The first definition of “international,” in Webster’s Third New International Dictionary, refers to the description of two or more nations or countries. A conflict not of an international character then refers to a conflict where one or more parties is not a nation. Furthermore, the context of Article 3 also illuminates the definition of “international.” Article 2 refers to conflicts where there are two High Contracting Parties. However, Article 3 drops the phrase “High Contracting” and uses the word “Party” when referring to the duties implemented by Article 3, implying that Article 3 applies to conflicts where one party is not a nation. Therefore, because al Qaeda is not a nation or country, Article 3 must apply to the conflict between the United States and al Qaeda.

Article 3 then invalidates the military commissions because they are not a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” The central reason why military commissions are not the regular court of the United States for trying military personnel is that the UCMJ has set the

104. A High Contracting Party is a signatory to the Geneva Conventions.
105. See Hamdan, 126 S. Ct. at 2795, 2795 n.60 (noting that Afghanistan is a signatory of the Geneva Conventions, and the government previously stated that the Conventions applied to the conflict with the Taliban).
106. Id. at 2795-96.
108. “[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.” Geneva Convention, supra note 46, art. 2.
109. See Geneva Convention, supra note 46, art. 3. One commentator agreeing with this position wrote, “[t]here is no substantive reason why the norms that apply to an armed conflict between a state and an organized armed group within its territory should not also apply to an armed conflict with such a group that is not restricted to its territory.” David Kretzmer, Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?, 16 EUR. J. INT’L L. 171, 195 (2005).
111. Geneva Convention, supra note 46, art. 3.
courts-martial as the regular court.\textsuperscript{112} In addition, by enacting the UCMJ, both Congress and the President have held that a court-martial provides enough procedural protections for the United States military, which should be the standard for "civilized people."\textsuperscript{113} The procedural protections of the military commissions fall short of the UCMJ, violating the standard Congress has identified as guarantees "indispensable by civilized peoples."\textsuperscript{114} Consequently, the military commissions violate Article 3 of the Geneva Conventions, which makes them an inappropriate tribunal for Hamdan.\textsuperscript{115}

D. Congress's Military Commissions Act Provides Further Guidance for the President

Following the Hamdan decision, on October 17, 2006, the President signed the Military Commissions Act into law.\textsuperscript{116} The effect of this law gave specific authorization for military commissions and provided guidance on the procedures for this tribunal. Although Congress generally stayed true to the conclusions of the Hamdan Court, it diverged in a few areas.

1. Congressional Authority for the Creation of Military Commissions

The Military Commissions Act of 2006\textsuperscript{117} provides "[t]he President ... authoriz[ation] to establish military commissions ... for offenses triable by military commission as provided in this chapter."\textsuperscript{118} This blanket authorization removed any questions concerning the President's authority to use military commissions. In addition, Congress restricted jurisdiction of the military commissions to only persons alleged to have

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\textsuperscript{112} See UCMJ arts. 17, 18, 21, 10 U.S.C. §§ 817, 818, 821 (2000).
\textsuperscript{113} The Geneva Conventions recognize that the court regularly used to try a country's military force satisfies the provisions of the Geneva Convention for procedural protections. See Geneva Convention, supra note 46, art. 102.
\textsuperscript{114} See supra text accompanying note 113; see also supra Part III.C.1.b (identifying all the discrepancies between the procedures of President Bush's military commissions and the procedures guaranteed by the UCMJ).
\textsuperscript{115} See Berndt & Huyser, supra note 51, for a discussion of whether CIA practices violate Common Article 3.
\textsuperscript{118} 10 U.S.C.A. § 948b(b) (West 2007).
\end{flushleft}
violated the laws of war or one of the specifically defined offenses.\textsuperscript{119}

Unfortunately, Congress failed to fully enumerate the violations of the laws of war triable by military commissions, but only referred to the laws of war generally.\textsuperscript{120} The effect of this failure is that confusion as to what constitutes the laws of war still exists, and there is a potential for the same debate as is depicted in the conspiracy discussion above.\textsuperscript{121} In addition, Congress failed to address the other common-law restrictions, specifically violations occurring within the period and theater of war.\textsuperscript{122}

Therefore, the President could read this act as allowing the military commissions to take jurisdiction over persons on a much broader scale than just persons captured in Afghanistan or other theaters of war. Such an interpretation would be inaccurate because the common-law restrictions on military commissions are still intact due to Congress’s failure to address them. Although Congress did settle some issues regarding the President’s authority to create military commissions, significant questions remain unanswered.

2. Congressional Authority for the Procedures of the Military Commissions

Congress did provide significant guidance on the procedures for the military commissions. Specifically, Congress required procedures for the military commissions to be based on the courts-martial procedures set forth in the UCMJ.\textsuperscript{123} One such procedure furthers the interests of the defendant. Under the Military Commissions Act, an appeal goes through the United States Court of Appeals for the District of Columbia, and ends by allowing certiorari petitions to the United States Supreme Court.\textsuperscript{124}

Another procedure provides that the defendant can only be excluded from the proceedings if he or she is disruptive.\textsuperscript{125}

Although some of these procedures protect the defendant, Congress also gave the President authority to use many questionable procedures that will inevitably work against the defendant. One example is that the

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    \item \textsuperscript{119} Id. § 948d(a); See id. § 950v(b) (defining twenty-eight triable crimes, including: attacking civilians, terrorism, providing material support for terrorism, and conspiracy).
    \item \textsuperscript{120} “A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war.” Id. § 948d(a).
    \item \textsuperscript{121} See discussion supra Part III.B.1.
    \item \textsuperscript{122} See supra text accompanying notes 17–23.
    \item \textsuperscript{123} “Such procedures shall, so far as the Secretary considers practicable or consistent with military or intelligence activities, apply the principles of law and the rules of evidence in trial by general courts-martial.” 10 U.S.C.A. § 949a(a) (West 2007).
    \item \textsuperscript{124} Id. § 950g(a), (d).
    \item \textsuperscript{125} Id. § 949d(e).
\end{itemize}
Military Commissions Act allows departures from the courts-martial procedures whenever the Secretary of Defense considers them practicable or inconsistent with military objectives. Additionally, Congress allows the military commissions to use hearsay evidence during any proceedings as long as the defendant is notified ahead of time. Through the Military Commissions Act, Congress has provided significantly more procedural protections to the defendant than were previously allowed, but these protections are less than are afforded to U.S. military forces. This leaves a window open for wide interpretation, which could result in future conflict about the military commissions.

IV. CONCLUSION

As the United States continues to fight the War on Terror, the issue of balancing military power among the branches will continue to be a divisive issue. Despite this difficult issue, the United States must continue to fight the War on Terror. Thus, the United States as a whole must fashion a workable solution that effectively provides for all competing interests.

The Supreme Court tried to balance this military power in Hamdan v. Rumsfeld by analyzing the President’s military commissions. Based on this balancing, the Hamdan Court correctly ruled that the President had the power to create military commissions because Congress specifically authorized the jurisdiction of the military commissions. Despite this correct ruling, the Court should have held that Hamdan’s situation lent itself to trial by military commissions, given that the Government alleged a violation of the laws of war that took place within the theater and the period of war. Finally, the Court was right to invalidate the military commissions because the procedures conflicted with both the UCMJ and Geneva Conventions.

Congress attempted to balance this military power in the Military Commissions Act. Although the legislation did answer questions as to some issues, such as the power of the President to convene military commissions and evidentiary issues, many more exist. Some of the issues left unanswered by Congress include defining violations of the laws of war, addressing other common-law restrictions to military commissions, delineating the powers of the Secretary of Defense to enact procedures inconsistent with the courts-martial procedures, and whether

126. *Id.* § 949a(a).
127. *Id.* § 949a(b)(2)(E).
CIA interrogation practices violate the Geneva Conventions.\textsuperscript{129} Despite attempts by the Supreme Court, Congress, and the President to balance the power of the military with the nation’s commitment to judicial rights,\textsuperscript{130} not one branch has succeeded. The effect of this uncertainty could possibly lead to continued division and conflicts within the United States, and will undoubtedly result in further cases that address the balance of military power.

\textsuperscript{129} See Huyser & Berndt, \textit{supra} note 51, examining CIA practices under Common Article 3 of the Geneva Conventions.
