ORAL ARGUMENT SCHEDULED FOR MARCH 8, 2005

No. 04-5393

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SALIM AHMED HAMDAN,

Petitioner-Appellee,

v.

DONALD H. RUMSFELD,
United States Secretary of Defense, et al.

Respondents-Appellants.

On Appeal from the United States District Court for the District of Columbia

---

BRIEF AMICI CURIAE OF FIFTEEN LAW PROFESSORS IN SUPPORT OF PETITIONER-APPELLEE AND URGING AFFIRMANCE

Carlos M. Vázquez
David C. Vladeck
Counsel of Record
Richard McKewen
Georgetown University Law Center
600 New Jersey Ave., NW
Washington, DC 20001
Phone: 202-662-9540

Dated: December 29, 2004

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Insofar as amici's counsel is aware, the brief for Respondents-Appellants contains all of the relevant information as to parties and amici below and/or before this Court.

2. The ruling under review is the district court's ruling in Hamdan v. Rumsfeld, No. 04-CV-1519, 2004 WL 2504508 (D.D.C. Nov. 8, 2004).

3. Counsel for amici relies on the representation of counsel for Respondents-Appellants that this case has previously been heard only by the district court. Insofar as amici's counsel is aware, the brief for Respondents-Appellants contains all of the relevant information as to the related cases pending before this and any other court.

Respectfully submitted,

_____
David C. Vladeck
Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

TREATIES

FEDERAL CASES

FEDERAL REGULATIONS

* Authorities upon which amici chiefly rely are marked with an asterisk.

ADMINISTRATIVE MATERIALS

BOOKS AND PERIODICALS

GLOSSARY

AUMF:	The Authorization for Use of Military Force
GENEVA III:	Third Geneva Convention Relative to the Treatment of Prisoners of War
GENEVA IV:	Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War

INTEREST OF AMICI CURIAE

Amici curiae are fifteen professors of law whose areas of expertise include constitutional law, federal jurisdiction, and international law. Amici have an interest in providing this Court with materials illuminating the law relevant to the interpretation of the Constitution's allocation of powers. Amici and their institutional affiliations (provided for purposes of identification only) are set forth in an appendix at the end of this brief. Amici submit this brief to address the constitutional allocation of powers issues raised by the President's Order of November 13, 2001, and implementing regulations establishing military commissions to try certain persons designated by the President.[1] Although the President's Order raises other constitutional questions, amici submit this brief only on the separation-of-powers question.

SUMMARY OF ARGUMENT

The President's position as Commander in Chief of the army and the navy does not encompass the power to establish military commissions to try enemy combatants for violations of the laws of war outside the theater of war without the authorization of Congress. Justice Jackson set forth the applicable test in his concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). President Bush's Military Order falls within the third of Justice Jackson's categories and does not meet the strict standard applicable to Presidential action falling into that category. Even if the

---

[1] "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57833 (Nov. 13, 2001) [hereinafter "Military Order"].

Military Order were placed in the second of Justice Jackson's categories, it would be invalid because neither the "imperatives of events" nor "abstract theories of law" support the Order. Although the Supreme Court in Ex parte Quirin, 317 U.S. 1 (1942), and Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004), said it was not deciding whether the President could establish such tribunals without congressional authorization, the Court's analysis in both cases revealed significant misgivings about the President's claim to such a power. Appellants have failed to identify historical uses of military commissions to try violations of the laws of war outside the theater of war and without congressional authorization.

Nor do the statutes cited by Appellants supply the requisite authority. The Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter "AUMF"], authorizes the use of military force against those responsible for the events of September 11 and anyone who harbor them, but does not say anything about the procedures for imposing punishment. In fact, the Court in Hamdi stressed that the purpose of such detention was not to punish such combatants, but merely to prevent them from rejoining the battle. Nor is the required congressional authorization supplied by 10 U.S.C. § 821. Section 821 at best authorizes the use of military commissions to the extent consistent with the laws of war. Developments in the laws of war since Quirin make clear that military commissions of the sort established pursuant to the Military Order may not be used today to try enemy combatants in the circumstances contemplated by the Order and implementing regulations.

ARGUMENT

I. THE PRESIDENT LACKS THE POWER TO ESTABLISH MILITARY COMMISSIONS OUTSIDE THE THEATER OF WAR OR OCCUPIED TERRITORY WITHOUT CONGRESSIONAL AUTHORIZATION.

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47 (James Madison). The President's Military Order and the regulations implementing it seek to combine the powers of the Executive with that of the Judiciary. It seeks to unite in the Executive the powers of the grand jury, prosecutor, defense lawyer, judge, jury, appeals panel, sentencing authority, and, in some cases, executioner.[2] This accumulation of Executive and Judicial powers may be accomplished outside the theater of war, if at all, only with Congress' authorization.

In his famous concurring opinion in Youngstown, Justice Jackson articulated the tripartite test that the Court continues to employ to assess the validity of Presidential action that intrudes upon the legislative sphere. See Dames & Moore v. Regan, 453 U.S. 654, 668-69 (1981) (applying approach of Jackson's concurrence in Youngstown). The President's power is at its apex when he acts pursuant to congressional delegation. Youngstown, 343 U.S. at 636-37. Presidential action taken in the face of congressional silence exists in a sort of twilight zone, where "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on

[2] The Order also seeks to grant the Executive legislative power insofar as it confers unguided discretion to determine the appropriate sentence. 32 C.F.R. § 9.6(g).

abstract theories of law." Id. at 637. The President's power is at its weakest when he acts in contravention of Congress. In such circumstances, "he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." Id. at 637-38.

The President's Military Order falls in the third of the Youngstown categories and may not be sustained under the test applicable to presidential conduct in that category. Congress has not been silent with respect to military commissions. Congress has authorized their use to try cases of spying, 10 U.S.C. § 906 (cited in Quirin as Article of War 82), and aiding the enemy, 10 U.S.C. § 904 (cited in Quirin as Article of War 81). In addition, according to the Supreme Court, Congress in Article of War 15 (now 10 U.S.C. § 821) authorized their use to try offenders or offenses that by the laws of war may be tried by military commissions. Quirin, 317 U.S. at 35, 46. Appellants do not contend that the first two statutes authorize the military commissions created pursuant to the Military Order. As we explain below, neither does the third.[3] The Military Order therefore falls into the third of Justice Jackson's categories, and the President must rely on his Article II powers because he seeks to exceed the limits that Congress has placed on the use of such commissions.

Also placing the Military Order in the third Youngstown category is the fact that Congress has provided the President with another mechanism for addressing the problem

[3] Specifically, we argue in Part II(B) that section 821 authorizes military commissions only in accordance with the laws of war, whereas the Military Order seeks to employ such commissions without a declaration of war and in a manner inconsistent with the laws of war.

at hand: it has authorized the use of general courts-martial to try enemy combatants for violations of the laws of war.[4] 10 U.S.C. § 818. As William Winthrop wrote before the jurisdiction of courts-martial was extended to such cases,

> The occasion for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offenses defined in a written code. It does not extend to many criminal acts, especially of civilians, peculiar to time of war; and for the trial of these a different tribunal is required.

William Winthrop, Military Law and Precedents 1296 (2d ed. 1920) (emphasis in original). The extension of the jurisdiction of courts-martial means that this "different tribunal" is no longer required. Indeed, the availability to President Bush of another mechanism authorized by Congress to address the problem at hand places this case on all fours with Youngstown. The President's decision to forego courts-martial in favor of military commissions calls to mind President Truman's decision to forgo the tools Congress had placed at his disposal to address the problem facing him (labor injunctions under the Taft-Hartley Act) in favor of his own preferred solution (seizure of the steel mills). "In choosing a different and inconsistent way of his own, the President cannot claim that [his Order] is necessitated or invited by failure of Congress to legislate upon the [matter]." Youngstown, 343 U.S. at 639.

Presidential action falling in the third Youngstown category may be upheld "only by disabling the Congress from acting upon the subject. Presidential claim to a power at

[4] See generally Major Jan E. Aldykiewicz & Major Geoffrey S. Corn, Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts, 167 Mil. L. Rev. 74 (2001).

once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." Youngstown, 343 U.S. at 637-38. The Constitution gives Congress "all legislative Powers" granted by the Constitution, U.S. Const. art. I, § 1, including the power "to declare War," "to define and punish . . . Offenses against Law of Nations," "to make Rules for the . . . Regulation of the land and naval Forces," "to establish Tribunals inferior to the Supreme Court," and to make all laws "necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof[,]" id. § 8, cls. 9-11, 14, 18, including the President's power as Commander in Chief. Against this array of powers assigned to Congress, the President rests on his designation as "Commander in Chief of the Army and Navy." U.S. Const. art. II, § 2, cl. 1. But, as Justice Jackson stressed in Youngstown, "the Constitution did not contemplate that [this] title . . . will constitute him also Commander-in-Chief of the country . . . ." 343 U.S. at 643-44. While the President can insist on freedom from congressional interference in the conduct of a military campaign — which may include the power to use military commissions for certain purposes within the theater of war — he may set up military tribunals outside the theater of war, except in the direst of emergencies, only with the sanction of Congress. Ex parte Milligan, 71 U.S. 2, 139-40 (1866) (Chase, C.J., concurring).

Even if the Military Order were placed in the second of the Youngstown categories, the President would lack the power to create such tribunals unilaterally. The "imperatives of events," Youngstown, 343 U.S. at 637, do not justify the Order, as

Congress has given the President other effective means to address the problem at hand. Historically, military commissions employing summary procedures not acceptable elsewhere were only tolerated on the field of battle because better procedures were obviously impracticable. See Winthrop, supra, at 1304-07 (military commissions may be used to try enemy combatants for violating the laws of war only if offense committed in theater of war and the commission operates there). Where an enemy combatant (lawful or unlawful) has been removed from the theater of war and may be detained far from any battlefield for the duration of the armed conflict, see Hamdi, 124 S. Ct. at 2640, the necessity that historically justified the exercise of summary battlefield justice is wholly lacking.

"[A]bstract theories of law," Youngstown, 343 U.S. at 637, are equally unavailing. The Constitution addresses the federal judiciary primarily in Article III, which provides that federal judges shall serve during good behavior and shall receive salaries that shall not be diminished during their continuance in office. U.S. Const. art. III, § 1. These guarantees of judicial independence "serve[] as 'an inseparable element of the constitutional system of checks and balances,'" and thus "safeguard[] the role of the Judicial Branch in our tripartite system." Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986) (quoting N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982) (plurality opinion)). The Supreme Court has held that non-Article III tribunals may validly be employed under certain circumstances and subject to certain constraints. See generally Schor, 478 U.S. at 852-57; N. Pipeline, 458 U.S. at 66, 85 (plurality opinion). It is clear, however, that such tribunals may be employed only if

established or authorized by Congress.[5] To assess the constitutionality of non-Article III federal tribunals, the Supreme Court has articulated a balancing test. The courts must weigh "the extent to which the 'essential attributes of the judicial power' are reserved to Article III courts," against "the concerns that drove Congress to depart from the requirements of Article III." Schor, 478 U.S. at 851 (emphasis added). This test confirms that the decision to depart from Article III in establishing federal adjudicatory tribunals must be made by Congress, not by the President acting alone.

The requirement that Congress authorize the use of non-Article III tribunals is memorialized in Article I's allocation to Congress of the power "to constitute Tribunals inferior to the Supreme Court." This provision was included in the Constitution to deny the Executive the power enjoyed by the king in England to establish ad hoc tribunals for the trial, in particular, of crimes against the crown, a power that was "very much abused; as in the establishment of the famous courts of high-commission, and of the star-chamber; two of the most infamous engines of oppression and tyranny, that ever were erected in any country . . . . Wisely, then, did the constitution of the United States deny to the executive magistrate a power so truly formidable . . . ." 1 Blackstone's Commentaries 267-68 (Tucker ed. 1803). Consistent with this allocation of powers, the

[5] See Milligan, 71 U.S. at 121 ("Every trial involves the exercise of judicial power; and from what source did the military commission . . . derive their authority? . . . They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws."); Dynes v. Hoover, 61 U.S. 65, 79 (1857) ("Congress has the power to provide for the trial punishment of military and naval offenses" in non-Article III courts) (quoted in N. Pipeline, 458 U.S. at 66) (emphasis added).

Supreme Court has never upheld the use of non-Article III federal tribunals outside a theater of war or occupied territory unless explicitly authorized by Congress.

That the Military Order impinges upon numerous constitutional rights of criminal defendants is another reason for concluding that such tribunals may be established, if at all, only by Congress.[6] Prominent among the constitutional rights implicated by the Military Order is the right not to be "deprived of life, liberty, or property without due process of law." U.S. Const. amend. V. In considering whether the Fifth Amendment permits adjudications before courts-martial, whose judges, like the members of military commissions, do not serve for a fixed term, the Court in Weiss v. United States observed that "a fixed term of office is a traditional component of the Anglo-American civilian judicial system." 510 U.S. 163, 178 (1994). While observing that fixed terms have never been a part of the military justice tradition, id., the Court rejected the proposition that "any practice in military courts which might have been accepted at some time in history automatically satisfies due process of law today." Id. at 179. The Court concluded that the Due Process question turned on whether "Congress ha[d] achieved an acceptable balance between independence and accountability" of the military judges. Id. at 180 (emphasis added); see also id. at 177 (stressing the need to give "deference to the

[6] The constitutional provisions discussed below are not by their terms limited to criminal trials taking place on United States territory or involving United States citizens. To the contrary, Article III expressly applies where the crime took place "outside any State," the Fifth Amendment applies to any "person," and the Sixth Amendment to "the accused." That at least some of these provisions apply to persons detained in Guantánamo is made clear in Rasul v. Bush, 124 S. Ct. 2686, 2698 n.15 (2004) (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring)).

determination of Congress, made under its authority to regulate the land and naval forces").[7] Thus, like the test for assessing the constitutionality of non-Article III tribunals, the test for assessing the compliance of military tribunals with Due Process requires a determination by Congress that departures from the normal protections of the Due Process Clause are justified.

Other constitutional rights on which the military commissions impinge include the right to trial by jury in criminal cases, guaranteed by Article III and the Sixth Amendment, and the right to presentment or indictment by grand jury recognized in the Fifth Amendment. In Milligan, a majority of the Court famously held that Congress lacked the power to suspend these rights for persons not in the U.S. armed forces even in time of war if the civilian courts were open and operating. 71 U.S. at 121-22. More important for the separation-of-powers question, however, is the position taken by the concurring Justices in Milligan. These Justices would have recognized the government's power to dispense with the right to indictment by grand jury and the right to trial by jury

[7] The Court concluded that the lack of fixed terms for court-martial judges did not violate due process, relying on a number of factors noticeably inapplicable to the military commissions trying enemy combatants: (a) Congress' particularly strong powers where "the constitutional rights of servicemen [are] implicated"; (b) the existence of statutory provisions "insulating military judges from the effects of command influence"; and (c) the availability of review in the Court of Military Appeals (now the Court of Appeals for the Armed Forces), whose judges are civilians who sit for 15-year terms. Weiss, 510 U.S. at 177, 179, 181; see 10 U.S.C. § 941 (describing composition of Court of Appeals for the Armed Services and tenure of its judges). The decisions of the military commissions are reviewed by other commissioned officers who do not serve for fixed terms and then by purely political officials (the Secretary of Defense and the President).

even when the civilian courts remained open, see 71 U.S. at 137-38 (Chase, C.J., concurring), yet they insisted that only Congress could suspend these rights:

> The power to make the necessary laws is in Congress; the power to execute in the President . . . . [T]he President [may not], 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 [military] campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offenses, either of soldiers or civilians, unless in cases of a controlling necessity . . . .

Id. at 139-140 (emphasis added).

Although Quirin, upon which Appellants mainly rely, does not reach the question whether the President may establish military commissions to try enemy combatants for war crimes without the authorization of Congress, 317 U.S. at 28-29, the Court's analysis reveals the Justices' misgivings on that score. The Court avoided the constitutional question by interpreting Article 15 of the Articles of War (now 10 U.S.C. § 821) as affirmative congressional authorization for the establishment of such commissions. As many have observed, that Article is written merely as a preservation of jurisdiction having its source elsewhere.[8] By its terms, Article 15 just clarified that the conferral of jurisdiction on courts-martial to try those "who by the law of war [are] subject to trial by a military tribunal," 10 U.S.C. § 818, "do[es] not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by

[8] See, e.g., Jack Goldsmith & Cass R. Sunstein, Military Tribunals and Legal Culture: What a Difference Sixty Years Makes, 19 Const. Comm. 261, 274-75 (2002); Derek Jinks, The Declining Significance of POW Status, 45 Harv. Int'l L.J. 367, 435 (2004); Timothy C. MacDonnell, Military Commissions and Courts Martial: A Brief Discussion of the Constitutional and Jurisdictional Differences Between the Two Courts, 2002 (Mar.) Army Law. 19, 21.

statute or by the law of war may be tried by military commissions . . . ." Id. § 821. The Court's interpretation of that Article as affirmative authorization of military commissions for the trial of war crimes was thus clearly a stretch — a stretch that evinces the Court's clear disinclination to hold that the President has the power to establish such commissions without congressional authorization.

Similar misgivings are evident in Hamdi. Although the plurality said it was not reaching the question of inherent presidential power to detain in the absence of congressional authorization, its narrow interpretation of the scope of the President's power *with* congressional authorization belies any notion of broad inherent presidential power. The plurality said it did not have to decide the Article II question because Congress had authorized such detentions in the AUMF. But the plurality declined to go further than to uphold that the AUMF authorized detentions of a "narrow category" of persons involved in a particular way in a narrowly defined conflict, for the duration of that specific conflict. Hamdi, 124 S. Ct. at 2639-41. The plurality's analysis of other issues in the case implicitly rejects the government's Article II argument. In discussing the due-process issue, and in particular whether the evidence submitted by the Executive Branch made further hearing or fact-finding unnecessary, the plurality relied on the limited nature of the detentions authorized by the AUMF:

> Under the definition of enemy combatant that we accept today as falling within the scope of Congress' authorization, Hamdi would need to be "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States" to justify his detention in the United States for the duration of the relevant conflict.

Id. at 2645. Further fact finding was necessary, according to the plurality, because Hamdi had not conceded the crucial facts. The plurality's resolution of this issue by relying on the limited nature of the detention authorized by Congress is inconsistent with an independent Presidential authority to detain enemy combatants. If the Constitution does not give the President independent power to take the more modest step of detaining enemy combatants during the pendency of a military campaign, then a fortiori it does not give him the power to set up tribunals to try such combatants for violations of the laws of war. See, e.g., Hamdi, 124 S. Ct. at 2682 (Thomas, J., dissenting) (distinguishing Milligan and other cases on the ground that they involved criminal punishment as opposed to mere detention).

Appellants and their amici place great stress on historical uses of military commissions. As amici recognize, however, many of those uses were with "explicit congressional approval," and others were on "the battlefield." Brief of Washington Legal Foundation et al. at 19, 21. Indeed, military commissions originated as boards of advisers to military commanders administering justice on the battlefield or in occupied territory at a time when the conduct of such commanders was largely unregulated. See Harold Hongju Koh, The Case Against Military Commissions, 96 Am. J. Int'l L. 337, 339 (2002) (military commissions traditionally consisted of "an advisory board of officers, convened for the purpose of informing the conscience of the commanding officer, in cases where he might act for himself if he chose"). Additionally, many of the historical examples pre-dated Congress' decision to authorize the use of military commissions under some circumstances and not others, and to authorize the use of courts-martial to try enemy

combatants for violation of the laws of war. Appellants and their amici have not identified uses of military commissions without congressional approval, off the battlefield, after the extension of court-martial jurisdiction to violations of the laws of war.[9] In any event, the historical examples cited by Appellants and amici were considered by the Court in Quirin, and the Court was unwilling to go further than to approve the use of military commissions as authorized by Congress, straining to interpret Article 15 as authorization. This court should be equally unwilling to approve the use of military commissions outside the theater of war or occupied territory where Congress has not authorized their use but has authorized the use of a different tribunal.

II. THE MILITARY COMMISSIONS HAVE NOT BEEN AUTHORIZED BY CONGRESS.

In addition to the President's Commander-in-Chief powers, Appellants cite two statutes as the legal basis for the Military Order: the AUMF and 10 U.S.C. § 821. Neither statute authorizes the establishment of the military commissions contemplated by the Military Order.[10]

[9] Winthrop gives only one example of a military commission operating outside the theater of war. See Winthrop, supra, at 1305 (describing case of T.E. Hogg and his six associates).

[10] A third statute cited in Order, 10 U.S.C. § 836, does not provide the President with the authority to establish military commissions for any particular type of case or for any particular purpose. The President apparently relied on this provision as authority for the Order's substantial departures from the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts. See Military Order § 1(f).

A. The AUMF

The AUMF, passed by Congress in the immediate aftermath of the attacks of September 11, 2001, authorized the President to use all necessary and appropriate force against the nations, organizations, or persons that were responsible for the September 11 attacks or those who harbored such persons or organizations, in order to prevent any future acts of international terrorism against the United States. The Supreme Court in Hamdi held that this congressional resolution authorized the detention of a narrow category of persons for a limited period of time. It based this holding on the proposition that the detention of enemy combatants for the duration of the particular conflict in which they were captured "is so fundamental and accepted an incident of war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." Hamdi, 124 S. Ct. at 2640. In the course of its discussion, the plurality wrote that "[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" Id. (citing Quirin, 317 U.S. at 28).

Contrary to Appellants' suggestion, this language does not mean that the Court read the AUMF to authorize the creation of military commissions to try unlawful combatants. The plurality in Hamdi did not conclude that even the detention of enemy combatants was authorized by the AUMF solely because it was an "important incident of war." It went on to examine the purpose of such detentions, emphasizing that their purpose was not to punish the detainee, but to "prevent captured individuals from returning to the field of battle and taking up arms once again." Hamdi, 124 S. Ct. at

2640. The plurality's analysis establishes that the detention of enemy combatants is essential to the successful use of military force in a way that the trial and punishment of unlawful combatants is not. Killing such combatants when they can be captured is contrary to the laws of war, and releasing them would harm the military effort. Because detention is the only option, the Court was thus justified in concluding that "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war." Hamdi, 124 S. Ct. at 2641 (emphasis added). The same cannot be said of the trial and punishment of enemy combatants for violations of the laws of war, which can be and usually is done after the cessation of hostilities.[11] Thus, the plurality opinion cannot be read to conclude that the AUMF authorizes all "important incidents of war." Given the pains the Court took in Hamdi to distinguish detention from punishment, its decision cannot be read to support the conclusion that the AUMF authorizes the punishment of unlawful combatants. To the contrary, the Court emphasized that the detentions themselves were justified solely as a means to disable the combatant from continuing to fight, not for other purposes that might advance the military effort, such as the extraction of intelligence. Hamdi, 124 S. Ct. at 2640, 2651.

Moreover, Appellant does not dispute that he may be tried; he merely challenges the validity of the forum created by the Military Order for such purpose. The plurality did not suggest that the AUMF authorized the trial of unlawful combatants in any

[11] During drafting of Article 85 of Third Geneva Convention, several delegations noted that trying prisoners of war accused of war crimes while hostilities were still in progress would be inappropriate and even unjust. ICRC, The Geneva Conventions of 12 August 1949 Commentary 416 (Jean S. Pictet, ed.1958).

particular types of tribunals. That the AUMF does not suffice to authorize the establishment of military commissions to try suspected war criminals is further supported by the reasons for concluding that congressional authorization is required. As discussed above, the test for assessing the constitutionality of using non-Article III federal adjudicatory tribunals and the test for upholding military procedures that impinge upon due process both require the courts to focus on Congress' balancing of the relevant factors. The AUMF does not explain any concerns that drove Congress to depart from the requirements of Article III or due process because Congress made no decision to depart from either.

Finally, the insufficiency of the AUMF to authorize the creation of military commissions to try violations of the laws of war is demonstrated by the sole decision cited by the plurality in Hamdi to support the proposition that the trial of unlawful combatants is an "important incident of war" — Quirin. The military commission there at issue was established during a declared war, yet the Court was not content to rely on the declaration of war as the source of the President's authority to establish the commissions. The Court instead relied on a statute that specifically referred to military commissions, which the Court strained to interpret as an explicit congressional statement that military commissions may be valid in certain circumstances. Quirin, 317 U.S. at 28. Far from supporting Appellants' claim that the AUMF suffices to authorize the military commissions, Quirin establishes that, at a minimum, it takes a statute that expressly refers to military commissions to authorize the President to establish such commissions.

B. 10 U.S.C. § 821

Quirin's reading of section 821's predecessor does not control this case. The statute contemplates the use of military commissions only "with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions . . . ." 10 U.S.C. § 821. The laws of war have developed significantly since Quirin, and today do not permit the trial of the sorts of offenders or offenses encompassed by the Military Order before the sorts of military commissions established pursuant to the Military Order.

The principal development in the laws of war since Quirin has been the entry into force of the four Geneva Conventions, which include numerous provisions that regulate the judicial procedures to which various categories of combatants and detainees may be subjected in various contexts. Of particular relevance are the Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter "Geneva III"], and the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter "Geneva IV"]. It is undisputed that the military operation in Afghanistan is an international armed conflict to which the Geneva Conventions apply. See Press Secretary Ari Fleischer, Statement by the Press Secretary on the Geneva Conventions (May 7, 2003). This section discusses some of the ways in which the military commissions violate the Geneva Conventions.

The court need not consider whether these conventions are self-executing. A non-self-executing treaty is one that requires implementation by Congress before it may be enforced in court. See Carlos Manuel Vázquez, The Four Doctrines of Self-Executing

Treaties, 89 Am. J. Int'l L. 695, 695 & n.7 (1995). Such a treaty is judicially cognizable if Congress has incorporated the treaty's standard into domestic legislation. Section 821 incorporates the laws of war into domestic law as a limitation on the power of the President to establish military commissions. The laws of war include the Geneva Conventions and customary international law norms that address the rights and obligations of belligerents in armed conflicts. See Quirin, 317 U.S. at 27-28 (1942); Chairman of the Joint Chiefs of Staff Instruction, CJCSI 5810.01B (Mar. 25, 2002) ("The law of war . . . includes treaties . . . to which the United States is a party, as well as applicable customary international law."). Thus, to the extent the Geneva Conventions require execution, section 821 executes them in all relevant respects.[12]

Article 102 of Geneva III provides that "[a] prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the

[12] Appellants' argument that non-self-executing treaties are not judicially cognizable even when Congress has incorporated them into domestic law is without merit. See Brief for Appellants at 33 (citing only Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2763, 2787 (2004)). Sosa held that a private right of action cannot be based on a statute that incorporates a non-self-executing treaty if the statute does not create a private right of action, and that a non-self-executing treaty by itself cannot ground a private right of action. 124 S. Ct. at 2755, 2767. The Court did not suggest that a statute that references treaties and does create a private right of action would not create a private right of action to enforce a non-self-executing treaty. Much less did it suggest that a treaty standard incorporated into a statute as a limit on Executive power is not judicially cognizable. Sosa is relevant to this case only insofar as it rebuts the Appellant's claim that section 821 should be read to incorporate the laws of war as they stood in 1916, when Congress enacted section 821's predecessor. See Brief of Appellants at 34-38; cf. Sosa, 124 S. Ct. at 2765 et seq. (recognizing that Alien Tort Statute's conferral of federal jurisdiction in cases involving violations of the law of nations supports power of courts to create remedies for violations of law of nations as it has evolved since 1789); see also Quirin, 317 U.S. at 31, 36 nn. 7, 12 (relying on post-1916 authorities in construing section 821).

same procedure as in the case of members of the armed forces of the Detaining Power." Geneva III, art. 102. Members of the U.S. armed forces are tried for war crimes not in military commissions, but in courts-martial, which do not employ the same procedures as military commissions. See MacDonnell, supra note 8, at 31. Because members of the U.S. armed forces are tried criminally in courts-martial, Geneva III permits the trial of POWs only in such courts.

In addition, Geneva III specifically entitles POWs to the same right to appeal that members of the U.S. armed forces enjoy. Geneva III, art. 106. Members of the U.S. armed forces may appeal a conviction by court-martial to the Court of Criminal Appeals, and thereafter to the Court of Appeals for the Armed Forces, composed of five civilian judges who serve for 15-year terms. 10 U.S.C. § 866(a); id. § 867; id. § 942(a), (b)(2). Thereafter, members of the U.S. armed forces may petition the U.S. Supreme Court for certiorari. Id. § 867a. The decisions of the military commissions, by contrast, are reviewed by a panel consisting of three commissioned officers removable by the President, and are reviewed thereafter only by the Secretary of Defense and then by the President, who (unlike the courts that review the judgments of courts-martial) is empowered to increase the sentence.

President Bush has concluded that "the Taliban detainees . . . do not qualify as prisoners of war" under the Geneva Conventions, because they do not satisfy the conditions set forth in Article 4(A)(2) of Geneva III, namely "(a) . . . being commanded by a person responsible for his subordinates; (b) . . . having a fixed distinctive sign recognizable at a distance; c) . . . carrying arms openly; [and] (d) . . . conducting their

operations in accordance with the laws and customs of war." Memorandum from Assistant Attorney General Jay S. Bybee to Alberto R. Gonzales, Counsel to the President (Jan. 22, 2002); Letter from Attorney General John Ashcroft to President George Bush (Feb. 1, 2002). However, Article 4(A)(1) provides, without qualification, that the term "prisoner of war" includes "[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces."[13] The conditions set forth in Article 4(A)(2) — those the President concluded were not satisfied by the Taliban fighters — bear on whether "[m]embers of other militias and members of other volunteer corps" qualify as POWs. Geneva III, art. 4(A)(2) (emphasis added). The plain text of Article 4 thus establishes that the criteria of Article 4(A)(2) do not apply to Article 4(A)(1). Moreover, even if the conditions of Article 4(A)(2) did apply to members of the armed forces of a party to the conflict, it is far from clear that none of the Guantánamo detainees satisfied those conditions. According to Article 5 of Geneva III, "should any doubt arise as to whether persons . . . belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." Hamdan's status has not been determined by such a tribunal.

Additionally, even detainees who are determined by a competent tribunal to be unlawful combatants rather than POWs enjoy certain procedural rights under the laws of

[13] Guantánamo detainees may also qualify as POWs under Article 4(A)(3): "Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power . . . ." Geneva III, art. 4(A)(3).

war. First, if they are prosecuted for violating the Geneva Conventions themselves, "[i]n all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the [Third] Geneva Convention." Geneva IV, art. 146.[14] The latter provisions include the right to counsel of the defendant's choice and to confer privately with counsel, Geneva III, art. 105, and the same right of appeal as that accorded members of the armed forces of the Detaining Power, id. art. 106. The Military Order and accompanying regulations do not protect these rights.[15]

Additionally, unlawful combatants enjoy the protections of Common Article 3 of the Geneva Conventions. Section 1 of Common Article 3 prohibits "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." Geneva III, art. 3(1)(d). The commissions established pursuant to the Military Order are not "regularly constituted courts" and they do not afford "all the judicial guarantees which are recognized as indispensable by

[14] These protections apply even to unlawful combatants. See Jinks, supra note 8, at 380.

[15] At least some of the crimes that the military commissions are authorized to try are violations of the Geneva Conventions. For example, the regulations include among the war crimes triable by commissions the willful killing of protected persons, 32 C.F.R. § 11.6(a)(1), the attacking of protected property, id. § 11.6(a)(4), and the use of protected persons as shields, id. § 11.6(a)(9), and they define "protected persons" and "protected property" by reference to the Geneva Conventions, see id. § 11.5(f), (g). In addition, a strong case has been made that the standards set forth in article 146 apply to all war crimes prosecutions. See Jinks, supra note 8, at 397-99.

civilized peoples." See generally Brief Amici Curiae of Sixteen Law Professors, Hamdan v. Rumsfeld, No. 04-CV-1519-JR (D.D.C. Sept. 30, 2004), at 30-40.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

Dated: December 29, 2004

David C. Vladeck
Carlos M. Vázquez
Richard McKewen
Georgetown University Law Center
600 New Jersey Ave., NW
Washington, DC 20001
Phone: 202-662-9540
Fax: 202-662-9634

COUNSEL FOR AMICI CURIAE

APPENDIX

The foregoing brief is submitted on behalf of the following fifteen law professors:

Bruce Ackerman
Sterling Professor of Law and
Political Science
Yale Law School

Rosa Ehrenreich Brooks
Associate Professor of Law
University of Virginia School of Law

Sarah H. Cleveland
Marrs McLean Professor in Law
University of Texas School of Law

David D. Cole
Professor of Law
Georgetown University Law Center

William S. Dodge
Professor of Law
University of California Hastings
College of the Law

Martin S. Flaherty
Professor of Law
Co-Director, Joseph R. Crowley
Program in International Human Rights
Fordham Law School

Ryan Goodman
J. Sinclair Armstrong Assistant Professor
of International, Foreign, and
Comparative Law
Harvard Law School

Oona Hathaway
Associate Professor of Law
Yale Law School

Derek Jinks
Associate Professor of Law
Arizona State University College of Law

Kevin R. Johnson
Associate Dean for Academic Affairs
Mabie/Apallas Professor of Public
Interest Law and Chicana/o Studies
University of California, Davis
School of Law

Judith Resnik
Arthur Liman Professor of Law
Yale Law School

David Scheffer
Visiting Professor of Law
George Washington University
Law School

Anne-Marie Slaughter
Dean, Woodrow Wilson School of
Public and International Affairs
Princeton University

Carlos M. Vázquez
Professor of Law
Georgetown University Law Center

David C. Vladeck
Associate Professor of Law
Co-Director, Institute for Public
Representation
Georgetown University Law Center

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 32(a)(7)(C) and 29(c)(5) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing brief is in compliance with the word limitations set forth in Rules 29(d) and 32(a)(7)(B) inasmuch as the brief contains fewer than 7,000 words when measured by Microsoft Word 2002, the world processing program used to prepare the brief (which counted 6,718 words) or WordPerfect 10 (which counted 6,671 words) which was used to double-check the number of words in the brief.

_____

David C. Vladeck

CERTIFICATE OF COUNSEL PURSUANT TO D.C. CIR. R. 29(d)

I hereby certify that Amici Curiae Fifteen Law Professors are not able to join other amici in filing a consolidated brief in support of affirmance because the foregoing brief addresses an argument that, to my knowledge, the other amici arguing in support of affirmance do not make: namely, that the military commissions established by the Military Order under review in this proceeding violate fundamental principles of separation of powers. Amici Curiae Fifteen Law Professors submitted the only amici brief addressing this issue in the district court, and the district court relied on that brief in its opinion. We are not aware of any other amici supporting affirmance that address this issue.

_____

David C. Vladeck

CERTIFICATE OF SERVICE

I hereby certify that I have caused two copies of the foregoing brief to be served this 29th day of December, 2004, upon the following persons, in the manner indicated:

Douglas N. Letter, Esq.
Robert M. Loeb, Esq.
(via electronic delivery and first-class mail, postage prepaid)
U.S. Department of Justice
Civil Division, Appellate
950 Pennsylvania Ave., NW
Washington, DC 20530-0001

Neal Katyal, Esq.
(hand delivered)
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001

Kelly A. Cameron, Esq.
(first-class mail, postage prepaid)
Perkins Coie, LLP
607 14th St., NW, Suite 800
Washington, DC 20005

Charles Swift, Esq.
(first-class mail, postage prepaid)
Office of the Chief Defense Counsel
for Military Commissions
1851 S. Bell Street, Suite 103
Arlington, VA 22202

Daniel J. Popeo, Esq.
Richard A. Samp, Esq.
(first-class mail, postage prepaid)
Washington Legal Foundation
2009 Massachusetts Avenue, NW
Washington, DC 20036

_____
David C. Vladeck