

Con Law I

November 3, 2009

Class Notes and Discussion Questions

1. After *Hamdi*, the Secretary of Defense authorized the creation of Combatant Status Review Tribunals (CRSTs), and then later promulgated procedures to govern the CRSTs intended to comply with the due process requirements articulated by Justice O'Connor.
2. Recall the distinction in *Quirin* between "lawful" and "unlawful" combatants. How does that apply in *Hamdan*? Justice Thomas quotes *Quirin* for the proposition that a military commission should be presumed constitutional unless a "clear conviction" exists that the President has gone too far. How do the Stevens plurality and the Kennedy concurrence distinguish *Quirin*?
3. Recall Justice Jackson's three-tiered approach to executive authority during a time of war in the *Steel Seizure Case*. Which tier applies in this case, according to Justice Stevens? According to Justice Thomas? What potential Congressional authority exists in this instance?
4. Reconsider Justice Thomas's invocation of the "unitary Executive" theory in *Hamdi* and compare that to Justice Douglas's concurrence in the *Steel Seizure Case*. They both recognize the importance the swift Presidential reaction and the slowness of Congressional responses to emergencies, but one suspects that Justice Douglas would not buy the unitary Executive theory. Why not?
5. *Eisentrager*, invoked by Justices Scalia and Thomas and by the D.C. Circuit, held that the writ of habeas corpus does not apply to aliens. How do Justices Stevens and Kennedy get around that question?
6. Justice Thomas asserts that the common law of war "is flexible and evolutionary in nature" – and has to be to respond to the evolution of war. Have the older Supreme Court precedents aged, according to Justice Thomas? Has the UCMJ aged to the point of obsolescence?
7. Justice Thomas asserts that the AUMF authorized the President to exact "swift military retribution." Assuming that is true, are there any limits at all on the President's wartime discretion under the AUMF? How does this military commission exist in relation to the alleged charge of Congress to the President in the AUMF?
8. How could Congress authorize the President to act?
9. Article 21 of the UCMJ incorporates the common law of war into the U.S. Code. The Court appears to be holding that Article 21 can limit the President's

- discretion in executing his war powers even outside the scope of military commissions. Is this a valid exercise of Congressional power?
10. The Court also holds that the Geneva Conventions apply to the President's execution of his war powers. How can the President's war powers be limited by an international treaty?
 11. It appears that although the Government made an argument that the President has *inherent authority* to utilize military commissions with any procedures to try individuals like Hamdan, the Court never addresses the question. Does the President have inherent authority under Article II?
 12. The President's Office of Legal Counsel wrote a memo in January 2002 opining that the President had inherent authority to "determine that Afghanistan ceased ... to be a state and therefore members of the Taliban militia" were not protected by the Geneva Conventions. The opinion, of course, part of the "Torture Papers," asserts that not much stops the President from authorizing torture (or something close to it) of Taliban fighters and others. Does this memo retain any validity after *Hamdan*?
 13. What did the MCA of 2006 explicitly authorize the President to do? What did the MCA explicitly take away from individuals being detained by the President?
 14. Do the protections of the Suspension Clause/Writ of Habeas Corpus change over time? Or depending upon the circumstances of the day? Why or why not?
 15. Again, how does the *Boumediene* Court distinguish *Eisentrager*?
 16. What authority does Congress have to strip away the jurisdiction of the federal courts? Of the Supreme Court?
 17. What is the difference between statutory habeas and constitutional habeas? Does that even make sense?

Military Commissions Act of 2006

House Report No. 109-664 (part 2)

... excerpts ...

DISSENTING VIEWS

DESCRIPTION OF LEGISLATION

H.R. 6054 has, as its stated purpose, “to authorize trial by military commission for violations of the law of war . . .” First, the legislation would authorize standards and procedures for the military commissions within the Uniform Code of Military Justice. Among other things, the bill provides standards for the admission of evidence, including hearsay evidence, and in certain circumstances, allows for the introduction of sensitive classified information into evidence outside the presence of the accused.

Second, in Section 4, H.R. 6054 would amend title 18, United States Code, to redefine a war crime under United States law as any “serious” violation of Common Article 3 of the Geneva Conventions (“Common Article 3”). Conduct, which would constitute a serious violation of Common Article 3, would include torture, cruel or inhuman treatment, murder, mutilation or maiming, intentionally causing great suffering or serious injury, and taking hostages. The section narrowly defines cruel or inhuman treatment, in contrast to the Common Article 3 standard, making the definition similar to the definition of torture.

Third, in Section 5, the legislation would amend title 28, United States Code, to allow for limited appeals of commission and Combatant Status Review Tribunal decisions to the United States Court of Appeals for the District of Columbia Circuit. In addition, the section strips federal courts of pending or future habeas jurisdiction “relating to any aspect of the alien’s detention, transfer, treatment, or conditions of confinement.” Fourth, the legislation, in Section 6, would lower the standards of the Geneva Conventions by establishing that compliance with section 1003 of the Detainee Treatment Act (“DTA”) of 2005 fully satisfies the obligations of the United States with regard to Common Article 3. In addition, the section prohibits individuals from invoking the Conventions “as a source of rights” in U.S. courts.

CONCERNS WITH LEGISLATION

A. H.R. 6054 endangers our troops by lowering U.S. and international standards

The legislation endangers our troops because it lowers the standards set forth in the Geneva Conventions, treaties this nation led the way in establishing and has maintained for over 50 years. In fact, the Geneva Conventions have been ratified by 194 countries and our own JAGs have testified that the United States military has been trained to comply with them for decades.

Redefining the Geneva Conventions poses a grave threat to our troops. Our uniformed military has been among the most vocal in their concerns about diluting this standard because they want to do everything possible to ensure that American forces would be treated with a similarly high standard if captured. Former Secretary of State, retired Gen. Colin Powell has stated that the Administration's proposal "would put our own troops at risk." The highly respected former Chairman of the Joint Chiefs of Staff, General John Vessey, has said that the change, "could give opponents a legal argument for the mistreatment of Americans being held prisoner in time of war" and would "undermine the moral basis which has . . . guided our conduct in war throughout our history."

B. The bill broadly strips courts of habeas jurisdiction

In a sweeping measure, Section 5 of H.R. 6054 contravenes separation of powers and constitutional guarantees by stripping federal courts of habeas review. If there is any one principle that has defined our nation, it is the respect for the rule of law and the independence of the courts. As numerous former federal judges, including Reagan FBI Director Sessions wrote, "[f]or two hundred years, the federal judiciary has maintained Chief Justice Marshall's solemn admonition that ours is a government of laws, and not men. The proposed legislation imperils this proud history . . ."

Moreover, by legislating that all pending and future habeas petitions are not subject to judicial review, the legislation leaves itself open to an adverse court ruling that will strike this bill similar to how the Supreme Court struck down the President's use of military commissions in *Hamdan v. Rumsfeld*. This would lengthen the current delay in the prosecution of terrorists. Not a single trial has taken place, or a single criminal convicted, in military commissions in the more than five years since September 11, 2001.

CONCLUSION

We need to come together to develop a fair system of military commissions that will swiftly convict terrorists. However, we cannot support legislation that in the name of fighting terrorism endangers our brave troops, undermines our nation's moral authority, and contravenes the principle of separation of powers and rule of law that our nation was founded on. The Committee should have passed a stronger more intelligent bill, that finally holds terrorists accountable but at the same time can withstand judicial scrutiny, protect American troops under the Geneva Conventions, and remains true to American values. [Footnote 16: "The importance of habeas is not a hypothetical concern. This Administration has been flatly wrong in its assessments as shown by the example of Maher Arar, who was falsely branded a terrorist and rendered to Syria where he tortured for 10 months. See Doug Struck, "Canadian Was Falsely Accused, Panel Says," *Washington Post*, September 19, 2006, at A01. In fact, if the provisions of this bill had been in force, the Hamdan ruling itself would not have been possible. Hamdan brought his challenge via a habeas petition."]