

Section 2, Clause 2 (Commander in Chief) and 10 U.S.C. §§113(d) and 131(b)(8).⁷ The AA reports directly to the Secretary of Defense.⁸

d. On 15 March 2004, the Secretary of Defense designated Mr. John D. Altenburg, Jr., as the Appointing Authority pursuant to the PMO, MCO 1 and DoD Dir. 5105.70.⁹

e. The Accused in this case was designated by the President for trial by military commission and charges against the Accused were referred to a Commission appointed in accordance with commission orders and instructions by Mr. Altenburg.

4. Legal Authority.

- a. President's Military Order of November 13, 2001.
- b. Manual for Courts-Martial (2002).
- c. Military Commission Order No. 1.
- d. DoD Dir. 5105.70.
- e. *In re Yamashita*, 327 U.S. 1 (1946).
- f. *Madsen v. Kinsella*, 343 U.S. 341 (1952).
- g. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
- h. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).
- i. 10 U.S.C. §§113(d) and 131(b).

5. Discussion

The Defense contends that the “power to appoint military commissions is derived from the power to exercise military jurisdiction, specifically, the power to convene a general court-martial.” Because the Appointing Authority is not authorized to convene a general court-martial under 10 U.S.C. §822, the Defense argues that he is not authorized to appoint a military commission or to exercise “military jurisdiction” of any kind. These propositions are manifestly misguided, and the Defense fails to cite any authority to support its position on this motion.

a. The Appointing Authority Has the Power to Appoint Military Commissions.

The President's Military Order of 13 November 2001, authorizes the Secretary of Defense “as a military function” to issue “orders for the appointment of one or more military commissions” and to “issue orders and regulations” to govern the military commission process.¹⁰ The PMO also anticipates that the Secretary of Defense would delegate authority to conduct commissions to appropriate officials.¹¹ The Secretary thereafter issued a series of orders and directives, as outlined in the facts above, to implement the PMO and establish a process for the conduct of military commissions. These orders and directives are firmly rooted in the President's clear constitutional and

⁷ Id. §4.1.

⁸ Id. §5.1.1.

⁹ Military Commission Order No. 5 (Mar. 15, 2004).

¹⁰ PMO §4(b).

¹¹ PMO §6(b).

statutory authority to establish military commissions.¹² These orders and directives empower the AA to appoint military commissions in accordance with Commission Law. In performing this function, the AA reports directly to the Secretary of Defense and acts “under the authority, direction and control” of the Secretary.

The Defense does not challenge the power of the President or the Secretary of Defense to appoint military commissions. Rather, they deny that the Secretary may delegate the authority to appoint commissions to anyone except an officer authorized to convene general courts-martial under 10 U.S.C. §822. However, in creating the office of AA, the Secretary does not rely on §822, but on the PMO and his general authority to delegate his functions, duties and powers under 10 U.S.C. §§113(d) and 131(b)(8). Under §113, Congress has empowered the Secretary to delegate his duties as he sees fit: “Unless specifically prohibited by law, the Secretary may, without being relieved of his responsibility, perform any of his functions or duties, or exercise any of his powers through, or with the aid of, such persons in, or organizations of, the Department of Defense as he may designate.” This is precisely what the Secretary has done in delegating his duties under the PMO to the AA. The Defense is unable to identify any law that specifically prohibits this delegation of authority.

Under the PMO, the President retains the power personally to designate individuals for trial by military commission. The President directs the Secretary of Defense to issue implementing orders and appoint officials to administer the military commissions process. The Secretary, acting pursuant to the President’s order and his own statutory authority, has delegated AA duties to Mr. Altenburg. The law gives the secretary the flexibility to structure the process in this way. It is eminently reasonable that he should do so, given the breadth and complexity of responsibilities that the Secretary must discharge on behalf of the Nation in time of war. Congress recognized these realities and conferred on the Secretary broad discretion to delegate functions as he sees fit. His determination to exercise his power to delegate is entitled to the deference of this Commission.

b. The Power to Appoint Military Commissions Is Not Derived from or Dependent Upon the Power to Convene General Courts-Martial.

The Defense claims that the military commission is improperly constituted because it must be constituted under 10 U.S.C. § 822, by a person with the authority to convene a general court-martial, and the Appointing Authority lacks such authority. This claim is meritless.

The rules set out in the UCMJ, including 10 U.S.C. § 822 (entitled “Who may convene a general courts-martial”¹³) apply to courts-martial, not military commissions. Pursuant to the Military Order, the President designated Hicks as eligible for trial before

¹² See “Prosecution Response to Defense Motion to Dismiss (Lack of Jurisdiction: President’s Military Order Is Invalid Under U.S. and Int’l Law)” dated 18 October 2004.

¹³ Section 822 provides that general courts-martial may be convened by the President, the Secretary of Defense, a service Secretary, and certain commanding officers. 10 U.S.C. §822 (USCS 2004).

a military commission. While the UCMJ recognizes the jurisdiction of military commissions to try violations of the laws of war, *see* 10 U.S.C. § 821 (“The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions”), it does not purport to subject such commissions to its comprehensive set of provisions governing courts-martial, including § 822. Indeed, the Supreme Court has recognized that while Congress has prescribed in detailed fashion the jurisdiction and procedures governing courts-martial, it has taken a hands-off approach with respect to wartime military commissions, by recognizing and approving their use, but not regulating their procedures.

In *Madsen v. Kinsella*, 343 U.S. 341 (1952), the Court rejected any suggestion that the procedures found in the Articles of War would apply to the trial by military commission of a person who was subject to both military commission and court-martial jurisdiction for the same offense. In *Madsen*, the civilian spouse of an Air Force officer was tried for murdering her husband by a military commission in occupied Germany. *Id.* at 343-44. At the time, the Articles of War provided that she could have been tried by court-martial for the offense. *Id.* at 345. The issue before the Supreme Court was whether Madsen could also be tried by a military commission for the same offense. *Id.* at 342.

Before reaching its ultimate conclusion that Madsen could be tried by a military commission, *id.* at 355, the *Madsen* Court characterized the unique nature and purpose of military commissions:

Since our nation’s earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have been called our common law war courts. They have taken many forms and borne many names. *Neither their procedure nor their jurisdiction has been prescribed by statute*. It has been adapted in each instance to the need that called it forth.

Id. at 346-348 (footnotes omitted) (emphasis added). The Court went on to hold that, “[i]n the absence of attempts by Congress to limit the President’s power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States.” *Id.* at 348. The Court explained that, in contrast to Congress’ active regulation of “the jurisdiction and procedure of United States courts-martial,” *id.* at 349, Congress had shown “evident restraint” with respect to making rules for military commissions. *Id.* The Court further explained that Article 15 of the Articles of War (now Article 21, UCMJ, 10 U.S.C. § 821) reflected Congress’ intent to allow the Executive Branch to exercise its discretion as to what form of tribunal to employ during wartime. *Id.* at 353.

When the President established military commissions to try unlawful combatants in the ongoing armed conflict with al Qaida and the Taliban and set out the procedures that will govern them, he exercised the very discretion that the *Madsen* Court held was

implicit in his powers as Commander in Chief and was left unrestricted by Congress. Because, as *Madsen* explained, Congress did not purport to apply the numerous UCMJ provisions regulating courts-martial to the common law military commissions, those provisions are inapplicable to the military commission trying the Accused in this case. Thus, there is no requirement that a military commission be constituted as a general court-martial under § 822.

In *Yamashita v. Styer*, 327 U.S. 1 (1946), the Supreme Court expressly rejected the contention that a military commission convened to try General Yamashita was subject to the procedures in the Articles of War (the precursor to the UCMJ) governing courts-martial. The Court explained that, by Article 15 of the Article of War (now Article 21, UCMJ), Congress “recognized military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles,” and “gave sanction . . . to any use of the military commission contemplated by the common law of war.” *Id.* at 19. Although the Court relied in part on the fact that General Yamashita did not fall within the categories of persons made subject to the jurisdiction of the courts-martial by the Article of War, the Court also based its holding on the fact that “the military commission before which he was tried, though sanctioned, and its jurisdiction saved, by Article 15, was not convened by virtue of the Articles of War, but pursuant to the common law of war.” *Id.* (emphasis added).

Contrary to the Defense assertion, *Yamishita* did not hold that *only* military commanders could appoint military commissions. The Court was required to answer whether General Styer, as Commander of the United States Forces, Western Pacific, had legal authority to create the military commission that tried General Yamashita. *Id.* at 9. The Court held that General Styer had such authority, based upon “long-established American precedents” and the President’s general proclamation of 2 July 1942 authorizing military commissions. *Id.* at 10. The Court was not called upon to consider and did not decide whether the Secretary of Defense could lawfully delegate such authority to a civilian official directly under his control, as he has done here. In other words, the Court affirmed the historic practice of permitting field commanders to appoint military commissions, but did not rule that the Secretary or the President could never delegate such power to a duly appointed civilian official. That issue has never been addressed by the Supreme Court.

Similarly, the Defense reliance on Winthrop’s 19th Century treatise on military law¹⁴ is of little use in resolving this question. First, the observations of Colonel Winthrop are a valuable guide to past practice, but cannot seriously be offered as restrictions on the powers of the Secretary of Defense under modern statutes. His scholarship reflects past custom and precedent; it of course cannot describe the scope of the Secretary’s powers under current law. Past customary practice cannot limit the Secretary’s powers explicitly conferred by Congress. Secondly, Winthrop merely suggested that “in the absence of any statute,” commanders could be guided by past practice. As demonstrated above, the Secretary acted upon sound statutory and Constitutional authority in delegating authority to the AA.

¹⁴ William Winthrop, *Military Law and Precedents* 836-40 (2d ed. 1920).

The Secretary of Defense has determined that it is necessary to delegate his duties under the PMO to an Appointing Authority. That determination is entitled to the deference of the Commission. Congress's longstanding decision both to recognize and approve the exercise of the President's wartime authority to convene military commissions to try violations of the laws of war reflects Congress's understanding that military exigencies require giving the President flexibility rather than detailed procedures in dealing with enemy fighters. That decision is entitled to just as much deference as Congress's decision to legislate detailed rules for the military's use of courts-martial in the UCMJ. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-636 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.") In these circumstances, the President's action is "supported by the strongest presumption and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981) (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

6. Attached Files. None.

7. Oral Argument. If the Defense is granted oral argument, the Prosecution requests the opportunity to respond.

8. Witnesses/Evidence. As the Defense's Motion is purely a legal one, no witnesses or evidence are required.

//Original Signed//

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