RECORD OF TRIAL

COVER SHEET

IN THE
MILITARY COMMISSION
CASE OF

UNITED STATES
V.
SUFYIAN BARHOUMI

ALSO KNOWN AS:

ABU OBAIDA
UBAYDAH AL JAZA'IRI
SHAFIQ

NO. 050006

VOLUME IV OF ___ TOTAL VOLUMES

HAMDAN V. RUMSFELD
U.S. SUPREME COURT & D.C. CIRCUIT
(SELECTED FILINGS: NO REDACTIONS)

United States v. Sufyian Barhoumi, NO. 050006

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After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to the Appointing Authority's administrative certification.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SALIM AHMED HAMDAN, *Petitioner-Appellee,* v. DONALD H. RUMSFELD, *et al.*, *Respondents*	No. 04-5393 [Civ. Action No. 1:04-cv-01519-JR]

MOTION TO STAY THE COURT'S MANDATE PENDING DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI

Petitioner-Appellee Salim Ahmed Hamdan hereby moves for a stay of the Court's mandate pending disposition by the Supreme Court of his Petition for a Writ of Certiorari. The requested stay is a very limited one, since the Supreme Court is currently scheduled to consider the Petition at its first Conference, on September 26, 2005. Under D.C. Cir. R. 35(a) and D.C. Cir. R. 41, the mandate of this Court would otherwise issue on or near September 5, 2005, in the absence of a panel rehearing or rehearing en banc.

A stay of the mandate is warranted under Fed. R. App. P. 41(d)(2) and D.C. Cir. R. 41(a)(2). Mr. Hamdan's case presents legal issues of extraordinary national and international significance and contains questions of first impression on which Supreme Court guidance is necessary. This case challenges the President's use of military commissions in the "war on terror" in a manner that Mr. Hamdan contends violates the Geneva Convention, the Uniform Code of Military Justice, and the United States Constitution. The District Court agreed with Mr. Hamdan, granting in part his petition for a writ of habeas corpus and halting his trial by the military commission. This Court, despite its reversal of the District Court's decision, has characterized the claims presented by Mr. Hamdan as "not insubstantial." (slip. op. at 6.)

In addition, good cause exists for the stay. The President's resuscitation of military commissions as adjudicative bodies, after their disappearance from the legal landscape for over half a century, has generated grave national and international concern that the American commitment to international law and due process has been shaken. *E.g.,* Amicus Br. of 305 U.K. and European Parliamentarians, *Hamdan v. Rumsfeld*, No. 04-5393. A hastily-arranged trial by military commission in the weeks ahead, which is the publicly-announced intention of the Executive branch, will be seized upon by America's enemies and held up as evidence of alleged American hypocrisy and disregard for law. This harm to the national and public interest is appropriately considered on a motion to stay the mandate, and should not be courted before the Supreme Court has had the opportunity to determine the legality of the process. In addition, even if the proceeding were to be vacated *ex post*, the harm to Mr. Hamdan in being forced to preview his defense before the military tribunal is irreparable, and constitutes an independent basis for the issuance of the stay. Accordingly, this Motion to Stay the Court's Mandate Pending Disposition of a Petition for Writ of Certiorari ("Motion") should be granted.

DISCUSSION

A. Procedural History.

On April 6, 2004, Mr. Hamdan filed a Petition for Mandamus or, in the Alternative, Habeas Corpus in the Western District of Washington. After the Supreme Court's decision in *Rasul v. Bush*, 124 S.Ct. 2686 (2004), the case was transferred to the District Court for the District of Columbia, Judge Robertson presiding. On November 8, 2004, the District Court granted Mr. Hamdan's petition in part. The District Court ruled that military commissions can only be used to try offenses triable under the laws of war; that the 1949 Geneva Convention is judicially enforceable under habeas, and; that while Mr. Hamdan's prisoner of war status remains in doubt he must be tried by court-martial. *See Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004). The District Court further found that the military

commission procedures established by the President did not meet the requirements of the Uniform Code of Military Justice, because those procedures allow the government to remove Mr. Hamdan from his own trial and to deny him the right to confront witnesses. 10 U.S.C. §§ 836, 839; *Id.* The Respondents, Donald H. Rumsfeld, *et al.*, appealed.

Following the District Court ruling, Respondents voluntarily suspended proceedings in the three other cases pending before Military Commissions. Respondents have not preferred charges against anyone eligible for trial by Military Commission in over a year. Instead they have released three of the fourteen persons designated by the President as eligible for such trials. No opening statements have been made in any commission trial.

On July 15, 2005, the Circuit Court reversed the District Court in this case. The mandate has not yet issued, and, absent a panel rehearing or rehearing en banc, the mandate will issue on or near September 5, 2005.

On August 8, 2005 Mr. Hamdan filed his Petition for Certiorari ("Petition"), well in advance of the 90-day filing deadline imposed by S. Ct. R. 13.1, approximately three weeks after this Court's decision in *Hamdan*. Assuming the Solicitor General files his Brief in Opposition in the 30-day period contemplated by S. Ct. R. 15.3, briefing would be completed on September 7. The case is currently slated for consideration at the September 26, 2005 conference.[1] Accordingly, only a brief stay is necessary to permit the Supreme Court the time to decide whether to issue a writ of certiorari.

B. The Motion Meets the Standards for Staying the Mandate.

A motion to stay a court's mandate pending the filing of a petition for certiorari should be granted if (1) the certiorari petition presents a "substantial question" and (2) there is "good

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[1] This schedule is, in effect, the same briefing schedule used in *Hamdan v. Rumsfeld*, No. 04-702, *cert. denied*, Jan. 18, 2005. Following the District Court's November 8, 2004, a Petition for Certiorari Before Judgment was filed on November 22, 2004. The Solicitor General, following the period specified for filing a Brief in Opposition under S. Ct. R. 15.3, submitted a Brief in Opposition on December 27, 2004, and the case was scheduled for the first available conference thereafter.

cause" for a stay. Fed. R. App. P. 41(d)(2); *see also* D.C. Cir. R. 41(a)(2) (requiring that movant for stay of mandate provide "facts showing good cause for the relief sought"). Both requirements are satisfied here.

To determine whether a certiorari petition presents a "substantial question" under Fed. R. App.P. 41(d)(2), a circuit court considers whether there is a reasonable probability that the Supreme Court will accept certiorari, and a reasonable possibility of reversal. *See United States Postal Service v. AFL-CIO*, 481 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers) (in considering stay of mandate court considers "whether four Justices will vote to grant certiorari [and] some consideration as to predicting the final outcome of the case in [the Supreme] Court"); *Books v. City of Elkhart*, 239 F.3d 826, 828 (7th Cir. 2001); *United States v. Holland*, 1 F.3d 454, 456 (7th Cir. 1993).[2] To guide this inquiry, the circuit court considers "the issues that the applicant plans to raise in the certiorari petition in the context of the case history, the Supreme Court's treatment of other cases presenting similar issues, and the considerations that guide the Supreme Court in determining whether to issue a writ of certiorari." *Williams v. Chrans*, 50 F.3d 1358, 1361 (7th Cir. 1995) (per curiam). A motion for stay of mandate, however, is excepted from the ordinary rule that a circuit court should not anticipate changes in the applicable law. *Books*, 239 F.3d at 828. Rather, the court must "perform the predictive function of anticipating the course of decision in the Supreme Court of the United States." *Id.* (citing *INS v. Legalization Assistance Project*, 510 U.S. 1301, 1304 (1993) (O'Connor, J., in chambers)).

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[2] The D.C. Circuit has to date employed a less stringent standard under Fed. R. App. 41(d)(2) and D.C. Cir. R. 41(a)(2), asking only whether the petition for certiorari "tenders [issues that] are substantial." *Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1128 (D.C. Cir. 1978) (stay issued *sua sponte* where "appellate process has been completed; the questions presented to the Supreme Court . . . .are substantial; and the likelihood is that Supreme Court action on the petitions is relatively near at hand.").

Second, to determine whether there is "good cause" to stay the mandate, the circuit court should consider the equities of granting the stay and whether the applicant will suffer "irreparable injury" if the stay is denied. *Nanda v. Board of Trustees of the University of Illinois*, 312 F.3d 852, 853 (7th Cir. 2002). In application, however, the irreparable injury standard is not difficult to meet, merely requiring that the movant show some harm will accrue absent the stay, or that some public interest supports the stay. *See Books* 329 F.3d at 829 (equities favored issuance of stay in case involving public display of religious material where "public interest is best served [by] affording the City a full opportunity to seek review in the Supreme Court of the United States before its officials devote attention to formulating and implementing a remedy"); *Postal Service*, 481 U.S. at 1302-03 (equities favor stay where employer will face injury because "temporary reinstatement of [a discharged employee], a convicted criminal, will seriously impair the applicant's ability to impress the seriousness of the Postal Service's mission upon its workers."). Here, both the "substantial question" and "good cause" standards are easily met.[3]

1. Mr. Hamdan's Certiorari Petition Presents Substantial Legal Questions.

First, Mr. Hamdan's Petition clearly presents numerous "substantial questions." The questions presented in Mr. Hamdan's Petition are:

> 1. Whether the military commission established by the President to try petitioner and others similarly situated for alleged war crimes in the "war on terror" is duly authorized under Congress's Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224; the Uniform Code of Military Justice (UCMJ); or the inherent powers of the President?

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[3] Recent interpretation of Fed. R. App.P. 41(d)(2) indicates that the factors set forth in the Rule are alternative, and that a stay may issue if *either* a substantial question is presented *or* there is good cause to grant the stay. *See Books*, 239 F.3d at 829 (where movant presented a "weak case for certiorari" under the first factor, stay still granted because "equities of granting a stay" merited relief). Although Mr. Hamdan's Motion satisfies both requirements of the Rule, even if he merely shows good cause the stay should issue.

> 2. Whether petitioner and others similarly situated can obtain judicial enforcement from an Article III court of rights protected under the 1949 Geneva Convention in an action for a writ of habeas corpus challenging the legality of their detention by the Executive branch?

See Petition at i (a copy of the Petition is attached for the Court's reference as Appendix A).

The first question presented raises important and unresolved issues involving military commissions, an area of law where the Supreme Court has frequently granted certiorari. *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864); *Ex parte Milligan*, 71 U.S. 2 (1866); *Ex parte McCardle*, 73 U.S. (6 Wall.) 318 (1868); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869); *Ex parte Quirin*, 317 U.S. 1 (1942); *Yamashita v. Styer*, 327 U.S. 1 (1946); *Johnson v. Eisentrager*, 337 U.S. 763 (1950); *Madsen v. Kinsella*, 343 U.S. 341 (1952) (all cases challenging military commissions).

Mr. Hamdan's Petition presents multiple issues of first impression, including (1) whether the President is constrained by the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 821, from convening a military commission under present circumstances, (2) whether the procedures of the military commission comply with UCMJ § 836, and (3) whether the AUMF against "terrorism" is the functional equivalent of a declaration of war against a nation-state, thereby investing the President with implied authority to convene military commissions. Likewise, Mr. Hamdan's second question presented regarding judicial enforcement in a habeas action of treaty-based rights under the 1949 Geneva Conventions is an issue on which the circuit courts are divided and there is no authoritative statement of law from the Supreme Court. Matters of first impression or circuit splits satisfy Rule 41's "substantial question" requirement. *Bricklayers Local 21 of Illinois v. Banner Restoration, Inc.*, 384 F.3d 911, 912 (7th Cir. 2004).

Both this Court and the District Court agreed that Mr. Hamdan's case presents substantial legal issues. *Hamdan*, 344 F.Supp.2d at 157-158 (refusing to abstain because of "substantial" legal arguments raised by Hamdan challenging commission); slip op. at 6

(same). These issues pose "important question[s] of federal law that [have] not been, but should be, settled" by the Supreme Court. U. S. Sup. Ct. Rule 10(c). *See generally* Petition; *see also Quirin*, 317 U.S. 1 (granting certiorari in military commission case, despite the exigencies of the war and the inconvenience to the members of the Court of sitting in Special Term).

For the reasons set out more fully in the attached Petition, Mr. Hamdan's Petition raises at least three substantial questions, any one of which would independently merit a stay of the mandate.

i. Mr. Hamdan's challenge to military commissions is worthy of certiorari and the Supreme Court may reverse.

First, Mr. Hamdan's challenge to the military commissions is an issue worthy of certiorari and one on which there is at least a reasonable possibility of Supreme Court reversal. Military commissions – because they are created and conducted by one branch, the Executive – break from the accepted mode of adjudication and have historically attracted close scrutiny from the Supreme Court. *Milligan*, 71 U.S. 2; *Quirin*, 317 U.S. 1; *Yamashita*, 327 U.S. 1; *Eisentrager*, 337 U.S. 763; *Madsen*, 343 U.S. 341. Mr. Hamdan's case represents the first challenge to the legality of a military commission since the post-World War II era. Yet in the intervening years, significant changes have occurred bearing on the legality of military commissions and their procedures. The United States has ratified the 1949 Geneva Conventions, transformed its understanding of how the Bill of Rights protects the accused in criminal proceedings, and enacted the Uniform Code of Military Justice, which thoroughly revised the predecessor Articles of War. In light of this history, and the Supreme Court's traditional interest in preventing abuse of military commissions, it is more than reasonably probable that the Supreme Court will grant certiorari in this case.[4] *Williams*, 50 F.3d at 1361.

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[4] Because of the infrequency of military commissions there is limited precedent establishing their jurisdictional limits and procedures, and the precedent that does exist raises significant

Moreover, given the Supreme Court's recent decision in *Rasul*, 124 S.Ct. 2686, there is a distinct possibility that the Supreme Court will reverse this Court on at least some aspects of Mr. Hamdan's challenge to these commissions. In *Rasul*, both the D.C. District Court and this Court held that federal courts did not have jurisdiction over habeas claims of prisoners detained at Guantanamo Bay in connection with the "war on terror." Despite this uniform perspective on the part of the lower courts, the Supreme Court reversed, stating that "Petitioners' allegations...unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'" *Id.* at 2698 n.15 (quoting 28 U.S.C. § 2241(c)(3)).

Here, of course, the opinions of the District Court and this Court are in direct opposition and express irreconcilable views on the application of statutes and Supreme Court precedent to this military commission. *Compare, e.g., Hamdan*, 344 F. Supp. 2d at 159-62 (holding that 10 U.S.C. § 821 limits military commissions to a circumscribed jurisdiction as traditionally recognized under the law of war, of which the Geneva Conventions now forms an integral part; and that 10 U.S.C. §§ 836 and 839, along with *Crawford v. Washington*, 124 S. Ct. 1354 (2004), require a defendant's presence at all stages of his trial by military commission, consistent with fundamental principles of U.S. and international law) *with* slip op. at 18 (*Madsen* supports broad Executive authority to establish procedures for this military commission, which as currently promulgated are not inconsistent with statutes or international law). In light of this tension, and the clear and recent indication that lower court disposition is not predictive of Supreme Court resolution of cases brought by detainees at Guantanamo Bay, reversal of this Court is at least a possibility. This possibility requires a stay of the mandate. *Holland*, 1 F.3d at 456 (stay warranted if reversal is possible); *Deering*,

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questions in application. For example, there is considerable tension between *Quirin*, a case this Court relied upon heavily in its decision and *Milligan*. *See, e.g., Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2670 n.4 (Scalia, J., dissenting); *id.* at 2682 (Thomas, J., dissenting). Supreme Court review to resolve this tension is likely to occur. *See* Petition at 10-15.

647 F.2d at 1129 ("likelihood of Supreme Court action on the petitions [for certiorari]" merits stay); *Books*, 239 F.3d at 828 (circuit court to predict whether reversal is a *possibility*).

This likelihood is exacerbated by the fact that this Court relied significantly on applications of *Eisentrager* and *Quirin* to the war on terrorism. Just as at least a portion of *Eisentrager*'s vitality was questioned by *Rasul*, it is likely that a footnote of *Eisentrager*, viz., footnote 14, which was dicta to begin with, may be reconsidered, alongside the anomalously rendered *Quirin* decision. Particularly in this new conflict, not against a nation-state, but against a series of stateless groups, questions about the vitality and fit of conventional-war precedent likely will loom large in subsequent proceedings.

ii. Mr. Hamdan's assertion of a judicially enforceable treaty right presents a circuit split.

Another measure of whether a certiorari petition presents a "substantial question" for purposes of Fed. R. App. P. 41(d)(2) is whether the petition presents an issue on which the circuit courts are divided. *Bricklayers Local 21 of Illinois*, 384 F.3d at 912 (circuit split "favorably indicate[s] success for a petition for a writ of certiorari" to support stay of mandate). Mr. Hamdan's case presents the important and unresolved question of whether the 1949 Geneva Convention is judicially enforceable in a habeas action. This Court's ruling on that issue creates a circuit split with decisions from other Circuits in habeas actions involving treaty-based rights. *Compare* slip. op. at 13 ("The availability of habeas may obviate a petitioner's need to rely on a private right of action, but it does not render a treaty judicially enforceable.") (internal citation omitted) *with Wang v. Ashcroft*, 320 F.3d 130, 140-41 (2d Cir. 2003) (rights protected under the Convention Against Torture (CAT) held judicially enforceable in habeas action, despite express disapproval of judicial enforcement in

implementing statute); *see also Ogbudimkpa v. Ashcroft*, 342 F.3d 207 (3d Cir. 2003); Petition at 24 (citing cases).[5]

Not only is this Court's decision on the enforceability of treaty rights at odds with the Second and Third Circuits, the viability of this Court's holding on that point is placed in doubt by the recent observations of four Supreme Court Justices in *Medellin v. Dretke*, 125 S.Ct. 2088 (2005). In that case, Justice O'Connor, in a dissent joined by Justices Stevens, Souter and Breyer, stated, "This Court has repeatedly enforced treaty-based rights of individual foreigners, allowing them to assert claims arising from various treaties. These treaties...do not share any special magic words. Their right-conferring language is arguably no clearer than the Vienna Convention's is, and they do not specify judicial enforcement." *Id.* at 2104 (O'Connor, J., dissenting) (citing cases). Other Justices did not reach the enforceability question due to procedural problems not present in this case.[6] *See also* Petition at 20-21. The matter, moreover, involves our most solemn treaties – treaties that protect our troops in treacherous and difficult conditions. *See* Amicus Brief of General David M. Brahms, et al. as Amici Curiae Supporting Petitioner, *Hamdan v. Rumsfeld*, No. 04-5393. Regardless of whether the issue of individual enforceability of treaty rights under the Geneva Convention is treated as one of first impression or as a circuit split, a stay is warranted. *Bricklayers Local 21 of Illinois*, 384 F.3d at 912.

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[5] Although this Court cited *Wang* favorably in its discussion of the Geneva Conventions, slip op. at 13, this Court's holding regarding the judicial enforceability of treaties is at odds with the holding of *Wang*.

[6] In addition, this Court's treatment of *The Head Money Cases*, 112 U.S. 580, 598 (1884) departs from the understanding of that case by the four dissenting Justices in *Medellin*. This Court reads *Head Money Cases* to prevent individual judicial enforceability of treaty rights. Slip op. at 10 (quoting *Head Money Cases*, 112 U.S. at 598). Four Justices in *Medellin*, citing the exact same portion of *Head Money Cases* but reading that passage in its entirety, reached the opposite conclusion. *Medellin*, 125 S.Ct. at 2099-2100 (quoting *Head Money Cases*, 112 U.S. at 598) ("a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country.").

iii. Mr. Hamdan's challenge to military commissions as constrained by the UCMJ presents an issue of first impression.

Finally, the operation of the UCMJ as a constraint on the Executive's authority to set procedures for this military commission is an issue of first impression and one that merits Supreme Court review. The Supreme Court has not offered guidance on what procedures are "contrary to or inconsistent with" the UCMJ within the meaning of § 836, or on whether Congress and the UCMJ meaningfully constrain the President in establishing military commission procedures. This Court relied on *Madsen*, 343 U.S. 346-48, to support its conclusion that the UCMJ imposes "only minimal restrictions upon the form and function of the military commissions." *See* slip op. at 18. However, the petitioner in *Madsen* only raised a jurisdictional challenge to her commission; the case did not present the question of whether, and to what extent, § 836 imposes procedural restrictions on military commissions. 343 U.S. at 346-347. Indeed, the case pre-dated the effective date of the UCMJ (just as *Eisentrager* pre-dated the 1949 Geneva Convention). Thus, the Supreme Court has never analyzed the issue.

Correspondingly, the conclusion drawn from that premise – that because the UCMJ imposes "only minimal restrictions," Mr. Hamdan may be excluded from his own trial and prevented from confronting witnesses – is one that has no precedential support and runs counter to hundreds of years of criminal jurisprudence, and to modern military law. *Crawford*, 124 S.Ct. at 1362-63 ("'It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross-examine.'") (quoting *State v. Webb*, 2 N.C. 103 (1794)); *Lewis v. United States*, 146 U.S. 370, 372, 375 (1895) ("A leading principle *that pervades the entire law of criminal procedure* is that, after indictment found, nothing shall be done in the absence of the prisoner.") (emphasis added); *United States v. Dean*, 13 M.J. 676, 678 (A.F.C.M.R. 1982) ("The accused must be present at

all stages of his trial. The *integrity of the military justice system* is jeopardized where a hearing is held and witnesses questioned without all parties to the trial being present.") (emphasis added); *see also* Petition at 18-19. The constraints placed on the President by the UCMJ, and the consequences that flow from an absence of those constraints, are "substantial questions" of first impression that demand Supreme Court review and justify a stay. *Williams*, 50 F.3d at 1361.

2. The Equities Favor a Stay and Mr. Hamdan Will Suffer Irreparable Injury if the Stay is Denied.

There is good cause to stay the mandate in this case, whether that cause is measured by the public interest favoring a stay or the irreparable harm that will occur to Mr. Hamdan if the mandate is issued. Fed. R. App. P. 41(d)(2); D.C. Cir. R. 41(a)(2); *Books* 329 F.3d at 829; *Postal Service*, 481 U.S. at 1302-03. Harm to the public interest shifts the equities heavily in favor of a stay. *Books*, 329 F.3d at 829; *Postal Service*, 481 U.S. at 1302-03.

Certainly, neither the public interest nor the interested parties will be harmed by the temporary maintenance of the status quo. On the contrary, it is the prospect of rushed proceedings posed by the denial of this motion that threatens to harm both groups. Absent a stay, these military commissions – widely decried as unjust throughout the international community, even among America's friends and allies – will move forward without the benefit and imprimatur of Supreme Court review. Staying the mandate will allow the Supreme Court to consider and address Mr. Hamdan's fundamental challenges to these commissions, and will give credence and support to the perception here and abroad that *all* criminal proceedings conducted by the United States are subject to full judicial review and are governed by the rule of law.

Moreover, issuance of the mandate prior to Supreme Court review presents a panoply of irreparable harms to Mr. Hamdan: he will be forced to preview his defense to the prosecution; he will be forced to defend in a proceeding where he challenges the very

jurisdiction of the commission to try him at all; he may be returned to solitary confinement during pre-commission detention (a form of detention that will impair his ability to defend himself once the commission resumes); and it may interfere with his ability to complete briefing at the Supreme Court. Given these compound harms, and the lenient standard by which "irreparable injury" is measured on a motion to stay a mandate, a stay is amply warranted in this case. *Books*, 329 F.3d at 829; *Postal Service*, 481 U.S. at 1302-03.

i. The equities and public interest strongly favor a stay.

There is great potential harm to the public interest if these commissions are allowed to proceed before there is a meaningful opportunity for Supreme Court review. Fed. R. App. P. 41(d)(2); D.C. Cir. R. 41(a)(2); *Books*, 329 F.3d at 829. Rushed proceedings would undermine the legitimacy of the Government's actions in Guantanamo and confuse and possibly delay the Supreme Court's review of this case. *See generally Quirin*, 317 U.S. at 19 (finding that the public interest required that the Court avoid all delay in reaching the merits of a challenge to military commissions).

The harm to the public interest in this case is not ephemeral or undefined – military commissions that flout the protections afforded by the Geneva Conventions bring the scorn of the international community and endanger the lives of U.S. servicemen and civilians captured and detained abroad. Amicus Brief of General David M. Brahms, et al., *supra*, at 5-10. The public interests implicated here are at least as strong as the interests found in other cases where the mandate has been stayed. *Books*, 239 F.3d at 829 (mandate stayed because public interest would be harmed if the city of Elkhart, Indiana, had to "devote attention to formulating and implementing" city policy regarding public display of religious symbols without the benefit of Supreme Court review). Allowing the Supreme Court the time it needs to review these proceedings would benefit the public interest by helping to clarify and legitimize the proceedings in Guantanamo. *See Quirin*, 317 U.S. at 19 (observing, in case raising similar issues, that "public interest required that we consider and decide these

questions without any avoidable delay."); *see also* Slip Op. at 6 ("[W]e are thus left with nothing to detract from *Quirin*'s precedential value.").

Moreover, the potential harm to the public interest is not offset by any harm to the Government if Mr. Hamdan's military commission is very briefly delayed. The Government's actions during Mr. Hamdan's detention clearly reveal that it does not consider delay harmful, and that immediate proceedings are not necessary to protect the Government's interests. Mr. Hamdan has been in the custody of the U.S. military since approximately November 2001, but wasn't declared eligible for trial by military commission until July 3, 2003. He then languished in pre-trial segregation (*i.e.*, solitary confinement) for nearly nine months. Mr. Hamdan was not able to meet with his counsel until January 30, 2004. After Mr. Hamdan's counsel filed his mandamus and habeas action the Government moved to hold Mr. Hamdan's petition in abeyance. *See* Notice of Motion and Motion for Order Holding Petition in Abeyance (filed April 23, 2004, D.D.C. docket no. 1).[7]

It was not until the Supreme Court ruled that habeas jurisdiction extended to Guantanamo Bay in *Rasul* on June 28, 2004, that the Government finally presented Mr. Hamdan with the charge against him, a fortnight later, in July, 2004. In November 2004 when the D.C. District Court halted Mr. Hamdan's commission, the Government never sought a stay of the district court injunction, despite its stated promise to do so. *See* DOJ Press Release, Nov. 8, 2004, *available at* http://www.usdoj.gov/opa/pr/2004/November/ 04_opa_ 735.htm. Following this injunction the government *on its own accord* suspended proceedings in the three other cases pending before Military Commissions. The Government

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[7] In support of its Motion to Hold in Abeyance, the Government invoked the importance and finality of Supreme Court review. *Id.* at 4 ("[I]t would be an unnecessary expenditure of resources for the parties to litigate – and for [the district court] to adjudicate – the very same jurisdictional issues the Supreme Court is virtually certain to address over the next two months and resolve in a manner that will dispose of this petition or, at a minimum, provide substantial guidance regarding its viability in the federal courts[.]").

has never sought a speedy commission for Mr. Hamdan, and it has no equitable claim to seek one now.

Moreover, granting a stay merely preserves this status quo, a state of affairs that the Government accepted in November and which has been in place for over eight months. Under the District Court's order, Mr. Hamdan still remains subject to the threat of both military (court-martial) and civil (Article III court) prosecutions for his alleged past violations of the laws of war. He will not, moreover, be free on bail in the interim, but rather detained at Guantanamo Bay. The Supreme Court has held that in habeas cases the possibility of flight and danger to the public – neither of which exists in this case – are both relevant factors for courts to consider in granting stays. *See Hilton v. Braunskill*, 481 U.S. 770, 777 (1987) (remanding for reconsideration of the government's motion for a stay). Finally, the public interest would be harmed if a hastily convened commission was permitted to go forward prior to an opportunity for Supreme Court review.[8]

ii. Mr. Hamdan will be irreparably injured if the stay is denied.

There is also good cause to stay the mandate because Mr. Hamdan will be irreparably injured if his commission is allowed to go forward without Supreme Court review. Fed. R. App. P. 41(d)(2); D.C. Cir. R. 41(a)(2); *Postal Service*, 481 U.S. at 1302-03. There are at least three concrete harms to Mr. Hamdan that demonstrate irreparable injury sufficient to stay the mandate. *Postal Service*, 481 U.S. at 1302-03 (harm requirement satisfied where

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[8] Indeed, if expediency was truly an important goal for the Government, its decision to prosecute Mr. Hamdan via this commission—rather than, for example, a court-martial—is entirely illogical. *See* 10 U.S.C. § 818 (permitting trial by the existing system of courts-martial and conferring jurisdiction over violations of the laws of war); *id.* § 810 ("When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.").

temporary reinstatement of discharged employee will send a negative message to other employees).

First, the right Mr. Hamdan seeks to vindicate is the right not to be tried at all by this military commission. If the mandate issues before the Supreme Court has the opportunity to review Mr. Hamdan's case, the trial proceedings will resume where they left off. Mr. Hamdan will be asked to enter a plea pursuant to rules that do not facially permit *Alford* or conditional pleas. Substantial aspects of the rights Hamdan asserts in this petition will be vitiated by the resumption of the trial, and they will be impossible for the federal courts to fully vindicate *ex post*. Likewise, issuance of the mandate before Supreme Court resolution would subject Hamdan to trial by military commission even as he presses his challenge in Article III courts to the jurisdiction of those commissions to try him. *Cf. Gilliam v. Foster*, 75 F.3d 881, 904 (4th Cir. 1996) (en banc) ("[A] portion of the constitutional protection [the Double Jeopardy Clause] affords would be irreparably lost if Petitioners were forced to endure the second trial before seeking to vindicate their constitutional rights at the federal level." (quoting *Abney v. United States*, 431 U.S. 651, 660 (1997)).

In this respect, the issue is the same as that governing abstention, where the Court in this case has already concluded that "setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction." Slip op. at 6 (citing *Abney*, 431 U.S. at 662); *cf. McSurely v. McClellan*, 697 F.2d 309, 317 (D.C. Cir. 1982) ("A showing of irreparable injury will generally be automatic from invocation of the immunity doctrine if the trial has begun or will commence during the pendency of the petitioner's appeal.").

Second, if the mandate issues before Supreme Court review and the commission resumes, it will irreversibly provide the prosecution a preview of Mr. Hamdan's trial defense. This Circuit has already acknowledged this as an irreparable injury, and in a context that involved simple exclusion from the United States in immigration proceedings, and not the far

more burdensome and stigmatizing possibility of a criminal conviction with life imprisonment. In *Rafeedie v. INS*, 880 F.2d 506, 517 (D.C. Cir. 1989), then-Judge Douglas Ginsburg pointed to the "substantial practical litigation advantage" forfeited by forcing the petitioner to go through a summary exclusion proceeding when he claimed he was entitled to a more robust plenary procedure. The Government had argued that he should go through the summary proceeding first, and only if excluded should he be able to challenge the process. This Court disagreed due to the irreparable injury engendered by forcing a preview of the defense:

> Rafeedie will suffer a judicially cognizable injury in that he will thus be deprived of a "substantial practical litigation advantage." Rafeedie spells out this dilemma: if he presents his defense in a § 235(c) proceeding, and a court later finds that section inapplicable to him, the INS will nevertheless know his defense in advance of any subsequent § 236 proceeding; if, however, he does not present his factual defense now, he risks forsaking his only opportunity to present a factual defense. . . Rafeedie has thus established a *significant and irreparable injury*.

Id. at 518 (emphasis added). *Cf. United States v. Philip Morris Inc.*, 314 F.3d 612, 622 (D.C. Cir. 2003) (granting a stay upon finding that "the general injury caused by the breach of the attorney-client privilege and the harm resulting from the disclosure of privileged documents to an adverse party is clear enough" to satisfy the irreparable injury prong).

Third, if the mandate issues, Judge Robertson's injunction barring Mr. Hamdan's continued placement in solitary confinement will cease. Mr. Hamdan has already been subject to eleven months of solitary confinement, and, as the only evidence relevant to this issue and in the record confirms, continued solitary confinement threatens Mr. Hamdan's health and ability to defend himself at trial. *See* Brief of Amici Curiae Human Rights First, Physicians for Human Rights, *et al*, in Support of Petitioner at 9-18 (solitary confinement seriously impairs an ability to defend, and Mr. Hamdan is vulnerable to the consequences of solitary confinement). The harm to Mr. Hamdan's ability to defend himself by a return to

solitary confinement is at least as harmful as the symbolic harms held to favor a stay in other cases. *Postal Service*, 481 U.S. at 1302-03 (equities favor stay where employer will face irreparable harm because "temporary reinstatement of [a discharged employee], a convicted criminal, will seriously impair the applicant's ability to impress the seriousness of the Postal Service's mission upon its workers.").

Fourth, if this Court does not grant a stay, there is a possibility that Mr. Hamdan's trial proceedings at Guantanamo may occur at the same time as his Reply Brief in the Supreme Court is due. Because commission proceedings have not been scheduled, it is impossible to know whether this possibility will materialize. If it does, Petitioner cannot hope to adequately pursue his claims simultaneously in both Washington and Cuba, given the amorphous and uniquely difficult nature of the proceedings in Guantanamo and the lack of sufficient access to research materials and law libraries. Both Mr. Hamdan and the judicial branch will suffer if the petitioner in such a pivotal case cannot pursue his claims with the utmost vigor. Indeed, the Government itself suffers in that scenario, given its interest in making sure that the proceedings in Guantanamo command the respect of the international community and of its own citizens.

In sum, if military commissions are worth conducting, they are worth conducting lawfully and being *perceived* as so conducted. Their deployment in jurisdictionally dubious contexts or in legally clouded conditions can only work a disservice to their potential utility when confined to proper circumstances and conducted under legally appropriate ground rules. Only the Supreme Court's prompt and decisive resolution of the questions presented by the use of military commissions in the circumstances of this case can dispel those clouds swiftly and with the certitude that those conditions require.

Petitioner has acted with the utmost of dispatch to ensure that the Supreme Court can resolve his Petition at its first available date, the first Conference, on September 26, 2005. Accordingly, only a brief stay is necessary.

CONCLUSION

For all the foregoing reasons, the Motion should be granted and this Court's mandate should be stayed pending the Supreme Court's review of Mr. Hamdan's Petition for Certiorari.

Respectfully submitted this 11th day of August, 2005.

/s/ Neal Katyal
Neal Katyal (D.C. Bar No. 462071)
600 New Jersey Avenue, NW
Washington, D.C. 20001
(202) 662-9000
Lt. Commander Charles D. Swift
Office of Military Commissions
U.S. Department of Defense
1931 Jefferson Davis Hwy. Suite 103
Arlington, VA 22202
(703) 607-1521

Benjamin S. Sharp (D.C. Bar No. 211623)
Joseph M. McMillan (*pro hac vice*)
PERKINS COIE LLP
607 Fourteenth Street, N.W., Suite 800
Washington, D.C. 20005-2011
(202) 628-6600
(202) 434-1690 (facsimile)

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this August 11, 2005, I caused copies of the foregoing Motion for Stay to be sent by hand delivery to the Court and the following counsel of record:

Robert M. Loeb
Attorney, Appellate Staff
Civil Division, Room 7263
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530-0001

Sharon Swingle
Attorney, Appellate Staff
Civil Division, Room 7250
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530-0001

/s/ Jennifer A. Maclean
Jennifer A. Maclean

No. 05-184

IN THE
Supreme Court of the United States

SALIM AHMED HAMDAN,
Petitioner,

v.

DONALD H. RUMSFELD, ET AL.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

Lieutenant Commander
Charles Swift
Office of
Military Commissions
1931 Jefferson Davis Hwy.
Suite 103
Arlington, VA 22202
(703) 607-1521

Neal K. Katyal
Counsel of Record
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9000

Benjamin S. Sharp
Harry H. Schneider, Jr.
Joseph M. McMillan
Kelly A. Cameron
David R. East
Charles C. Sipos

PERKINS COIE LLP
607 14th St., NW
Washington, DC 20005
(202) 628-6600

Date: September 12, 2005

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Respondents have done everything possible to avoid review of their military commissions—from contesting Petitioner's right to seek habeas relief, to holding trials at Guantanamo, to changing commission rules after trials have begun. These maneuvers only underscore the commissions' basic flaw: They are "built upon no settled principles," are "entirely arbitrary in [their] decisions," and are "in truth and reality no law." *Reid v. Covert*, 354 U.S. 1, 26 (1957) (plurality) (quoting William Blackstone, 1 *Commentaries* *413).

1. Petitioner faces a military commission, the first in over 50 years, that abandons tradition, the UCMJ, and the Geneva Conventions. At issue is whether the President can supersede established civilian and military judicial systems. "No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people..." *Ex parte Milligan*, 71 U.S. 2, 118-19 (1866). Over 600 law professors have argued that these commissions violate separation of powers and international law. Rep. App. 72a-103a. Despite disagreement on the merits, the district court and court of appeals found these collateral issues jurisdictional and did not abstain.

Trial will neither modify these critical structural issues nor permit their disappearance. They will inexorably recur. A record will not illuminate whether Congress' authorization of "*necessary and appropriate* force" authorizes this commission; nor will it illuminate the failure to provide Geneva Convention immunities. Trial will not settle whether the Court's detention decisions apply to this commission. *Compare* Pet. App. 6a (applying *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004)) with *Padilla v. Hanft*, – F. 3d – (Sept. 9, 2005), slip op., at 20 (suggesting detention is less harmful than trial).

A trial will shed no light on how *Milligan* and the explicitly circumscribed *Ex Parte Quirin*, 317 U.S. 1, 45-46 (1942) apply to human beings not alleged to have taken up arms against the U.S. *Compare Padilla*, slip op., at 11 (*Quirin* applicable because "like Hamdi, Padilla took up arms against United States forces in" Afghanistan) *with* Pet. App.

62a-67a (Hamdan's charge, unlike Hamdi and Padilla, which concerns civil-war conduct going back to 1996, but not taking up arms *against the U.S.*). The allegations against Hamdan are, at most, the same ones for which Lambdin Milligan was *convicted*. *Milligan*, 71 U.S., at 4-5, 27 (Milligan charged with "conspiring to seize munitions of war" and "joining and aiding…a secret society…for the purpose of overthrowing the Government" and "found guilty on all the charges"). For *Milligan* not to protect Hamdan would suggest that the Constitution does not protect human dignity, or the separation of powers, at Guantanamo—a conclusion at odds with *Rasul v. Bush*, 124 S. Ct. 2686, 2698 n.15 (2004). Pet. 15-16.

The lengthy delay occasioned by waiting for the shifting commission process to conclude–a delay that will preclude this Court from hearing another commission case for many years–strongly counsels for certiorari. Delay imposes severe hardships, to Hamdan, Rep. App. 59a-71a, and to the nation's vital interests. *E.g.*, Amicus Briefs filed by Retired Generals and Admirals, Chief Defense Counsel, and Human Rights First. The need for immediate review is no less now than it was in *Quirin* and other cases, Pet. 9-10; indeed, it is more.

2. An interlocutory posture is not a *jurisdictional* bar to certiorari. Nor is it a prudential bar, for reasons the Solicitor General articulated clearly in *United States v. Phillip Morris*, No. 05-92.[1] Respondents cite no authority applying any rule

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[1] Respondents' *Phillip Morris* Petition, attached as Rep. App. A, fully refutes the claims they advance here:

"But the Court has recognized that 'there is no absolute bar to review of nonfinal judgments of the lower federal courts'…. See, *e.g.*, *Mazurek* v. *Armstrong*, 520 U.S. 968, 975 (1997)." *Id.*, at 23.

"The Court has not hesitated to review an interlocutory decision when 'it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.' Indeed, this Court has granted [interlocutory] review…innumerable times." *Id.*, at 24 (footnote and citations omitted, listing nine examples since 2000).

"[T]he issue presents a vitally important and recurring question that has major consequences for this important case." *Id.*, at 24.

"[T]he court of appeals would be unlikely to issue a decision until 2007. Under the best of circumstances, this Court would not receive a petition for writ of certiorari before the summer of 2007." *Id.*, at 25-26 & n.

"[T]his Court has repeatedly granted review of interlocutory court of appeals decisions in similar circumstances involving issues of far less significance…*Norfolk Southern Railway* v. *Kirby*, 125 S. Ct. 385 (2004)…,

against interlocutory review to military court cases, let alone commission or habeas challenges. On all scores, *Quirin*, the closest precedent, dictates that review should occur now. In the next closest precedent, *Solorio v. United States*, 483 U.S. 435 (1987), the Court rejected the same interlocutory objections urged by the Solicitor General here. Rep. App. 7a-10a. The questions presented are far graver than the service-connection test at issue in *Solorio*.[2]

a. This is not a criminal interlocutory appeal, as Respondents argue with respect to *every* other aspect of this trial. Pet. 30. The Petition challenges an *ad hoc* commission. It does not challenge courts-martial or civilian criminal systems, which are expressly authorized by Congress, time-tested, and subject to direct oversight by federal courts. Yet Respondents seek to harvest the benefit of rules from these fora. The panel itself rejected this logic, finding *Quirin*, not *Schlesinger v. Councilman*, 420 U.S. 738 (1975), the appropriate lens for viewing prudential doctrines like abstention. Respondents have even argued that the panel decided all issues with respect to commissions. Rep. App. 25a-45a. These judgments are final, not interlocutory. Returning to the district court serves no purpose. It is by no means clear that the panel's rulings can be revisited later, at any time.

Even if this were a typical case, strong reasons militate in favor of review. The court of appeals has already found the collateral-order doctrine applicable, recognizing that "setting aside the judgment after trial" would not address Mr. Hamdan's claims. Pet. App. 4a (citing *Abney v. United States*, 431 U.S. 651, 662 (1977)).[3] Hamdan asserts a right not

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which involved narrow issues of maritime liability…Nevertheless, the Court granted review to decide—before the district court had determined petitioner's liability in the maritime contract dispute…" *Id.*, at 26-27 (footnote listing additional cases omitted).

[2] The Court has consistently recognized that military jurisdiction is harsh even at its best, and has therefore policed jurisdiction before trials begin. *E.g.*, *Toth v. Quarles*, 350 U.S. 11 (1955).

[3] Like the Petitioners in *Helstoski* and *Abney*, Mr. Hamdan contends that he is immune from trial. Pet. App. 29a ("The government does not dispute the proposition that prisoners of war may not be tried by military tribunal."). Petitioner believes that the commission is not lawfully

to be tried. That right is irretrievably lost upon trial. *E.g., Helstoski v. Meanor*, 442 U.S. 500 (1979) (examining pre-trial a defendant's immunity under Speech and Debate Clause). Just as ordinary concerns against interlocutory review are "not very persuasive as to the extremely small class of criminal cases brought against Members of Congress," *United States v. Myers*, 635 F.2d 932, 936 (2d Cir. 1980), they are not persuasive as to the first commission in a half-century.

Proceduralists in particular should reject Respondents' attempt to apply rules from conventional settings. Robert Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 Yale L.J. 718 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979). Unlike judges, commission members lack independence and often do not explain their reasoning in opinions. Nor does the commission employ a jury–and encroachment on the jury function traditionally warrants interlocutory review. *E.g., Beacon Theat. v. Westover*, 359 U.S. 500, 501 (1959) ("We granted certiorari because 'Maintenance of the jury as a fact-finding body is of such importance…that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'") (citations omitted). And Respondents do not defend their process against allegations by their own prosecutors that the commission was handpicked to ensure Hamdan's conviction and that exculpatory evidence would not be given to him. Unlike established systems, this type of trial record will obscure more than it illuminates. Pet. 28, 96a; Phillip Morris Pet. 26.

b. Not only are the most basic threshold questions–such as whether the Constitution and treaties even apply to these

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authorized. Putting him in a trial will aggravate, not alleviate, these legal objections. *See Sell v. United States*, 539 U.S. 166, 176-77 (2003) (reviewing, interlocutorily, medication of defendant before trial because of "clear constitutional importance" and harm that would occur during trial); *Bunting v. Mellen*, 124 S. Ct. 1750, 1754 (2004) (Scalia, J., dissenting from denial of certiorari) (collateral issue review appropriate "to clarify constitutional rights without undue delay"); *In re Sealed Case*, 893 F.2d 363, 366-68 (D.C. Cir. 1990); U.S. Pet. Cert., *In re Cheney*, No. 03-475, at 23-24 ("Where, as here, the separation-of-powers arguments…are logically antecedent....it serves no purpose to require the President or Vice President to assert privilege claims before permitting an interlocutory appeal.").

trials–undecided by the Court; the rules for the trial are in constant flux. Respondents admit that they changed the rules a week before their brief was filed in this Court, just as they changed the rules on the eve of filing their briefs in *Padilla*, *Hamdi*, and *Rasul*. The commission now looks like none other in American history, rendering Respondents' reliance on *Quirin* even more untenable. With constantly shifting terms and conditions, the commissions resemble an automobile dealership instead of a legal tribunal dispensing American justice and protecting human dignity.[4]

The rule changes expose the central problem: the commission is not founded on law; it is a contrived system subject to change at the whim of the President. If he can change the rules this way today, he can change them back tomorrow, and then change them again the day after, with the Petitioner's life (and death-penalty eligibility) hanging in the balance. The President should not be allowed to "play ducks and drakes with the judiciary," *Baker v. Carr*, 369 U.S. 186, 268 (Frankfurter, J., joined by Harlan, J., dissenting). As *Carmell v. Texas*, 529 U.S. 513, 533 (2000) held, "[t]here is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes…"

If the rule of law means anything, it means that rules are

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[4] For example, the new rule changes strip two of three commission members of their votes on legal questions. The Presiding Officer had previously tried to do this, but Hamdan objected, claiming it was illegal and prejudiced him. Reply App. 52a-56a. In 2004, the head of the commissions (the Appointing Authority) agreed, concluding that the President's Order identifies "only one instance in which the Presiding Officer may act on an issue of law or fact on his own." *Id.*, at 57a. The Secretary of Defense has now overruled the Appointing Authority, without notice or opportunity for comment. The members were stripped of their votes ten months *after* oral argument (but *before* their decisions) on multiple legal challenges to the commissions, raising additional suspicions about the monolithic rulemaking and prosecuting entity.

Respondents suggest Petitioner might not be excluded from the courtroom. However, as the district court found, the prosecution will exclude him for two days. Pet. App. 45a. Respondents suggest commission membership may change, but the Appointing Authority has already ruled that out, http://www.defenselink.mil/transcripts/2005/tr20050831-3821.html ("one more" member needed on Hamdan's case). In any case, the Presiding Officer would remain, not alleviating the problem.

known in advance, generally applied, and not subject to change, particularly after the presiding officer and factfinder have been empaneled. "Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular case." *Hurtado v. California,* 110 U.S. 516, 535-36 (1884); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (a "government of laws, and not of men").[5] The Government's attempt to evade certiorari through herky-jerky late changes merely demonstrates the system's inherent instability and the constitutional need for immediate judicial review and legislation establishing rules.

c. This Court has not subjected habeas cases to its rules for interlocutory appeals. Had it done so, Respondents' leading precedent, *Quirin*, would not have been heard. Rather, "[i]n analyzing the finality of a judgment in a habeas corpus or prohibition proceeding, the Supreme Court has recognized that such proceedings are independent matters and that a final judgment rendered therein is reviewable regardless of the status of a related prosecution." R. L. Stern, et al., *Supreme Court Practice* 161 (8th ed. 2002). The Court's first foray into habeas in the national-security context, *Ex parte Bollman*, 8 U.S. 75 (1807), confirms this understanding.[6]

For example, when a defendant charged under a state

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[5] *See Weaver v. Graham*, 450 U.S. 24, 29 n.10 (1981) ("The *ex post facto* prohibition also upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law"); *United States v. Brown*, 381 U.S. 437, 455 n.29 (1965); *Rogers v. Tennessee*, 532 U.S. 451, 460 (2001). The Court has been wary of retroactive changes. E.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988). They are "contrary to fundamental notions of justice," *Kaiser Aluminum v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring), in that they upset an accused's expectations and compromise crafting defense strategy. *Calder v. Bull*, 3 U.S. 386 (1798).

[6] The petitioners were charged with participating in a conspiracy to overthrow the U.S. That the petition was filed before trial had commenced was held irrelevant. As Chief Justice Marshall wrote, a "question brought forward on a habeas corpu[s] is always distinct from that which is involved in the cause itself…and therefore these questions are separated, and may be decided in different courts." 8 U.S., at 101. Although the Court knew the case might "excite and agitate the passions of men," it found a need to decide it, for "[w]hether this inquiry be directed to the fact or to the law, none can be more solemn, none more important to the citizen or to the government; none can more affect the safety of both." *Id*. at 125.

"anti-secret organization" statute brought a pre-trial habeas challenge to the statute's legality, the Court held that a habeas action "is quite unlike the fragmentary or branch proceeding . . . held to be interlocutory only," and that a habeas decision "refusing to discharge him is a final judgment in that suit and subject to review by this Court." *New York ex. rel Bryant v. Zimmerman*, 278 U.S. 63, 70-71 (1928). This rule "has been respected and given effect in an unbroken line of…decisions …[and] followed in other cases," *id.* at 71; *Rescue Army v. Mun. Court*, 331 U.S. 549, 566-67 (1947) (rule "well settled"); *Holmes v. Jennison*, 39 U.S. 540, 564-65 (1840). Moreover, the prospect of renewal of a habeas petition does not deprive a judgment of finality. *Betts v. Brady*, 316 U.S. 455, 461 (1942).

d. This Court has regularly reviewed, over the objection of the Solicitor General, interlocutory criminal cases. *E.g., Bates v. United States*, 522 U.S. 23 (1997); *Solorio, supra*; *Oliver v. United States*, 466 U.S. 170 (1984). "[T]he interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." Stern, *supra*, at 260; *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States v. Gen. Motors*, 323 U.S. 373, 377 (1945). This Petition presents the ultimate questions raised by Hamdan's case, and they have been fully decided below.

Furthermore, the Court has heard interlocutory appeals to resolve issues of importance to other cases. Stern, *supra*, at 259-60 (citing 18 cases); *Cent. Bank v. First Interstate Bank*, 511 U.S. 164, 170 (1994); *Santa Fe Indus. v. Green*, 430 U.S. 462 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). Respondents have argued that the decision below not only resolves all challenges to all commissions, but most all claims brought by the hundreds of Guantanamo detainees.[7]

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[7] The questions presented are cleanly distinct from Petitioner's guilt or innocence, and concern the same matters that led the district court to enjoin Hamdan's commission. They do not concern an accidental "classic 'trial error,'" *Arizona v. Fulminante*, 499 U.S 279, 309 (1991), but rather the systemized and foreseeable denial of fundamental rights that amount to "structural defects in the constitution of the trial mechanism [itself], [and] which defy analysis by 'harmless-error' standards." *Id.*

e. Finally, prudential reasons to defer review do not apply, since federal jurisdiction has already been exercised to decide fundamental issues.[8] Unlike the ordinary case, where a panel decision might be questioned by another Circuit, this decision is the law of the nation. Denying certiorari freezes that law into place for years to come.

As such, Respondents' abstention argument militates in *favor* of certiorari. If prudence requires courts to stay silent, denying certiorari would leave in place a court of appeals' decision that is *anything but* silent. The many virtues of judicial inaction are not furthered by denying review of a case where the Government itself contends that the panel reached out improperly to decide key issues. *See Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).[9]

3. By overreading one footnote (in *Eisentrager*) and underreading another (in *Rasul*), the court of appeals created a legal black hole where no law applies. In this setting, individuals will not merely be *detained*, but tried and sentenced to life imprisonment and even death.

Respondents' characterizations of the panel's decision are belied by their own representations in *al Odah*, where they argued that *Hamdan* binds the court of appeals on

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[8] At most, Respondents' claim militates in favor of granting the Petition while commission proceedings are underway, or for deferring its consideration until those proceedings conclude, not denying the writ altogether. *See* Stern, *supra*, at 311, 451; *Medellin v. Dretke*, 125 S. Ct. 2088, 2105 (O'Connor, J., dissenting). The statutory restrictions on review of state-court proceedings in *Medellin* are not applicable here. *Id.*, at 2090-92.

[9] Respondents' contention that the district court should have abstained is wrong and was properly rejected by both the court of appeals and district court. Pet. App. 3a, 23a; Hamdan Ct. App. Br. 8-31. Respondents' speculation that Petitioner may be acquitted does not diminish the need for this Court's immediate review. Issues of military-court jurisdiction are unique because an accused cannot secure the benefit of an acquittal. See *United States v. Ball*, 163 U.S. 662, 669 (1896) ("an acquittal before a court having no jurisdiction is, of course,…no bar to subsequent indictment and trial in a court which has jurisdiction of the offence."); Rep. App. 59a-71a.

Even if the Commission found Hamdan not guilty, the Appointing Authority and Review Board could send his case back. 32 C.F.R. §9.5(p). Commission rules permit Hamdan to be charged with another offense (such as conspiring to commit some other offense, or even aiding and abetting the very *same* object offenses for which he is currently charged). *Id. Cf. Spencer v. Kemna*, 523 U.S. 1, 18 (1998) ("capable of repetition, yet evading review"). As long as the Military Order stands, Respondents can bring new charges—and subject Hamdan to new trials—*ad infinitum*.

matters such as whether the Constitution and Geneva Conventions protect detainees at Guantanamo. Rep. App. 11a-24a. Furthermore, elaboration of *Rasul* is easier in a case involving criminal prosecution (with life imprisonment and the stigma of conviction at stake)--a context where the Constitution, UCMJ, and treaties provide far more rights. For example, GPW Arts. 3 and 102 speak of trial rights, as do many constitutional and UCMJ provisions. This Court's recognition of Petitioner's rights would not automatically extend to noncommission detainees. The *al Odah* cases involve myriad individuals of diverse citizenship, captured in a variety of conflicts. Before wading into them, the Court should provide guidance in a single, cleanly presented case.[10]

4. Unlike the court below, other circuits have held that the habeas statute permits treaties to be judicially enforced. *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 219 (3d Cir. 2003); *Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003). *Wang* did not rely on "rights created by a statute." Opp. Br. 20. The portion of *Wang* Respondents quote is a summary of a lawyer's argument, not its holding. *Wang* relied on the treaty, implemented in domestic law via statute, and used habeas to enforce it. 320 F.3d at 141 n.16. In this case, there is no dispute that the GPW has been implemented by AR 190-8,

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[10] Respondents' brief is marred by numerous errors. First, some claims are wrong. The guilt phase of trial was not "one month" away; on the morning of the district court's ruling the Presiding Officer indicated that it was many months away. (To date, no discovery order has issued permitting access to inculpatory or exculpatory material.) Petitioner did raise 10 U.S.C. 3037 in his D.C. Circuit brief at pp. 15 and 63. Hamdan *does* challenge his detention, Habeas Pet., at 25. The claim that Petitioner will remain detained as an "enemy combatant" cannot be assumed given the pending appeal in *al Odah.* Conspiracy is not a stand-alone offense triable under the laws of war, see Amicus Br. of Professors Martinez and Danner, http://www.law.georgetown.edu/faculty/nkk/documents/dannermartinezamicus.pdf. Review in *Quirin* was not due to an "imminent execution," and the Government tellingly cites to nothing to support its claim. *Quirin* was heard before the verdicts, not before sentencing. 317 U.S. at 19-20.

Second, some claims contradict one another, such as the assertion that this case implicates the "most sensitive national security concerns," and the simultaneous claims that the number of commission cases is "small," Opp. Br., at 16, and Petitioner would be detained anyway, *id.*, at 13.

Third, some claims are simply incredible, such as the claim that Respondents fear the delay from certiorari, Opp. Br., at 16, in light of the near three-year delay in merely charging Petitioner. Rep. App. 68a.

and would be enforced under *Wang*'s rationale. Pet. 24-25.[11]

5. Common Article 3, on which the court below broke with the Second Circuit and was itself divided, provides yet another reason for certiorari. No vehicle problems exist; the panel fully reached the merits. As *amici* 304 Parliamentarians point out, even if the GPW is not judicially enforceable, this Court's elimination of the panel's merits holding is critical to vindicate diplomatic and military-enforcement mechanisms. Because the panel rested on statutes explicitly incorporating laws of war, 10 U.S.C. 821; *Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (1804), this case is an ideal vehicle to examine whether the GPW applies to the "war on terror."

6. Respondents' claims at pp. 27-29 are irrelevant. Petitioner does not dispute the existence of "armed conflict," the question is whether the resolution permitting "*necessary and appropriate force*" authorizes this commission, particularly when the panel found the laws of war inapplicable. *Milligan* requires applying the benefits, as well as the burdens, of the laws of war to defendants; under the panel's reasoning, no law exists for Hamdan to violate. Pet. 12-15.

CONCLUSION

Review would enable this Court to preserve a *status quo* that has existed for more than a half-century, and permits the Court to examine Respondents' revolutionary proposals before they indelibly alter the charter of American justice. In this unique setting, certiorari is the prudent course.

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[11] Petitioner has consistently maintained that he is not a member of al-Qaeda or of any armed forces. Respondents do not allege that Petitioner engaged in hostilities; that is why Petitioner is protected under Art. 4(a)(4), which covers "[p]ersons who accompany the armed forces without actually being members thereof." Even if the CSRT labeled Hamdan an enemy combatant, a determination not in the record, he would be protected under Art. 4(a)(1). That article protects al-Qaeda members who were "militi[a] or volunteer corps forming part of" Taliban forces. For this reason, the Government told the district court that the CSRT had "zero effect" on the case, C.A. App. 250-51, but now, inconsistently, relies on it.

Petitioner need not fulfill the criteria of Art. 4(a)(2), as he explicitly argued below. Hamdan Ct. App. Br., 47-49. As the district court correctly found, the circumstances of his capture, his insistence upon innocence, and his claims to GPW protection establish "doubt" sufficient to require an Article 5 tribunal, and further resolution as to which specific subsection cannot take place until after that tribunal. Pet. App. 28a-32a.

RESPECTFULLY SUBMITTED,

Lieutenant Commander
Charles Swift
Office of
Military Commissions
1931 Jefferson Davis Hwy.
Suite 103
Arlington, VA 22202
(703) 607-1521

Neal K. Katyal
Counsel of Record
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9000

Benjamin S. Sharp
Harry H. Schneider
Joseph M. McMillan
Kelly A. Cameron
Charles C. Sipos
David R. East
PERKINS COIE LLP
607 14th St., NW
Washington, DC 20005
(202) 628-6600

September 12, 2005

REPLY APPENDIX A

No. 05-92

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP MORRIS USA, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General

SHARON Y. EUBANKS
STEPHEN D. BRODY
FRANK J. MARINE
MARK B. STERN
ALISA B. KLEIN
MARK R. FREEMAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the district court's equitable jurisdiction to issue "appropriate orders" to "prevent and restrain" violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1964(a), encompasses the remedial authority to order disgorgement of illegally-obtained proceeds.

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II. THE INTERLOCUTORY CHARACTER OF THE COURT OF APPEALS' DECISION IN THIS INSTANCE WEIGHS IN FAVOR OF THIS COURT'S REVIEW

The United States has pointed out in numerous instances that the interlocutory character of a court of appeals' decision normally counsels against this Court's immediate review because the proceeding in the lower court may obviate the need for the Court's intervention. *See, e.g., Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967). But the Court has recognized that "there is no absolute bar to review of nonfinal judgments of the lower federal courts" and that the interlocutory character of a decision affects only the prudential calculus of whether certiorari should be granted. *See, e.g., Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (per curiam) (summarily reversing an interlocutory order). When "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Robert L. Stern et al., Supreme Court Practice 259 (8th ed. 2002). The Court has not hesitated to review an interlocutory decision when "it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co. v. Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893). Indeed, this Court has granted review of interlocutory court of appeals decisions, decided pursuant to 28 U.S.C. 1292(b), innumerable times.

[footnote] For a few recent examples, see, *e.g.*, *Cutter* v. *Wilkinson*, 125 S. Ct. 2113 (2005); *Norfolk S. Ry.* v. *Kirby*, 125 S. Ct. 385 (2004); *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004); *Gratz* v. *Bollinger*, 539 U.S. 244 (2003); *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1 (2003); *Breuer* v. *Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003); *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001); *Green Tree Fin. Corp.-Ala.* v. *Randolph*, 531 U.S. 79 (2000); *Harris Trust & Sav. Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238 (2000).

This case presents an instance in which the prudential considerations weigh heavily in favor of immediate review. The issue presented here-whether Section

1964(a) authorizes a court to grant the government the remedy of equitable disgorgement in a RICO action-plainly warrants this Court's review for the reasons already stated: (1) the divided court of appeals' resolution of that issue is inconsistent with the decisions of this Court and other courts of appeals (pp. 9-19, supra); and (2) and the issue presents a vitally important and recurring question that has major consequences for this important case (pp. 20-23, supra). The interlocutory character of the court of appeals' ruling on that issue should not preclude this Court's review where the interlocutory review process has produced an erroneous intermediate appellate court ruling that, if left undisturbed, would require the district court to fashion a remedy based on fundamentally mistaken principles of law.

The district court determined five years ago that Section 1964(a) allows equitable disgorgement, Pet. App. 117a-121a, and it certified its May 24, 2004, order, despite the government's objection, for the limited purpose of obtaining guidance on whether the so-called "Carson standard" for disgorgement applies to this case. See id. at 148a-153a. Over a forceful dissent, the court of appeals panel majority elected to go beyond the narrow issue that prompted the district court to certify its order. See id. at 37a-49a, (Tatel, J., dissenting); see note 1, supra. Indulging respondents' "questionable tactics" (id. at 48a), the divided court reached out to decide an issue unnecessarily and contrary to the decisions of this Court, other courts of appeals, and the court of appeals' own precedent. See pp. 9-19, supra.

That unwarranted and badly mistaken decision-which the en banc court left unreviewed following a tie vote on whether to grant rehearing-will impair, rather than advance, the ultimate resolution of this case. The district court certified its order for interlocutory review to address the applicability of the Carson standard, which that court discerned to provide a "substantial ground for difference of opinion." See Pet. App. 151a (emphasis omitted). The court of appeals majority instead reached out to address an issue-the availability of disgorgement-over which the district court and the courts of appeals were heretofore in agreement. If the Court postpones correction of the court of appeals' mistaken guidance until after the district court issues an artificially constrained final judgment and this complex case traces a new route through the court of appeals, then the

district court will be precluded from correctly resolving this litigation until remand proceedings can be convened at a far distant date.

[footnote] Under the current schedule, post-trial briefing will not be completed until October 2005. See Order #964-A (June 10, 2005). The district court could conceivably issue a final decision by early 2006, but even if the court of appeals undertook expedited review, the briefing in the court of appeals would likely not be completed until the summer of 2006. Given the massive record in this case, the court of appeals would be unlikely to issue a decision until 2007. Under the best of circumstances, this Court would not receive a petition for writ of certiorari before the summer of 2007. If the Court granted the petition, it could not reasonably be expected to issue a decision until 2008. Under this optimistic projection, remand proceedings would be unlikely to commence until late 2008 at the earliest. In light of the daunting burden the district court would face in recommencing proceedings three or more years from now in this complex six-year-old case, the Court should resolve the correctness of the court of appeals' interlocutory guidance during its 2005 Term so that the district court can issue a final decision—relying on this Court's definitive guidance—by the summer of 2006.

The district court has not yet rendered a ruling on liability in this case, but respondents have no basis for expecting a favorable outcome. The government has put forward a powerful liability case, see note 7, supra, and the district court has provided no indication that the government has failed to carry its burden of proof. In any event, this Court has repeatedly granted review of interlocutory court of appeals decisions in similar circumstances involving issues of far less significance. For example, the Court recently reviewed an interlocutory court of appeals decision addressing remedial issues in advance of a liability determination in *Norfolk Southern Railway v. Kirby*, 125 S. Ct. 385 (2004). That case, which involved narrow issues of maritime liability affecting a limited number of carriers, involved matters of far less pressing public importance than the issue involved here. Nevertheless, the Court granted review to decide-before the district court had determined petitioner's liability in the maritime contract dispute -whether petitioner was entitled to the protection of potential contractual liability limitations. See id. at 392.

[footnote] The Court followed the same practice in *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199 (1996), granting review to determine, in advance of a liability determination, whether certain state law remedies remain available to a personal injury claimant in a maritime wrongful-death suit. See *id*. at 204. The Court also followed that practice in *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122 (1989), granting review, in advance of a liability determination, to determine whether the Warsaw Convention's limitation on damages for passenger death applies despite the defendant's failure to provide adequate notice of the limitation. See *id*. at 124. Similarly, the Court decided a case concerning the availability of an innocent-owner defense in a civil forfeiture action where the claimant, on remand, could also defeat forfeiture by rebutting the finding of probable cause. *United States* v. *92 Buena Vista Ave.*, 507 U.S. 111 (1993). Each of these cases reached the Court after the respective court of appeals rendered a decision through the interlocutory procedure set out in 28 U.S.C. 1292(b). See *Kirby*, 125 S. Ct. at 392; *Yamaha*, 516 U.S. at 204-205; *Chan*, 490 U.S. at 124-125; *92 Buena Vista Ave.*, 507 U.S. at 116.

In short, this case warrants the Court's attention at this critical juncture of the litigation. The court of appeals' mistaken interlocutory guidance not only presents an obstacle, rather than an aid, to the ultimate termination of the litigation, but it stands as a mistaken precedent that will continue to misdirect other courts and constrain the government's ability to seek full relief in future civil RICO cases. As the court of appeals panel itself acknowledged, its decision has created a circuit conflict, and the court of appeals' inability to decide the issue en banc ensures that the conflict will persist until this Court resolves it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

EDWIN S. KNEEDLER*
Acting Solicitor General
PETER D. KEISLER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General
SHARON Y. EUBANKS
STEPHEN D. BRODY
FRANK J. MARINE
MARK B. STERN
ALISA B. KLEIN
MARK R. FREEMAN
Attorneys

* The Solicitor General is disqualified in this case.

REPLY APPENDIX B

In the Supreme Court of the United States
October Term, 1985

Richard Solorio, Petitioner
v.
United States of America

On Petition for a Writ of Certiorari to the United States Court of Military Appeals

BRIEF OF THE UNITED STATES IN OPPOSITION

Charles Fried
Solicitor General
Department of Justice
Washington, D.C. 20530

…

The decision of the Court of Military Appeals is correct, it does not conflict with any decision of this Court, and it involves a jurisdictional issue that has no impact beyond the military justice system. Furthermore, petitioner's contentions are not ripe for this Court's review : petitioner's convictions have not yet been reviewed on direct appeal, and one of the questions in the petition was not raised in any of the lower courts. For these reasons, review by this Court is not warranted.

1. This case is currently in an interlocutory posture. The Court of Military Appeals rendered its decision on a government appeal from the trial judge's dismissal of the charges against petitioner. Following that court's decision, petitioner was convicted and sentenced. Petitioner's sentence includes a term of confinement in excess of six months and a bad conduct discharge. If that sentence is upheld by the convening authority (see Art. 60, UCMJ, 10 U.S.C. (& Supp.

II) 860), petitioner's convictions and sentence will be reviewed by the Coast Guard Court of Military Review under Article 66 of the UCMJ, 10 U.S.C. (& Supp. II) 866. If that court rules against him, petitioner will again be able to seek review by the Court of Military Appeals under Article 67 of the UCMJ, 10 U.S.C. (& Supp. II) 867. Because a favorable decision by either court below on petitioner's pending appeal may render moot the claims that he has raised in his petition, review by this Court at this time would be premature.

The record on petitioner's appeal from the judgment of conviction also provides a more complete factual background against which to consider the claims presented in the petition. Contrary to petitioner's assertion (Pet. 20), the trial on the merits has produced additional facts that are relevant to the issue of jurisdiction.' Accordingly, on petitioner's upcoming appeal, the Court of Military Review will be able to apply its expertise to the more complete factual record of the case, so as to present a better record for subsequent review. See Schlesinger v. Councilman, 420 U.S. 738, 760 (1975) (noting that whether an offense is subject to prosecution by court-martial is a "matter[] as to which the expertise of military courts is singularly relevant") ; see also id. at 760-761 n.34. There is therefore no need for this Court to decide the claims presented by petitioner in the current posture of this case.

Petitioner maintains (Pet. 19) that review by this Court is necessary at this time because a service-member defendant may petition for a writ of certiorari only from a judgment of the Court of Military Appeals. Petitioner contends that his opportunity to seek review by this Court will be frustrated if the Court of Military Appeals declines to re-view his case again. That claim, however, is not persuasive.

When Congress gave this Court certiorari jurisdiction in military cases, it gave the Court jurisdiction to review only the judgments of the Court of Military Appeals, and not the courts of military review. Congress restricted this Court's jurisdiction in that fashion to ensure that the cases coming to this Court would be only those involving issues of

substantial national importance. See S. Rep. 98-53, 98th Cong., 1st Sess. 8-11, 33-34 (1983); H.R. Rep. 98-549, 98th Cong., 1st Sess. 16-17 (1983). If the Court of Military Appeals were to decline to review petitioner's case following the affirmance of his conviction, it would put petitioner in precisely the same position as if the court of military review had ruled against him in the first instance and the Court of Military Appeals had declined to review that ruling. The fact that the Court of Military Appeals has a screening function that is designed to limit the number of military cases reaching this Court should not provide a justification for relaxing the usual principles counseling against review of interlocutory decisions.

5. We are informed that, for example, additional evidence of the impact of the offenses on the victims' families, which the Court of Military Appeals considered significant (Pet. App. 10a-12a), was developed during the trial testimony of the victims' mothers, who did not appear at the pretrial hearing. It was also revealed during the trial that one of the victims had considered suicide

In any event, the Court of Military Appeals has been sensitive to the fact that it must grant review before a defendant may seek review in this Court. Consistent with congressional concern as to the role that it plays in the process (S. Rep. 98-53, supra, at 34), the Court of Military Appeals has in some cases granted review and summarily affirmed on the basis of its own longstanding precedents that have never been reviewed by this Court, apparently in order to allow the defendant to seek review in this Court.

See, e.g., United States v. Spicer, 20 M.J. 188 (1985), cert. denied, No. 84-1978 (Oct. 21, 1985) ; United States v. Simmons, 21 M.J. 38 (1985), cert. denied, No. 85-857 (Feb. 24, 1986) United States v. Holman, 21 M.J. 149 (1985), cert. denied, No. 85-963 (Jan. 13, 1986).

Moreover, the decision by the Court of Military Appeals not to review petitioner's case would not prevent him from obtaining review of his claims by a federal court. Petitioner can collaterally attack his convictions by filing a petition for

a writ of habeas corpus in federal district court, as Congress recognized when it limited direct review in this Court from the judgments of the military courts. See S. Rep. 98-53, supra, at 32-33.

On the merits, petitioner's claims do not warrant further review. The courts below correctly applied this Court's decisions to the facts of this case, and petitioner has not presented any sufficient reason to justify further review.

The Constitution (Art. I, § 8, Cl. 14) empowers Congress to provide for the court-martial of service-men for committing crimes. Whether an individual serviceman may be tried by a court-martial for a particular crime turns on whether, on the facts of the case, the offense and the underlying conduct sufficiently affect the interests of the military as to be "service-connected." Councilman, 420 U.S. at 760; Rel f ord v. Commandant, 401 U.S. 355, 365-369 (1971) ; O'Callahan v. Parker, 395 U.S. 258 (1969). That inquiry requires a court to gauge "the impact of an offense on military discipline and effectiveness, * * * whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and * * * whether the distinct military interest can be vindicated adequately in civilian courts." Councilman, 420 U.S. at 760. This undertaking involves "matters of judgment that often turn on the precise set of facts in which the offense has occurred," as to which "the expertise of military courts is singularly relevant" (ibid.). See also Relford, 401 U.S. at 365-366 (adopting "an ad hoc approach to cases where a trial by court-martial is challenged). The ruling below that petitioner can be tried by a court-martial is consistent with these principles…

REPLY APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5064, 05-5095 through 05-5116

KHALED A.F. AL ODAH, et al., Petitioners-Appellees/Cross-Appellants,

v.

UNITED STATES OF AMERICA, et al., Respondents-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE UNITED STATES, ET AL.

The United States submits this supplemental brief in response to this Court's order of July 26, 2005, which directed the government to file a brief "addressing the effect of this court's opinion in Hamdan v. Rumsfeld, No. 04-5393 (D.C. Cir. July 15, 2005)." Hamdan significantly undercuts the claims advanced by petitioners in this case. Specifically, it bolsters our argument that the Due Process Clause of the Fifth Amendment is inapplicable to aliens captured abroad and held at Guantanamo Bay, Cuba. In addition, Hamdan forecloses petitioners' Geneva Convention claims altogether by holding that the Geneva Convention does not create judicially enforceable rights, and its rationale is fully applicable to petitioners' other treaty-based claims. Finally, Hamdan bars petitioners' claims based on Army regulations relating to the treatment of detainees.

STATEMENT

In Hamdan v. Rumsfeld, __ F.3d __ , 2005 WL 1653046, No. 04-5393 (D.C. Cir. July 15, 2005), this Court

upheld the legality of the use of military commissions to try alien enemy combatants for violations of the laws of armed conflict. Hamdan himself, who served as the personal driver for Osama bin Laden and other high ranking al Qaeda members and associates, was captured during military operations in Afghanistan and was transferred to a detention facility at Guantanamo Bay, Cuba. In July 2003, the President issued a finding that "there is reason to believe that [Hamdan] was a member of al Qaeda or was otherwise involved in terrorism directed against the United States," and designated Hamdan for trial by military commission. Slip op. 4. In July 2004, Hamdan was charged with conspiracy to commit the offenses of attacking civilians, attacking civilian objects, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent, and terrorism.

Hamdan filed a petition for a writ of habeas corpus in federal district court to challenge the commission proceedings. The district court granted the petition in part. Invoking various provisions of the Third Geneva Convention, that court enjoined the ongoing military commission proceedings against Hamdan and ordered him released to the general detention population at the Guantanamo Bay Naval Base.

This Court reversed. It held that the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), among other provisions, "authorized the military commission that will try Hamdan." Slip op. 9. It further held that the district court had erred in determining that the Third Geneva Convention creates judicially enforceable rights, see slip op. 10-13, and that members and affiliates of al Qaeda qualify for prisoner-of-war status under the Geneva Convention, see slip op. 13-14. Next, this Court stated that, contrary to Hamdan's argument, the Supreme Court's decision in Rasul v. Bush, 124 S. Ct. 2686 (2004), considered only the "'narrow' question" of the scope of statutory habeas jurisdiction, and the fact "[t]hat a court has jurisdiction over a claim does not mean the claim is valid." Slip op. 11, 13. And it held that military commissions need not follow the procedural rules laid out for courts-martial in the Uniform Code of Military Justice. See slip op. 17-18.

ARGUMENT

I. Hamdan undermines petitioners' claims based on the Due Process Clause of the Fifth Amendment.

As we explained in our opening brief, petitioners' constitutional claims lack merit because the Due Process Clause is inapplicable to aliens captured abroad and held at Guantanamo Bay, Cuba. See Opening Brief for the United States 15-29. Both the Supreme Court and this Court have been "emphatic" in rejecting "the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990); see also Johnson v. Eisentrager, 339 U.S. 763, 781-85 (1950). Under Eisentrager, the applicability of the Fifth Amendment turns on whether the United States is sovereign over a territory, not whether it merely exercises control there. See id. at 778; see also Verdugo, 494 U.S. at 269.

Petitioners do not contend that the United States is sovereign at Guantanamo Bay, but instead rely on an expansive reading of the Supreme Court's decision in Rasul v. Bush, 124 S. Ct. 2686 (2004). In Rasul, the Court held that jurisdiction under the habeas statute extends to claims brought by detainees at Guantanamo Bay. Petitioners attach dispositive significance to a footnote in Rasul stating that their allegations "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. § 2241(c)(3)." 124 S. Ct. at 2698 n.15. In their view, this footnote implicitly overruled the Fifth Amendment holdings of Eisentrager and its progeny.

Hamdan undermines petitioners' implausible reading of Rasul. In Hamdan, this Court explained that Rasul addressed only the scope of statutory habeas jurisdiction, leaving Eisentrager's substantive holdings intact. As the Court stated, Rasul decided a "'narrow' question: whether federal courts had jurisdiction under 28 U.S.C. § 2241 `to consider challenges to the legality of the detention of foreign nationals' at Guantanamo Bay." Slip op. 11 (quoting Rasul, 124 S. Ct. at 2690). The Court further stressed: "That a court has jurisdiction over a claim does not mean that the claim is valid. See Bell v. Hood, 327 U.S. 678,

682-83 (1946)." Slip op. 13; compare Opening Brief for the United States 24 (citing Bell for the proposition that "[t]o say that these allegations are sufficient for jurisdictional purposes, a reading of footnote 15 strongly suggested by context, establishes only that they are not `wholly insubstantial' or `frivolous' on the merits"). Thus, Hamdan supports our argument that Rasul did not alter the established principle that the Fifth Amendment is inapplicable to aliens who are outside the sovereign territory of the United States.

II. Hamdan forecloses petitioners' claims under the Third Geneva Convention, and significantly weakens their other treaty-based claims.

In Hamdan, this Court squarely held that the Third Geneva Convention does not create judicially enforceable rights. See slip op. 13 ("We therefore hold that the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court."). It also rejected the argument, advanced by petitioners here, see Appellees' Brief 62-64, that the habeas statute permits courts to enforce treaty rights that otherwise would not be judicially enforceable. See slip op. 13 ("The availability of habeas may obviate a petitioner's need to rely on a private right of action . . . but it does not render a treaty judicially enforceable."). These holdings are binding on this panel and are dispositive of petitioners' claims under the Third Geneva Convention.

Moreover, even if the Convention were judicially enforceable, alternative holdings in Hamdan would foreclose petitioners' claims on the merits. Hamdan held that the Convention does not apply to al Qaeda and its members, since that organization is not one of the "High Contracting Parties" to the Convention. Slip op. 14. Nor could Hamdan qualify for prisoner-of-war status as "a member of a group" that meets the requirements of Article 4(A)(2) of the Convention-requirements that include displaying "a fixed distinctive sign recognizable at a distance" and conducting "operations in accordance with the laws and customs of war." Ibid. The President has determined that neither al Qaeda detainees nor Taliban detainees qualify for prisoner-of-war status, see Addendum to Opening Brief for the

United States 9a-10a, and petitioners do not, and could not, challenge that manifestly correct foreign-policy judgment of the Commander-in-Chief These holdings in Hamdan therefore provide alternative bases for rejecting petitioners' Geneva Convention claims.

Petitioners have also asserted claims under treaties other than the Third Geneva Convention, including the Fourth Geneva Convention, see Appellees' Brief 70, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, see id. at 71, the Convention for Elimination of the Worst Forms of Child Labor, see ibid, and the International Covenant on Civil and Political Rights, see id. at 72 n.65. Hamdan's reasoning undermines all of these claims. Hamdan explained that "this country has traditionally negotiated treaties with the understanding that they do not create judicially enforceable individual rights." Slip op. 10. That is because, "[a]s a general matter, a `treaty is primarily a compact between independent nations,' so "[i]f a treaty is violated, this `becomes the subject of international negotiations and reclamation,' not the subject of a lawsuit." Ibid. (quoting Head Money Cases, 112 U.S. 580, 598 (1884)). Therefore, "' [i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.'" Ibid. (quoting Restatement (Third) of the Foreign Relations Law of the United States § 907 cmt. a, at 395 (1987)). Petitioners have made no effort to overcome this presumption against judicial enforceability with respect to the treaties on which they rely. For this reason, those treaty claims should be rejected.

III. Hamdan forecloses petitioners' claims based on Army regulations.

Petitioners have claimed that Army Regulation 190-8 entitles them to be treated as prisoners of war. See Appellee Brief 75. As we have explained, even if their interpretation of the regulation were correct, the regulation could not override the President's contrary determination that al Qaeda and Taliban detainees are not entitled to prisoner-of war status. See Opening Brief 64. This Court accepted this

argument in Hamdan when it held that the regulation only "requires that prisoners receive the protections of the Convention `until some other legal status is determined by competent authority.' Slip op. 19. The Court went on to conclude that "[n]othing in the regulations, and nothing Hamdan argues, suggests that the President is not a `competent authority' for these purposes." Ibid.

Petitioners have not explained exactly what procedures they believe are guaranteed to them by Army Regulation 190-8. But even assuming that petitioners have a right to have their status determined by a "competent tribunal," the Hamdan Court held that a military commission was such a tribunal because, as specified by Army Regulation 190-8, it was "composed of three commissioned officers, one of whom must be field-grade." Ibid. The Combatant Status Review Tribunals (CSRTs) that have determined petitioners' status as enemy combatants also meet these requirements. See JA 1194 ("Each tribunal shall be composed of a panel of three neutral commissioned officers . . . . The senior member of each Tribunal shall be an officer serving in the grade of 0-6 and shall be its President. The other members of the Tribunal shall be officers in the grade of 0-4 and above."). Although the CSRTs did not specifically address petitioners' prisoner-of-war status, they did find petitioners to be enemy combatants by virtue of their association with Taliban or al Qaeda forces, see JA 1187, and this, combined with the President's determination concerning those groups, removes any doubt as to their prisoner-of-war status. Hamdan thus forecloses petitioners' claims under Army Regulation 190-8.

CONCLUSION

For the foregoing reasons, as well as for the reasons stated in our principal briefs, the district court's order should be reversed insofar as it denies the Government's motions to dismiss, and the cases should be remanded with instructions to dismiss.

Respectfully submitted,

PAUL D. CLEMENT *Solicitor General*

PETER D. KEISLER *Assistant Attorney General*

KENNETH L. WAINSTEIN *Acting United States Attorney*

GREGORY G. KATSAS
Deputy Assistant Attorney General

DOUGLAS N. LETTER
Terrorism Litigation Counsel

ROBERT M. LOEB
ERIC D. MILLER
Attorneys, Appellate Staff
Civil Division, Room 7256
Department of Justice
950 Pennsylvania Ave., N W.
Washington, D. C. 20530-0001

August 2, 2005

REPLY APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 05-5062, 05-5063

LAKHDAR BOUMEDIENE, et al., Petitioners-Appellants,
v.
GEORGE W. BUSH, et al., Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE FEDERAL APPELLEES

Appellees George W. Bush, et al., submit this supplemental brief in response to this Court's order of July 26, 2005, which directed the government to file a brief "addressing the effect of this court's opinion in Hamdan v. Rumsfeld, No. 04-5393 (D.C. Cir. July 15, 2005)." Hamdan significantly undercuts the claims advanced by petitioners in this case. Specifically, it bolsters our argument that the Due Process Clause of the Fifth Amendment is inapplicable to aliens captured abroad and held at Guantanamo Bay, Cuba. In addition, Hamdan forecloses petitioners' Geneva Convention claims altogether by holding that the Geneva Convention does not create judicially enforceable rights, and its rationale is fully applicable to petitioners' other treaty-based claims. Finally, Hamdan undermines petitioners' argument that the President lacks the authority to detain petitioners as enemy combatants.

STATEMENT

In Hamdan v. Rumsfeld, ____ F.3d ____, 2005 WL 1653046, No. 04-5393 (D.C. Cir. July 15, 2005), this Court upheld the legality of the use of military commissions to try alien enemy combatants for violations of the laws of armed conflict. Hamdan himself, who served as the personal driver for Osama bin Laden and other high ranking al Qaeda members and associates, was captured during military operations in Afghanistan and was transferred to a detention facility at Guantanamo Bay, Cuba. In July 2003, the President issued a finding that "there is reason to believe that [Hamdan] was a member of al Qaeda or was otherwise involved in terrorism directed against the United States," and designated Hamdan for trial by military commission. Slip op. 4. In July 2004, Hamdan was charged with conspiracy to commit the offenses of attacking civilians, attacking civilian objects, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent, and terrorism.

Hamdan filed a petition for a writ of habeas corpus in federal district court to challenge the commission proceedings. The district court granted the petition in part. Invoking various provisions of the Third Geneva Convention, that court enjoined the ongoing military commission proceedings against Hamdan and ordered him released to the general detention population at the Guantanamo Bay Naval Base.

This Court reversed. It held that the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), among other provisions, "authorized the military commission that will try Hamdan." Slip op. 9. It further held that the district court had erred in determining that the Third Geneva Convention creates judicially enforceable rights, see slip op. 10-13, and that members and affiliates of al Qaeda qualify for prisoner-of-war status under the Geneva Convention, see slip op. 13-14. Next, this Court stated that, contrary to Hamdan' s argument, the Supreme Court's decision in Rasul v. Bush, 124 S. Ct. 2686 (2004), considered only the "'narrow'

question" of the scope of statutory habeas jurisdiction, and the fact "[t]hat a court has jurisdiction over a claim does not mean the claim is valid." Slip op. 11, 13. And it held that military commissions need not follow the procedural rules laid out for courts-martial in the Uniform Code of Military Justice. See slip op. 17-18.

ARGUMENT

I. Hamdan undermines petitioners' claims based on the Due Process Clause of the Fifth Amendment.

As we explained in our principal brief, petitioners' constitutional claims lack merit because the Due Process Clause is inapplicable to aliens captured abroad and held at Guantanamo Bay, Cuba. See Brief for Appellees 13-27. Both the Supreme Court and this Court have been "emphatic" in rejecting "the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990); see also Johnson v. Eisentrager, 339 U.S. 763, 781-85 (1950). Under Eisentrager, the applicability of the Fifth Amendment turns on whether the United States is sovereign over a territory, not whether it merely exercises control there. See id. at 778; see also Verdugo, 494 U.S. at 269.

Petitioners do not contend that the United States is sovereign at Guantanamo Bay, but instead rely on an expansive reading of the Supreme Court's decision in Rasul v. Bush, 124 S. Ct. 2686 (2004). In Rasul, the Court held that jurisdiction under the habeas statute extends to claims brought by detainees at Guantanamo Bay. Petitioners attach dispositive significance to a footnote in Rasul stating that their allegations "unquestionably describe `custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. § 2241(c)(3)." 124 S. Ct. at 2698 n.15. In their view, this footnote implicitly overruled the Fifth Amendment holdings of Eisentrager and its progeny.

Hamdan undermines petitioners' implausible

reading of Rasul. In Hamdan, this Court explained that Rasul addressed only the scope of statutory habeas jurisdiction, leaving Eisentrager's substantive holdings intact. As the Court stated, Rasul decided a "'narrow' question: whether federal courts had jurisdiction under 28 U. S.C. § 2241 `to consider challenges to the legality of the detention of foreign nationals' at Guantanamo Bay." Slip op. 11 (quoting Rasul, 124 S. Ct. at 2690). The Court further stressed: "That a court has jurisdiction over a claim does not mean that the claim is valid. See Bell v. Hood, 327 U.S. 678, 682-83 (1946)." Slip op. 13; compare Brief for Appellees 23 (citing Bell for the proposition that "[no say that these allegations are sufficient for jurisdictional purposes, a reading of footnote 15 strongly suggested by context, establishes only that they are not `wholly insubstantial' or `frivolous' on the merits"). Thus, Hamdan supports our argument that Rasul did not alter the established principle that the Fifth Amendment is inapplicable to aliens who are outside the sovereign territory of the United States.

II. Hamdan forecloses petitioners' treaty-based claims.

In Hamdan, this Court held that the Third Geneva Convention does not create judicially enforceable rights. See slip op. 13 ("We therefore hold that the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court."). It also rejected the argument, advanced by petitioners here, see Appellants' Brief 30-33, that the habeas statute permits courts to enforce treaty rights that otherwise would not be judicially enforceable. See slip op. 13 ("The availability of habeas may obviate a petitioner's need to rely on a private right of action . . . but it does not render a treaty judicially enforceable.").

Petitioners in this case have asserted claims under the Fourth Geneva Convention rather than the Third Geneva Convention. But the two conventions are indistinguishable in all material respects, and petitioners have identified no reason

why one would be judicially enforceable while the other is not. More generally, Hamdan' s reasoning undermines whatever claims petitioners might have under the Fourth Geneva Convention. Hamdan explained that "this country has traditionally negotiated treaties with the understanding that they do not create judicially enforceable individual rights." Slip op. 10. That is because, "[a]s a general matter, a treaty is primarily a compact between independent nations,' so "[I]f a treaty is violated, this `becomes the subject of international negotiations and reclamation,' not the subject of a lawsuit." Ibid. (quoting Head Money Cases, 112 U.S. 580, 598 (1884)). Therefore, "' [i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.'" Ibid. (quoting Restatement (Third) of the Foreign Relations Law of the United States § 907 cmt. a, at 395 (1987)). Petitioners have made no effort to overcome this presumption against judicial enforceability with respect to the Fourth Geneva Convention--or with respect to the International Covenant on Civil and Political Rights, on which they also rely, see Appellants' Brief 33-34. For this reason, petitioners' treaty claims should be rejected.

III. Hamdan supports the President's authority to detain enemy combatants.

Petitioners contend that the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), does not authorize their detention. See Appellants' Brief 20-27. As we have explained, the detention of enemy combatants is independently justified by the President's inherent constitutional authority, even apart from the AUMF. See Brief for Appellees 55-56. But in any event, Hamdan confirms that petitioners' reading of the AUMF is unduly narrow. As Hamdan explains, the AUMF gives the President authority "'to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided' the [September 11] attacks and recognized the President's `authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.' Slip op. 8 (quoting AUMF). Hamdan held

that this authority includes, as "an `important incident to the conduct of war,' the power to seize and detain enemy combatants, and to try and punish them for violations of the laws of war. Ibid (quoting In re Yamashita, 327 U.S. 1 (1946)). This power necessarily includes the presidential authority at issue in this case.

Petitioners suggest that the AUMF is limited to those individuals who were personally involved in the September 11 attacks, see Appellants' Brief 20, or that it applies only in certain geographical areas, see id. 23. But see Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2048, 2109, 2118 (2005) (arguing that "Congress has authorized the President to use force against all members of al Qaeda, including members who had nothing to do with the September 11 attacks and even new members who joined al Qaeda after September 11" and that "the AUMF authorizes the President to use force anywhere he encounters the enemy"). While Hamdan had no occasion to address the precise arguments advanced by petitioners here, its broad reading of the AUMF contains no suggestion of the limitations that petitioners advocate.

CONCLUSION

For the foregoing reasons, as well as for the reasons stated in our principal brief, the judgment of the district court should be affirmed.

Respectfully submitted,

PAUL D. CLEMENT *Solicitor General*

PETER D. KEISLER *Assistant Attorney General*

KENNETH L. WAINSTEIN *Acting United States Attorney*

GREGORY G. KATSAS
Deputy Assistant Attorney General

DOUGLAS N. LETTER
Terrorism Litigation Counsel

ROBERT M. LOEB
ERIC D. MILLER
Attorneys, Appellate Staff
Civil Division, Room 7256
Department of Justice
950 Pennsylvania Ave., N W.
Washington, D. C. 20530-0001

August 2, 2005

REPLY APPENDIX E

No. 02-CV-00299

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID M. HICKS, Petitioner

v.

GEORGE WALKER BUSH, President of the United States, et al., Respondents,

RESPONDENTS RENEWED RESPONSE AND MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW WITH RESPECT TO PETITIONER'S CHALLENGES TO THE MILITARY COMMISSION PROCESS

....

Hamdan v. Rumsfeld

The D.C. Circuit's decision in Hamdan resolved a number of core issues concerning the military commissions. As explained below, it resolved challenges to the lawfulness of the military commissions and determined, inter alia, that abstention is appropriate with respect to issues concerning how those commissions carry out their responsibilities.

a. In Hamdan, the Court of Appeals first rejected

the argument that the President lacked authority[1] to establish the military commissions.[2] The Court of Appeals first concluded that Congress had authorized military commissions through the authorization for the use of force contained in the AUMF, because an "'important incident to the conduct of war is the adoption of measures by the military commander . . . to seize and subject to disciplinary measures those enemies who . . . have violated the law of war' [and that] '[the trial and punishment of enemy combatants' . . . is thus part of the 'conduct of war.'" 2005 WL 1653046 at *3 (quoting In re Yamashita, 327 U.S. 1, 11 (1946)). The Court of Appeals further held that two statutes reflected the President's authority to establish military commissions. First, it noted that the Supreme Court in Ex parte Quirin, 317 U.S. 1, 28-29 (1942), had held that Congress authorized military commissions through the predecessor to 10 U.S.C. § 821.[3] See 2005 WL 1653046 at *3.

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[1] Hamdan had raised the argument that Article I, § 8, of the Constitution gives Congress the power "to constitute Tribunals inferior to the supreme Court," that "Congress has not established military commissions, and that the President has no inherent authority to do so under Article II." 2005 WL 1653045 at *2.

[2] In addressing the President's authority to establish the military commissions, the Hamdan Court rejected the government's argument that the court should abstain with respect to such jurisdictional issues under the doctrine of abstention reflected in Schlesinger v. Councilman, 420 U.S. 738 (1975), applied in this Circuit in New v. Cohen, 129 F.3d 639 (D.C. Cir. 1997), which generally eschews federal court intervention in ongoing military tribunals. See 2005 WL 1653046 at *1-*2.

[3] Section 821 provides that the provision of courts-martial jurisdiction in the UCMJ does 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 commission." Quirin addressed Article 15 of the Articles of War, enacted in 1916. See 317 U.S. at 28-29. As noted in Hamdan, since the "modern version of Article 15 is 10 U.S.C. § 821," Congress authorized the President to establish

Second, the Court of Appeals noted that Congress had also authorized the President to establish procedures for military commissions in 10 U.S.C. § 836(a). See id. The D.C. Circuit held that in light of these enactments, Quirin, and Yamashita, "it is impossible to see any basis for Hamdan's claim that Congress has not authorized military commissions."[4] Id. (citation omitted).

b. The D.C. Circuit also rejected Hamdan's challenges to the military commissions based on the GPW. The Court first held that the GPW did not confer rights enforceable in federal court. 2005 WL 1653046 at *4. The Court relied on the holding of Johnson v. Eisentrager, 339 U.S. 763 (1950), that the 1929 Geneva Convention was not judicially enforceable, concluding that this aspect of Eisentrager is "still good law and demands . . . adherence."[5] 2005 WL 1653046 at *4.[6]

The Court of Appeals further held that even if the

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military commissions through this statute. 2005 WL 1653046 at *3.

[4] The Hamdan court dismissed an argument attempting to distinguish Quirin and Yamashita on the ground that the military commissions in those cases were in "war zones" while Guantanamo Bay is far removed from the battlefield. The Hamdan Court questioned "why this should matter." 2005 WL 1653046 at *3. Further, the Court found that the distinction did not hold because the military commission in Quirin sat in the Department of Justice building in Washington, D.C., and the military commission in Yamashita sat in the Philipines after the Japanese surrender. Id.

[5] The D.C. Circuit compared the 1949 GPW to the 1929 Convention and found that although there are differences, "none of them renders Eisentrager's conclusion about the 1929 Convention inapplicable to the 1949 Convention." 2005 WL 1653046 at *5.

[6] The D.C. Circuit also found that Eisentrager required rejection of any argument that the habeas statute, 28 U.S.C. § 2241, somehow permits courts to enforce the GPW. 2005 WL

GPW could be judicially enforced, Hamdan's challenge to the commission would fail. The Court rejected Hamdan's argument that the military commission ran afoul of GPW art. 102, which provides that a "prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power."[7] 2005 WL 165304 at *6. The Hamdan Court noted that the petitioner in the case did not satisfy the requirements for treatment as a prisoner-of war ("POW")[8] and that any claimed assertion of such status requiring resolution could be decided by the military commission. Id.

The Court also concluded that the GPW would not apply to al Qaeda, of which petitioner in the case was alleged to be a part. The Court noted that the so-called Common Articles[9] in the GPW contemplate application in two types of conflicts: GPW art. 2 (Common Article 2)

1653046 at *6. Hamdan noted that Eisentrager determined that any individual rights specified in the 1929 Geneva Convention "were to be enforced by means other than the writ of habeas corpus." Id. Moreover, while the Supreme Court's decision in Rasul v. Bush, 542 U.S. 466, 124 S. Ct. 2686 (2004), gave district courts jurisdiction over Guantanamo Bay detainee habeas corpus petitions, "Rasul did not render the Geneva Convention judicially enforceable." 2005 WL 1653046 at *6. Hamdan noted that while the availability of habeas may relieve a petitioner of the need for a private right of action, it does not render a treaty judicially enforceable. Id. The Court of Appeals further noted that merely providing a court jurisdiction over a claim does not make the claim valid. Id. (citing Bell v. Hood, 327 U.S. 678, 682-83 (1946)).

[7] If Article 102 was applicable, the relevant court would be a court-martial.

[8] See GPW art. 4.

[9] The Common Articles are contained in all the Geneva Conventions, including the GPW.

provides for application of the Conventions in international conflicts, namely, (a) in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties;" (b) in "all cases of partial or total occupation of the territory of a High Contracting Party;" or (c) when a non-signatory "Power[] in conflict" "accepts and applies the provisions [of the Conventions]." The Court concluded, however, that al Qaeda is neither a "High Contracting Party" nor a "Power" that "accepts and applies" the Conventions, within the meaning of Common Article 2. 2005 WL 1653046 at *6.

The second type of conflict is contemplated in GPW art. 3 (Common Article 3) and involves "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties," which the Hamdan Court described as "a civil war." 2005 WL 1653046 at *7. In such cases, 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 a civilized people." Although Afghanistan is a "High Contracting Party" and Hamdan was captured there, the Hamdan Court deferred to President Bush's determination that the conflict against al Qaeda is international in scope, and thus, not covered by Common Article 3.[10] Id. The Court noted that such a determination "is the sort of political-military decision constitutionally committed to" the President, id. (citing Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986)), and that the President's "construction and application of treaty provisions is entitled to 'great weight,'" id. (citing United

[10] See Memorandum for the Vice President, the Secretary of State, the Secretary of Defense, et al., from President George W. Bush Re: Humane Treatment of al Qaeda and Taliban Detainees ¶ 2 (Feb. 8, 2002) (available at http://www.library.law.pace.edu/research/020207_bushmemo.pdf) (finding "relevant conflicts are international in scope").

States v. Stuart, 489 U.S. 353, 369 (1989); Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 186 (1982); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961)).

In a key aspect of its opinion, however, the Hamdan Court held that regardless of its conclusion regarding application of Common Article 3 to al Qaeda, the Court would in any event "abstain from testing the military commission against the requirement in Common Article 3(1)(d) that sentences must be pronounced 'by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'" See 2005 WL 1653046 at *7. The Court referenced the doctrine of abstention reflected in Schlesinger v. Councilman, 420 U.S. 738 (1975), applied in this Circuit in New v. Cohen, 129 F.3d 639 (D.C. Cir. 1997), which eschews federal court intervention in ongoing military tribunals where the federal court challenge does not raise substantial arguments regarding the military tribunal's jurisdiction over the accused, i.e., regarding the right of the military to try the accused at all. See New, 129 F.3d at 644 (citing Councilman, 420 U.S. at 759). The Court stated:

> Unlike [petitioner's] arguments that the military commission lacked jurisdiction, his argument here is that the commission's procedures – particularly its alleged failure to require his presence at all stages of the proceedings – fall short of what Common Article 3 requires. The issue thus raised is not whether the commission may try him, but rather how the commission may try him. That is by no stretch a jurisdictional argument. No one would say that a criminal defendant's contention that a district court will not allow him to confront witnesses against him raises a jurisdictional argument. Hamdan's claim therefore falls outside the recognized exception to the Councilman doctrine. Accordingly, comity would dictate that we defer to the ongoing military

> proceedings. If [petitioner] were convicted, he could contest his conviction in federal court after he exhausted his military remedies.

2005 WL 1653046 at *7 (emphasis in original).[11]

c. The D.C. Circuit in Hamdan also rejected arguments that the military commissions established by the Military Order were contrary to the Uniform Code of Military Justice. Petitioner in the case, and the district court, had interpreted UCMJ art. 36 (10 U.S.C. § 836)[12] as requiring "that military commissions must comply in all respects with the requirements of" the UCMJ, including those provisions that were specifically addressed to the conduct of courts-martial. 2005 WL 1653046 at *8. The D.C. Circuit, however, concluded that given the careful distinctions made in the UCMJ between courts-martial and military commissions, the "far more sensible reading" of § 836 was that "the President may not adopt procedures for military commissions that are 'contrary or inconsistent with' the UCMJ's provisions

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[11] Senior Circuit Judge Williams, in a concurrence, fully agreed with the panel's conclusions that the GPW is not judicially enforceable, but opined that Common Article 3 in fact does apply to the conflict with al Qaeda. He further agreed with the panel, however, that abstention on issues of application of the GPW was appropriate. 2005 WL 1653046 at *9.

[12] 10 U.S.C. § 836 provides:

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

governing military commissions."[13] Id. Thus, only UCMJ provisions that specifically address themselves to military commissions would impose constraints on the commission, see id., and, as noted in Hamdan, such provisions "impose[] only minimal restrictions upon the form and function of military commissions," id. (citing 10 U.S.C. §§ 828 (court reporters and

interpreters), 847(a)(1) (refusal to comply with subpoena), 849(d) (use of depositions)).

d. The final issue discussed in the Hamdan opinion was whether Army Regulation 190-8, which provides "policy, procedures, and responsibilities" for the Military with respect to "the administration, treatment, employment, and compensation" of military detainees, see AR 190-8 § 1-1.a (copy attached as Exhibit A), provided petitioner any claim.[14] The Court concluded it did not. The Court first noted AR 190-8 § 1-5.a(2) and its requirement that detainees be provided GPW protections "until some other legal status is determined by competent authority." The Court concluded that the President, in making his decisions regarding (non)application of the GPW to al Qaeda, was

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[13] The Hamdan Court found that its reading of the UCMJ was supported, and the district court's interpretation was undermined, by the Supreme Court's opinion in Madsen v. Kinsella, 343 U.S. 341 (1952). The Supreme Court, writing two years after the enactment of the UCMJ, referred to military commissions as "our commonlaw war courts. . . . Neither their procedure nor their jurisdiction has been prescribed by statute." 2005 WL 1653046 at *8 (quoting Madsen, 343 U.S. at 346-48). As the Hamdan Court noted, it is "difficult, if not impossible, to square the Court's language in Madsen with the sweeping effect with which the district court would invest Article 36." 2005 WL 1653046 at *8.

[14] The Court stated that it had considered all of the petitioner's remaining claims, but that "the only one requiring further discussion" was the AR 190-8 argument. 2005 WL 1653046 at *9. Issues that the Court considered but did not consider worthy of discussion included petitioner's argument that the non-statutory based charge of conspiracy brought against petitioner was not triable by military commission. See Hamdan Brief of Appellee at 70-71 (available at 2004 WL 3080434 at *70).

such an authority. 2005 WL 1653046 at *9. The Hamdan Court further noted that to the extent the petitioner raised a claim to entitlement to a further determination of status by a "competent tribunal" under AR 190-8 § 1-6, then the military commission in the case, being composed of at least one field-grade officer, id. § 1-6.c, could decide the issue. 2005 WL 1653046 at *9.

In light of its holdings, the D.C. Circuit reversed the decision of the district court granting in part Hamdan's writ of habeas corpus and denying the government's motion to dismiss. 2005 WL 1653046 at *9.

ARGUMENT

Since the founding of this nation, the military has used military commissions during wartime to try violations against the law of war. Nearly ninety years ago, Congress recognized this historic practice and approved its continuing use in the Articles of War. And nearly sixty years ago, the Supreme Court upheld the use of military commissions during World War II against a series of challenges, including cases involving a presumed American citizen, captured in the United States, Ex parte Quirin, 317 U.S. 1 (1942); the Japanese military governor of the Phillippines, Yamashita v. Styer, 327 U.S. 1 (1946); German nationals who alleged that they worked for civilian agencies of the German government in China, Johnson v. Eisentrager, 339 U.S. 763 (1950); and the spouse of a serviceman posted in occupied Germany, Madsen v. Kinsella, 343 U.S. 341 (1952). Thus, both Congress and the Judiciary historically have approved the Executive's use of military commissions during wartime. And just over one month ago, in Hamdan, the D.C. Circuit confirmed the President's power to establish and utilize military commissions in the ongoing war against al Qaeda and the Taliban. The Hamdan decision effectively resolves the claims raised by petitioner with respect to his impending trial by military commission; those claims are properly the subject of abstention and/or lack merit. Petitioner's military commission claims, therefore, should be dismissed.

I. *HAMDAN* REQUIRES REJECTION OF PETITIONER'S CLAIM THAT THE MILITARY COMMISSIONS ARE NOT LAWFULLY ESTABLISHED.

The D.C. Circuit's decision in Hamdan resolves petitioner's challenge in Count 1 of the petition, Petition ¶¶ 41-49, that the military commission that will try petitioner lacks jurisdiction because Congress did not authorize the President to establish such commissions. As explained previously, the D.C. Circuit held that "Congress authorized" the President to establish military commissions,[15] such as the one that will try petitioner Hicks, through the AUMF, 10 U.S.C.30 § 821, and 10 U.S.C. § 836(a).[16] See 2005 WL

[15] Respondents note that they have argued in this case that abstention is appropriate with respect to all aspects of the instant case, including the claims in Count 1. The D.C. Circuit in Hamdan chose to explore the issue of the lawfulness of military commissions. See supra note 16 (where we note the D.C. Circuit did not abstain). Respondents, however, expressly reserve their argument that abstention is appropriate with respect to all claims related to military commission issues in this case, as more fully argued in respondents' original briefs on military commission issues in this case. See Respondents' Response and Motion to Dismiss or for Judgment as a Matter of Law with Respect to Challenges to the Military Commission Process Contained in Petitioner's Second Amended Petition for Writ of Habeas Corpus Complaint for Injunctive, Declaratory, and Other Relief (dkt. no. 88); Response to Petitioner's Brief in Opposition to Respondents' Motion to Dismiss and in Support of Petitioner David M. Hicks' Cross-Motion for Partial Summary Judgment (dkt. no. 120).

[16] Petitioner is also wrong that the "Constitution expressly grants Congress the sole powerto create military commissions and the offenses to be tried by them," Petition at ¶ 43. The President has inherent authority to create military commissions pursuant to the powers granted him by the Constitution as Commander in Chief, see U.S. CONST. art. III, § 2, and that authority is confirmed by historical practice. This issue is more fully articulated in Respondents' Response and Motion to Dismiss or for Judgment as a Matter of Law with Respect to Challenges

1653046 at *4. Petitioners' challenge to the lawfulness of the military commission in this case, therefore, must be rejected.

In addition, petitioner's claim that military commissions lack authority to try anyone "far from the locality of actual war," see Petition ¶ 50, such that the military commission that will try him may not lawfully sit at Guantanamo Bay, see id. ¶ 51, likewise must be rejected. As a matter of common sense, it is wrong to argue either that any location in the globe is "far from the locality of actual war" when petitioner was captured in the context of a global war where the enemy has hatched its plans to attack and/or conducted attacks and military operations against the United States and its allies in Europe, Africa, Asia, the Middle East, and in the United States itself – planning and attacks that continue to this day[17] – or that the Military cannot conduct a commission trial in a setting that is less likely to be subject to enemy attack. In any event, the petitioner in Hamdan raised a similar assertion in the context of attempting to distinguish his case from cases in which the Supreme Court approved military commissions (Quirin and Yamashita), and in response, the D.C. Circuit questioned "why this should matter." 2005 WL 1653046 at *3. Further, the Court found that the attempted distinction was baseless because the military commission in Quirin sat

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to the Military Commission Process Contained in Petitioner's Second Amended Petition for Writ of Habeas Corpus Complaint for Injunctive, Declaratory, and Other Relief at 20-22 (dkt. no. 88), and respondents' Response to Petitioner's Brief in Opposition to Respondents' Motion to Dismiss and in Support of Petitioner David M. Hicks' Cross-Motion for Partial Summary Judgment at 16-17 (dkt. no. 120). Hamdan's confirmation that Congress has authorized the President to establish military commissions made it unnecessary to reach this issue; nevertheless, the President's inherent authority supplies an independent basis upon which to conclude that the military commission in this case has been lawfully established. See also Hamdan, 2005 WL 1653046 at *2 (noting President's reliance on his constitutional authority in establishing military commissions).

[17] See supra note 1.

in the Department of Justice building in Washington, D.C., and the military commission in Yamashita sat in the Philipines after the Japanese surrender. Id. Petitioner's claim that the military commission that will try him may not lawfully sit at Guantanamo Bay, accordingly, is meritless and must be rejected.

For these reasons, Count 1 of the Petition in this case, challenging the establishment and situs of the military commission, must be dismissed.

II. PETITIONER'S CLAIMS UNDER THE GPW, THE UCMJ, AND THE DUE PROCESS CLAUSE WITH RESPECT TO THE MILITARY COMMISSION'S PROCEDURES MUST BE REJECTED.

Petitioner also asserts that various aspects of the military commission's procedures violate the GPW, the UCMJ, and the Constitution's Due Process Clause. Petition ¶¶ 66-74. Included with this claim is a complaint regarding the possibility that the military commission may ultimately rely on evidence from interrogations that petitioner alleges were conducted in a way that violated due process. Id. ¶¶ 68, 110-12. Petitioner's challenge thus amounts to a complaint about commission procedural rules, including about potential evidence Hicks believes the commission would be free to consider. As explained below, these claims must be rejected because they are subject to abstention or otherwise have no validity.

A. Petitioner's Claims under the GPW, the UCMJ, and the Due Process Clause are Subject to Abstention.

The Hamdan Court disposed of the types of procedurally related claims raised by petitioner here by finding that questions of how, as opposed to whether, a detainee should be tried by military commission are appropriate for abstention. See 2005 WL 1653046 at *7. Specifically, the Court, relying on the Councilman abstention

doctrine, declined to "test[]" the military commission at issue against the requirement of Common Article 3 that sentences be handed down by "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Id. It did so in the context of Hamdan's assertion that the military commission could exclude (and already had excluded) him from stages of the proceeding, potentially denying him the ability to confront witnesses. Id. ("That is by no stretch a jurisdictional argument."). Comity, according to the Court, dictated deference to the military proceedings on such matters of how the commission carried out its responsibilities. See id. In the Court's view, there was no reason that, if convicted, a military commission defendant could not contest the conviction, i.e., the manner in which it came about, if appropriate, in post-trial (presumably habeas) proceedings in federal court. See id.

This abstention principle would be applicable not only to petitioner Hicks's challenges under the GPW to procedural aspects of the military commission that will try him, but to his challenges under the UCMJ and the Due Process Clause as well. As Hamdan recognized, the jurisdictional exception to the Councilman doctrine is based primarily on the theory that "setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction." 2005 WL 1653046 at *2. Thus, a primary consideration is whether the right at stake is the "right not to be tried" as opposed to "a right whose remedy requires dismissal of the charges." Cf. United States v. Hollywood Motor Car. Co., Inc., 458 U.S. 263, 271 (1982) (per curiam). "The former necessarily falls into the category of rights that can be enjoyed only if vindicated prior to trial. The latter does not." Id. Petitioner's challenges to the procedural

aspects of the military commission under the UCMJ and the Due Process Clause, thus, would be subject to abstention.[18]

B. Petitioner's Claims Should be Rejected on the Merits.

Aside from the issue of abstention, petitioner's claims under the GPW and the UCMJ must be rejected on the merits under Hamdan. As discussed supra, Hamdan determined that the GPW is not judicially enforceable, and, in any event, does not apply to those who are part of al Qaeda. See 2005 WL 1653046 at *6-*7. Hamdan also rejected the argument, made by petitioner, Petition ¶ 70, that military commissions must comply with all the requirements of the UCMJ. 2005 WL 1653046 at *8.

As to petitioner's due process challenge to the military commission, respondents have previously pointed out, and another Judge of this Court has determined, that aliens, such as petitioner, outside of the United States and with no voluntary connections thereto, cannot invoke the Constitution of the United States. See Khalid v. Bush, 355 F.

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[18] Though petitioner's due process argument may raise constitutional questions, this does not support an argument for premature habeas review. "'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" Department of Commerce v. United States House of Representatives, 525 U.S. 316, 343 (1999) (quoting Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 105 (1944)). Here, there would be no need for the adjudication of petitioner's constitutional claim depending on the actions taken during the commission, including possible acquittal. Due process claims are routinely considered in post-conviction proceedings. Cf. Gray v. Netherland, 518 U.S. 152 (1996) (post-conviction habeas petition raising due process challenge to the manner in which the prosecution introduced evidence of petitioner's criminal conduct); Jamerson v. Secretary for Dep't. of Corrections, 410 F.3d 682 (11th Cir. 2005) (post-conviction habeas petition raising due process challenge to jury instructions); Howard v. Bouchard, 405 F.3d 459 (6th Cir. 2005) (post-conviction habeas petition raising due process challenge to eyewitness identification procedure).

Supp. 2d 311, 320 (D.D.C. 2005) ("Non-resident aliens captured and detained outside the United States have no cognizable constitutional rights."); see also Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law § II.A. (dkt. no. 82) ("EC Response") (citing, inter alia, United States v. Verdugo Urquidez, 494 U.S. 259 (1990), and Johnson v. Eisentrager, 339 U.S. 763 (1950)). Indeed, even the Hamdan Court questioned whether the petitioner in that case could assert a constitutional claim against trial by military commission, noting prior law that aliens outside the sovereign territory of the United States and lacking a substantial voluntary connection to this country lack constitutional rights. See 2005 WL 1653046 at *2 (expressing "doubt" whether a constitutional claim can be asserted by such a person, citing People's Mojahedin Org. v. Dep't of State, 182 F.3d 17, 22 (D.C. Cir. 1999); and 32 County Sovereignty Comm. v. Dep't State, 292 F.3d 797, 799 (D.C. Cir. 2002))[19]; see also 2005 WL 1653046 at *5 (characterizing Rasul v. Bush, 542 U.S. 466, 124 S. Ct. 2686 (2004), as deciding only the "narrow" question of whether federal courts have jurisdiction under the habeas statute).

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[19] In People's Mojahedin, the D.C. Circuit, in considering a petition for judicial review bytwo groups designated as "foreign terrorist organizations" by the United States Secretary of State, found that a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." 182 F.3d at 22. The Court based this finding on the Supreme Court's holding in United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990), that aliens "receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." Similarly, in 34 County Sovereignty Comm., involving Irish political organizations, the D.C. Circuit found that because the organizations could not "rightly lay claim to having come within the United States and developed substantial connections with this country" the Secretary of State did not have to provide them "with any particular process before designating them as foreign terrorist organizations." 292 F.3d at 799 (citations and quotation marks omitted).

Of course, Judge Green determined in her decision on respondents' motion to dismiss the enemy combatant claims in this case that the petitioners in the case, including Hicks, stated valid procedural due process claims under the Fifth Amendment and that the Combatant Status Review Tribunal procedures used by the government to confirm the petitioners' "enemy combatant" status "violate[d] the petitioners' rights to due process of law." See In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 445 (D.D.C. 2005). The issue, however, of whether non-resident alien detainees at Guantanamo Bay, such as petitioner, can avail themselves of constitutional rights is the subject of the pending appeals in Khalid and In re Guantanamo, which are scheduled for oral argument on September 8, 2005. Even assuming it is ultimately determined that petitioners such as Mr. Hicks could avail themselves of the Constitution, such rights vis-á-vis military commission procedures can be fully vindicated in post-commission review proceedings in federal court as appropriate, consistent with Hamdan's teaching, making abstention with respect to such claims appropriate. See 2005 WL 1653046 at *7.

III. PETITIONER'S EQUAL PROTECTION CLAIMS SHOULD BE DISMISSED.

Petitioner claims that, because they apply to non-citizens only, the President's Military Order and MCO No. 1 violate the equal protection component of the Fifth Amendment and 42 U.S.C. § 1981. See Petition ¶¶ 75-81. Like the other claims the petition raises, there are numerous reasons why this claim lacks merit or should otherwise be dismissed. The equal protection claim raised by petitioner is a procedural rather than jurisdictional challenge, and the D.C. Circuit taught in Hamdan that federal courts should abstain under Councilman from entertaining pre-military commission trial procedural challenges. Further, even if petitioner could avail himself of the equal protection component of the Fifth Amendment, his equal protection

claim fails because (1) Hicks is not a member of a suspect class and, (2) even if he were, courts have historically shown extraordinary deference to the federal government regarding its policies toward aliens – deference that reaches its apex when applied to decisions of the President during wartime that implicate national security and sensitive foreign policy matters. In addition, Hicks's statutory claim under 42 U.S.C. § 1981 fails because the statute is facially inapplicable to federal action, and, in any event offers no greater protection than the Constitution.

For these reasons, petitioner's equal protection claims with respect to the military commission must be rejected.

A. Petitioner's Equal Protection Claim is Subject to *Councilman* Abstention Because it is a Procedural, Rather than Jurisdictional, Challenge.

As a threshold matter, Hamdan prevents consideration of petitioner's equal protection claims at this stage of proceedings because the claims fall outside the recognized jurisdictional exception to the Councilman doctrine. 2005 WL 1653046 at *2. Petitioner's equal protection claims are not jurisdictional in nature, but rather challenge the application to the non-citizen petitioner of the military commission's procedures, which according to petitioner are "less protective" than those available to citizens through "civilian justice." See Petition ¶ 77. Even in the criminal justice context, courts do not treat equal protection claims as jurisdictional challenges to the underlying criminal proceedings. Indeed, courts do not enjoin ongoing trial proceedings to permit defendants to proceed with an interlocutory appeal or habeas petition challenging the denial of an equal protection claim. Instead, courts regularly proceed with adjudication of the indictment and then permit the defendant as appropriate to assert any equal protection claim in a post-conviction habeas petition. See, e.g., Miller-El v. Dretke, 125 S. Ct. 2317, 2222-23 (2005) (post-

conviction habeas petition raising equal protection challenge to discriminatory jury selection); Ragland v. Hundley, 79 F.3d 702, 706 (8th Cir. 1996) (post- conviction habeas petition raising equal protection challenge to felony-murder doctrine); United States v. Jennings, 991 F.2d 725, 726-31 (11th Cir. 1993) (post-conviction habeas petition raising selective prosecution equal protection claim). That approach should be followed in this case. Petitioner should not be permitted to assert his constitutional defense to commission proceedings by way of a preemptive equal protection challenge, especially when petitioner has the opportunity to raise the same argument in post-conviction habeas review, if necessary.[20]

As Hamdan recognized, the jurisdictional exception to the Councilman doctrine is based primarily on the theory that "setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction." 2005 WL 1653046 at *2. This doctrine originated in the context of challenges to trial court jurisdiction in interlocutory appeals of decisions denying motions to dismiss indictments. See, e.g., Abney v. United States, 431 U.S. 651, 662 (1977) (cited in Hamdan, 2005 WL 1653046 at *2); United States v. Cisneros, 169 F.3d 763 (D.C. Cir. 1999) (cited in Hamdan, 2005 WL 1653046 at *2). In that context, one of the primary considerations is whether the right at stake is the "right not to be tried" as opposed to "a right whose remedy requires dismissal of the charges." United States v. Hollywood Motor Car. Co., Inc., 458 U.S. 263, 271 (1982) (per curiam). "The former necessarily falls into the category of rights that can be enjoyed only if vindicated prior to trial. The latter does not." Id. Applying this analogous framework to the present case,

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[20] Although petitioner's equal protection argument may raise constitutional questions, this does not support his argument for premature habeas review. See supra note 33. Here, there would be no need for the Court to adjudicate petitioner's constitutional claims if the military commission acquits him of the charges brought against him.

petitioner's equal protection challenge does not fall within the category of rights that must be vindicated prior to trial. Unlike a Double Jeopardy argument, for instance, petitioner's equal protection challenge does not encompass the "right not to be haled into court at all." See Blackledge v. Perry, 417 U.S. 21, 30 (1974). Rather, petitioner stands in the same position as a criminal defendant who asserts a pretrial motion attacking an indictment on the ground that the underlying criminal statute authorizing the prosecution is unconstitutional. See Cisneros, 169 F.3d at 769-70. Such claims are not jurisdictional and, as explained above, any decision by the trial court – in this case the military commission – could be reviewed, if appropriate, through a subsequent habeas petition in the event petitioner is convicted.

Petitioner also cannot evade Hamdan by couching his equal protection claim as jurisdictional. Petitioner's equal protection challenge appears premised on the theory that if the President's Military Order is unconstitutional, it is void ab initio, and the military commission has no jurisdiction to try him for any offense. The D.C. Circuit, however, rejected a similar theory in United States v. Baucum, 80 F.3d 539, 540 (D.C. Cir. 1996) (holding that constitutional challenges to criminal statutes are "nonjurisdictional"). In Baucum, the defendant argued that a commerce clause challenge to a criminal drug statute, 21 U.S.C. § 860(a), should be considered a jurisdictional challenge, based on the theory that if the statute is unconstitutional, the court has no jurisdiction to convict the defendant for that offense. 80 F.3d at 540. The D.C. Circuit emphatically rejected this position, noting the Supreme Court's refusal to adopt "such a broad-sweeping proposition." Id. at 541.

The logic of Baucum applies equally to this case. Petitioner's equal protection challenge to the President's Military Order cannot be construed as a jurisdictional objection to the military commission, instead it is a challenge to the military commission's procedures. Accordingly,

Hamdan controls, 2005 WL 1653046 at *7 ("The issue thus raised is not whether the commission may try him, but rather how the commission may try him. That is by no stretch a jurisdictional argument."), and the Court, in the interest of comity, should defer to the military commission and abstain from considering petitioner's equal protection claims in the first instance.

B. Even If Petitioner Could Invoke the Fifth Amendment, His Claim Lacks Merit.

Even assuming contrary to Verdugo-Urquidez and Eisentrager that Hicks could raise a claim under the Fifth Amendment's equal protection component,[21] that claim lacks merit. The President found that in order "[t]o protect the United States and its citizens," it was "necessary" to establish military commissions to try non-citizens captured during the ongoing conflict for violations of the law of war. See Military Order § 1(e). This politically sensitive determination would be subject to the utmost deference, because it constitutes an exercise of the President's war powers vis-á-vis alien enemy combatants and implicates

[21] As respondents explained regarding petitioner's Fifth Amendment's due process claim, respondents have previously pointed out, and another Judge of this Court has determined, that aliens, such as petitioner, outside of the United States and with no voluntary connections thereto, cannot invoke the U.S. Constitution and Hamdan signaled the legitimacy of this result. See supra § II.B. And while Judge Green determined in her decision concerning the enemy combatant claims in this case that petitioner stated valid claims under the Fifth Amendment's due process clause, she did not make a finding relating to the Fifth Amendment's equal protection component. See In re Guantanamo, 355 F. Supp. 2d at 445. The issue, however, of whether non- resident alien detainees, such as petitioner, can avail themselves of constitutional rights is the subject of the pending appeals. Even assuming it is ultimately determined that petitioner can avail himself of the Constitution, such rights vis-á-vis military commission procedures can be fully vindicated in post-commission federal court proceedings consistent with Hamdan's teaching, making abstention appropriate. See 2005 WL 1653046 at *7.

pressing national security and foreign policy concerns. As the Supreme Court has repeatedly observed:

> [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Matthews v. Diaz, 426 U.S. 67, 81 n.17 (1976) (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952)). There is no basis for disturbing the President's judgment here.

REPLY APPENDIX F

From: [Military Commission Presiding Officer]
Sent: Wednesday, July 28, 2004 13:06
To: OMC-D LCDR Sundel [detailed defense counsel]
Subject: Authority of the Presiding Officer

LCDR Sundel,

1. In a telephone conference this morning, you generally refused to a) talk to me or b) answer questions. You stated that you did not believe I have the authority to conduct pretrial matters absent the entire commission, although you did acknowledge that I am, in fact, detailed to the case of Al Bahlul as the Presiding Officer. Further, despite the fact that you had your co-counsel, MAJ Bridges, opposing counsel, and the Chief Defense Counsel, COL Gunn, present while you were talking with me on speaker phone, you kept insisting that the substance of the conversation be placed on record. Until such time as you are able to convince me, or have superior competent authority tell me, that my interpretation of the law is incorrect as to my authority to manage pretrial and motions practice without the presence of the full Commission, you will follow my instructions and orders in that regard. If I am incorrect in the exercise of my authority or otherwise err, there is an Appointing Authority and Review Panel to whom you may address the matter. It cannot be, and it will not be, that a counsel can refuse to discuss a matter - or litigate a matter - on the claim the Presiding Officer has no authority thereby preventing the discussion and litigation of the very issue….

5. I am now giving you a order. The order is for you to provide notice of motions by COB 28 July 2004. You have several options:

a. You can obey the order.

b. You can state that you refuse to obey this order subjecting you to proper sanction.

c. You can request an extension of time to a date certain.

d. You can email me the following: I have been detailed to the case of Al Bahlul since February 2004. There are no matters of which I or my co-counsel am aware concerning which I intend to raise a motion before the Commission, or have reason to believe will or may be raised.

6. If you choose option 5b, I hereby direct you to furnish your reasons to me.

7. You are further ordered to submit to me by 1200 hours, 29 July 2004, your legal analysis concerning why you believe that the Presiding Officer in a military commission can not handle pretrial matters without the presence of the entire commission notwithstanding MCI #8, Section 5…

Presiding Officer

REPLY APPENDIX G

From: Sundel, Philip, LCDR, DoD OGC
To: [Presiding Officer]
Subject: RE: Authority of the Presiding Officer
Date: Wednesday, July 28, 2004 4:18 PM

To the extent that the order and deadline communicated in paragraph 5, below, has been imposed by the military commission as a whole, I respectfully request of the military commission as a whole an extension of time to provide a notice of motions until after counsel detailed to represent Mr. al Bahlul have had an opportunity to establish contact with him again. The necessity for this request is contained in the memorandum provided by Major Bridges on 23 July. Unfortunately, because I do not know when we will be able to again establish contact with Mr. al Bahlul I am unable to provide a date certain for the expiration of the requested extension. I will notify the commission once we are able to establish contact with Mr. al Bahlul again.

V/r

LCDR Sundel
Detailed Defense Counsel

* * *

From: [Presiding Officer]
Sent: Wednesday, July 28, 2004 18:08

Subject: Notice of Initial Sessions

TO All Counsel:
1. The Presiding Officer will convene the Commission (without members) in the cases of:
UNITED STATES v. IBRAHIM AHMED MAHOUD AL QOSI
UNITED STATES v. ALI HAMZA AHMAD SULAYMAN AL BAHLUL
UNITED STATES v. SALEM AHMED SALEM HAMDEN

UNITED STATES v. DAVID HICKS
during the week of 23 August at GTMO. A schedule for the proceedings during that week will be published at a later date.
2. During these sessions, the Accused and all Counsel will be present. After the convening of the commission in each case, counsel will be permitted to voir dire the Presiding Officer, and all motions and matters that can be resolved will be resolved…

REPLY APPENDIX H

From: [Presiding Officer]
Sent: Wednesday, July 28, 2004 22:03

Subject: Counsel and the Authority of the Presiding Officer

Memorandum For: COL Gunn, Chief Defense Counsel
28 July 2004

Subject: Counsel and the Authority of the Presiding Officer

…2. It has come to my attention (e.g., see Incl 2 - Email from LCDR Sandul [Sundel], 28 Jul 04) that certain counsel may be operating under a misapprehension concerning my authority as the Presiding Officer. Please note that this memorandum does not specifically address any case or any counsel - it covers all four of the cases to which I have been detailed and all of the counsel, whether prosecution or defense, detailed to those cases.

3. So that there is no question of my view in these matters, let me state the following:

a. I have the authority to set, hear, and decide all pretrial matters.
b. I have the authority to order counsel to perform certain acts.
c. I have the authority to set motions dates and trial dates.
d. I have the authority to act for the Commission without the formal assembly of the whole Commission.

The above listing is not supposed to be all inclusive. Perhaps a better way of looking at the matter is to say that I have authority to order those things which I order done.

4. I base my view upon my reading and interpretation of the references. (I note that my analysis of the references

comports with that contained in reference 1l.) I recognize that any one person's interpretation of various documents might be wrong. However, in the cases to which I have been appointed as Presiding Officer, my interpretation is the one that counts:

a) until the cases have been resolved and the cases are reviewed, if necessary, by competent reviewing authority (See reference 1k.). At that time, there will be an opportunity for advocates, for either side, to state that the Presiding Officer was wrong in his interpretation of the references or in his actions based upon those interpretations. If so, competent reviewing authority will determine the remedy, if any. Or,
b) until superior competent authority (The President, The Secretary of Defense, The General Counsel of the Department of Defense, The Appointing Authority) issues directives stating that what I am doing is incorrect.

…

Presiding Officer

REPLY APPENDIX I

10 Aug 2004

MEMORANDUM FOR THE OFFICE OF THE APPOINTING AUTHORITY

FROM: Lieutenant Commander Charles D. Swift, JAGC, USN, Detailed Defense Counsel, *United States v. Hamdan*

SUBJECT: Powers of the Presiding Officer

Purpose: The purpose of this memorandum is to inform the Appointing Authority of Detailed Defense Counsel's objections regarding the Assistant to the Presiding Officer's request to the Appointing Authority on behalf of the Presiding Officer for revision of Military Commission Instruction No. 8 (attached). This memorandum seeks to cognizance the Presiding Officer's purported authority to exercise de facto powers of a military judge in contravention of the powers prescribed under Commission rules, historical precedence, and promotion of a full and fair trial. In addition to alerting the Appointing Authority to Detailed Defense Counsel's objections, this memorandum proposes alternative solutions in regards to the commission of Salim Ahmed Hamdan. Objections and recommendations raised in this memorandum are solely that of Detailed Defense Counsel in Military Commission proceedings in conjunction with Salim Ahmed Hamdan and do not represent the position of the Chief Defense Counsel or the Defense teams, military or civilian, in any other Commission.

Issue: Under the President's Military Order, subsequent military orders and instructions, and legal president, do Military Commission proceedings conducted outside the presence of the other commission members constitute a lawfully constituted tribunal, when the proceedings are conducted by the Presiding Officer for the purpose of resolving legal motions, witness and evidentiary issues?

Discussion: The Presiding Officer's proposed actions contrast with the President's Military Order of November 13, 2001, dictating that the Military Commission provide "a full and fair trial with the Military Commission sitting as triers of both law and fact," and Military Commission Order No. 1, Section 4.A.1, that states "members shall attend all sessions of the Commission." The Presiding Officer's power under MCO No. 1 is administrative rather than substantive (e.g. limited to the preliminary admission of evidence, subject to review of panel members, maintaining the discipline of proceedings, ensuring qualifications of attorneys, scheduling, certifying interlocutory questions[22], determining the availability of witnesses, etc.) See sections 4.A, 5.H, 6.A.5, and 6.D.1, 6.D.5. Nothing in the powers set out in either the President's Military Order or the MCO No. 1 suggest that the Presiding Officer's powers extend to that of a military judge, capable of holding independent sessions.

In creating the present Military Commissions the government has relied on the legal and historical principles set out *in re Quirin.* The Quirin Commission, however, was conducted for all sessions with the Military Commissions as a whole, hearing all questions of law and fact. These included questions of the Commissions including questions of whether counsel had the right to preemptory challenge, jurisdiction, lawfulness of the Presidential order, and lawfulness of the charges. (See pages 15-18, 23-39, and 46-60 of Transcript of Proceedings Before the Military Commissions to Try Persons Charged with Offenses against the Law of War and the Articles of War, Washington, D.C., July 8 to July 31, 1942, University of Minnesota, 2004, Editors, Joel Samaha, Sam Root, and Paul Sexton). Indeed the Detailed Defense Counsel has been able to find no previous Military Commission that was conducted in the manner proposed by the Presiding Officer.

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[22] The requirement under Section 4.A.(5)(d) of MCO 1, that the Presiding officer certify all dispositive motions to the Appointing Authority conflicts with the plain language of the Presidential order that the Commission be the "triers of law and fact" and is likely invalid under section 7.B. of MCO 1.

The conduct of Military Commission sessions outside the presence of all members does not comport with the overriding objective that the Commission provide a full and fair trial. By acting as a de facto military judge in these proceedings, the Presiding Officer runs a high risk in prejudicing the panel as a whole. In essence what the Presiding Officer proposes is that he alone will make determinations regarding legal motions, such as but not limited to the legality of the Commission, the elements of the charges, issues of voluntariness of confessions, relevance of witnesses and those facts that are not subject to contention. In order to make these determinations the Presiding Officer will necessarily have to make findings of fact in addition to determining the law. By assuming the role of an independent fact finder and law giver, the Presiding Officer elevates his status relative to the other members to a point that it cannot be reasonably expected that his opinions will not be given undue weight by the other members during deliberations. It cannot be reasonably expected that after the Presiding Officer has independently heard evidence, determined the law, and conducted a portion of the proceedings outside the presence of the other members that they will not subsequently defer to his judgment during deliberations. Such a system is not in keeping with the requirement that the proceedings be full and fair. For the process to be full and fair, each member must have an equal voice. The Presiding Officer, however, in the name of expediency proposes to make himself first among equals.

Even if the Appointing Authority agrees with the Presiding Officer's position regarding alteration of MCI No. 8, Detailed Defense Counsel objects to any alterations to military instructions without the concurrence of Mr. Hamdan and his Defense Counsel as an expos facto alteration of the procedures for trial after charges have been referred to Commission, thereby commencing proceedings.

Detailed Defense Counsel is not unmindful of the difficulties associated with the use of members to make all of these determinations. The Presiding Officer's assistant in his ex parte memorandum to the Legal Advisor to the

Appointing Authority, points out that the use of members to make determinations on all issues substantially mirrors the court-martial process prior to the institution of the Uniform Code of Military Justice. Although this process was abandoned with the advent of the Uniform Code of Military Justice for Courts-martial, there is no authority for abandoning it with respect to Military Commissions. Nothing in the President's order indicated that he tended to deviate from the past process; rather the portion of the President's Military Order of November 13, 2001, dealing with Military Commissions, is an almost word for word that of President Roosevelt's orders regarding the Quirin Commission.

Mr. H.'s memo justifies the departure from historical precedent on the grounds that requiring line officers to vote on complex issues few lawyers can articulate jeopardizes efficient trials and potentially prejudices the proceedings. Detailed Defense Counsel agree that line officers will be confronted with extremely complex issues, but does not agree that the solution lies in granting judicial powers to the Presiding Officer in a hearing that is distinctly separate from a courts-martial or federal trail

Recommendation: Detailed Defense Counsel proposes in the alternative that recent procedures used in international tribunals for war crimes provide the solution. In both the former Yugoslavia and Rwandan tribunals, the war crimes tribunals have been composed of international judges. Detailed Defense counsel recommends that the Appointing Authority reject the Presiding Officers interpretation of his powers and clarify that all sessions of the Military Commission shall be attended by all members of the commission. Further, Defense Counsel recommends that the Appointing Authority relieve the line officers appointed to serve as members of the commission and appoint in the alternative active or reserve Judge Advocates who are qualified to serve as military judges. Appointment of a panel of judge advocates does not require a change in the Military Commission rules as there is no requirement that a commission member be anything beyond a commissioned officer. Appointment of judge advocates to

the commissions will permit careful consideration of the legal issues, expedite necessary legal research into these issues, avoid prejudice created by ex parte proceedings, and mirror international process.

LCDR Charles D. Swift, JAGC, USN
Detailed Defense Counsel
Office of Military Commissions

Cc:
Chief Defense Counsel
Chief Prosecutor
Presiding Officer
Detailed Prosecutor in *U.S. v. Hamdan*
Legal Advisor to the Appointing Authority
Legal Advisor to the Presiding Officer

REPLY APPENDIX J

August 11, 2004

MEMORANDUM FOR Presiding Officer

SUBJECT: Presence of Members and Alternate Members at Military Commission Sessions

The Orders and Instructions applicable to trials by Military Commission require the presence of all members and alternate members at all sessions/proceedings of Military Commissions.

The President's Military Order (PMO) of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," requires a full and fair trial, with the military commission sitting as the triers of both fact and law. See Section 4(c)(2). The PMO identifies only one instance in which the Presiding Officer may act on an issue of law or fact on his own. Then, it is only with the members present that he may so act and the members may overrule the Presiding Officer's opinion by a majority of the Commission. See Section 4"c)(3).

Further, Military Commission Order (MCO) No. 1 requires the presence of all members and alternate members at all sessions/proceedings of Military Commissions. Though MCO No. I delineates duties for the Presiding Officer in addition to those of other Commission Members, it does not contemplate convening a session of a Military Commission without all of the members present.

The "Commission" is a body, not a proceeding, in and of itself. Each Military Commission, comprised of members, collectively has jurisdiction over violations of the laws of war and all other offenses triable by military commission. The following authority is applicable.

• MCO No. 1, Section 4(A)(l) directs that the Appointing Authority shall appoint the members and the alternate member or members of each Commission. As such, the appointed members and alternate members collectively make up each "Commission."

• MCO No. 1, Section 4(A)(I) also requires that the alternate member or members shall attend all sessions of the Commission. This requirement for alternate members to attend all sessions assumes that members are required to attend all sessions of the Commission, as well.

• MCO No. 1. Section 4(A)(4) directs the Appointing Authority to designate a Presiding Officer from among the members of each Commission. This is further evidence that the Commission was intended to operate as an entity including all of the members.

• MCO No. 1, Section 4(A)(4) also states that the Presiding Officer will preside over the proceedings of the Commission from which he or she was appointed. Implicit in this statement is the understanding that there are no proceedings without the Commission composed of and operating with all of its members. The Presiding Officer is only one of the appointed members to the Commission, who in addition, presides over the proceedings of the Commission.

Thomas L. Hemingway,
Brigadier General, U.S. Air Force
Legal Advisor to the Appointing
Authority for Military Commissions

REPLY APPENDIX K

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Hamdan v. Rumsfeld, et al.
No. 04-5393

MOTION TO STAY THE COURT'S MANDATE PENDING DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI

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1. The Equities Favor a Stay and Mr. Hamdan Will Suffer Irreparable Injury if the Stay is Denied.

There is good cause to stay the mandate in this case, whether that cause is measured by the public interest favoring a stay or the irreparable harm that will occur to Mr. Hamdan if the mandate is issued. Fed. R. App. P. 41(d)(2); D.C. Cir. R. 41(a)(2); *Books* 329 F.3d at 829; *Postal Service*, 481 U.S. at 1302-03. Harm to the public interest shifts the equities heavily in favor of a stay. *Books*, 329 F.3d at 829; *Postal Service*, 481 U.S. at 1302-03.

Certainly, neither the public interest nor the interested parties will be harmed by the temporary maintenance of the status quo. On the contrary, it is the prospect of rushed proceedings posed by the denial of this motion that threatens to harm both groups. Absent a stay, these military commissions – widely decried as unjust throughout the international community, even among America's friends and allies – will move forward without the benefit and imprimatur of Supreme Court review. Staying the mandate will allow the Supreme Court to consider and address Mr. Hamdan's fundamental challenges to these commissions, and will give credence and support to the

perception here and abroad that *all* criminal proceedings conducted by the United States are subject to full judicial review and are governed by the rule of law.

Moreover, issuance of the mandate prior to Supreme Court review presents a panoply of irreparable harms to Mr. Hamdan: he will be forced to preview his defense to the prosecution; he will be forced to defend in a proceeding where he challenges the very jurisdiction of the commission to try him at all; he may be returned to solitary confinement during pre-commission detention (a form of detention that will impair his ability to defend himself once the commission resumes); and it may interfere with his ability to complete briefing at the Supreme Court. Given these compound harms, and the lenient standard by which "irreparable injury" is measured on a motion to stay a mandate, a stay is amply warranted in this case. *Books*, 329 F.3d at 829; *Postal Service*, 481 U.S. at 1302-03.

a. The equities and public interest strongly favor a stay.

There is great potential harm to the public interest if these commissions are allowed to proceed before there is a meaningful opportunity for Supreme Court review. Fed. R. App. P. 41(d)(2); D.C. Cir. R. 41(a)(2); *Books*, 329 F.3d at 829. Rushed proceedings would undermine the legitimacy of the Government's actions in Guantanamo and confuse and possibly delay the Supreme Court's review of this case. *See generally Quirin*, 317 U.S. at 19 (finding that the public interest required that the Court avoid all delay in reaching the merits of a challenge to military commissions).

The harm to the public interest in this case is not ephemeral or undefined – military commissions that flout the protections afforded by the Geneva Conventions bring the scorn of the international community and endanger the lives of U.S. servicemen and civilians captured and detained abroad. Amicus Brief of General David M. Brahms, et al., *supra*, at 5-10. The public interests implicated here are at

least as strong as the interests found in other cases where the mandate has been stayed. *Books*, 239 F.3d at 829 (mandate stayed because public interest would be harmed if the city of Elkhart, Indiana, had to "devote attention to formulating and implementing" city policy regarding public display of religious symbols without the benefit of Supreme Court review). Allowing the Supreme Court the time it needs to review these proceedings would benefit the public interest by helping to clarify and legitimize the proceedings in Guantanamo. *See Quirin*, 317 U.S. at 19 (observing, in case raising similar issues, that "public interest required that we consider and decide these questions without any avoidable delay."); *see also* Slip Op. at 6 ("[W]e are thus left with nothing to detract from *Quirin*'s precedential value.").

Moreover, the potential harm to the public interest is not offset by any harm to the Government if Mr. Hamdan's military commission is very briefly delayed. The Government's actions during Mr. Hamdan's detention clearly reveal that it does not consider delay harmful, and that immediate proceedings are not necessary to protect the Government's interests. Mr. Hamdan has been in the custody of the U.S. military since approximately November 2001, but wasn't declared eligible for trial by military commission until July 3, 2003. He then languished in pre-trial segregation (*i.e.*, solitary confinement) for nearly nine months. Mr. Hamdan was not able to meet with his counsel until January 30, 2004. After Mr. Hamdan's counsel filed his mandamus and habeas action the Government moved to hold Mr. Hamdan's petition in abeyance. *See* Notice of Motion and Motion for Order Holding Petition in Abeyance (filed April 23, 2004, D.D.C. docket no. 1).[23]

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[23] In support of its Motion to Hold in Abeyance, the Government invoked the importance and finality of Supreme Court review. *Id.* at 4 ("[I]t would be an unnecessary expenditure of resources for the parties to litigate – and for [the district court] to adjudicate – the very same jurisdictional issues the Supreme Court is virtually certain to address over the next two months and resolve in a manner that will dispose of this

It was not until the Supreme Court ruled that habeas jurisdiction extended to Guantanamo Bay in *Rasul* on June 28, 2004, that the Government finally presented Mr. Hamdan with the charge against him, a fortnight later, in July, 2004. In November 2004 when the D.C. District Court halted Mr. Hamdan's commission, the Government never sought a stay of the district court injunction, despite its stated promise to do so. *See* DOJ Press Release, Nov. 8, 2004, *available at* http://www.usdoj.gov/opa/pr/2004/November/ 04_opa_735.htm. Following this injunction the government *on its own accord* suspended proceedings in the three other cases pending before Military Commissions. The Government has never sought a speedy commission for Mr. Hamdan, and it has no equitable claim to seek one now.

Moreover, granting a stay merely preserves this status quo, a state of affairs that the Government accepted in November and which has been in place for over eight months. Under the District Court's order, Mr. Hamdan still remains subject to the threat of both military (court-martial) and civil (Article III court) prosecutions for his alleged past violations of the laws of war. He will not, moreover, be free on bail in the interim, but rather detained at Guantanamo Bay. The Supreme Court has held that in habeas cases the possibility of flight and danger to the public – neither of which exists in this case – are both relevant factors for courts to consider in granting stays. *See Hilton v. Braunskill*, 481 U.S. 770, 777 (1987) (remanding for reconsideration of the government's motion for a stay). Finally, the public interest would be harmed if a hastily convened commission was permitted to go forward prior to an opportunity for Supreme Court review.[24]

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petition or, at a minimum, provide substantial guidance regarding its viability in the federal courts[.]").

[24] Indeed, if expediency was truly an important goal for the Government, its decision to prosecute Mr. Hamdan via this commission—rather than, for example, a court-martial—is entirely illogical. *See* 10 U.S.C. § 818 (permitting trial by the existing system of

b. Mr. Hamdan will be irreparably injured if the stay is denied.

There is also good cause to stay the mandate because Mr. Hamdan will be irreparably injured if his commission is allowed to go forward without Supreme Court review. Fed. R. App. P. 41(d)(2); D.C. Cir. R. 41(a)(2); *Postal Service*, 481 U.S. at 1302-03. There are at least three concrete harms to Mr. Hamdan that demonstrate irreparable injury sufficient to stay the mandate. *Postal Service*, 481 U.S. at 1302-03 (harm requirement satisfied where temporary reinstatement of discharged employee will send a negative message to other employees).

First, the right Mr. Hamdan seeks to vindicate is the right not to be tried at all by this military commission. If the mandate issues before the Supreme Court has the opportunity to review Mr. Hamdan's case, the trial proceedings will resume where they left off. Mr. Hamdan will be asked to enter a plea pursuant to rules that do not facially permit *Alford* or conditional pleas. Substantial aspects of the rights Hamdan asserts in this petition will be vitiated by the resumption of the trial, and they will be impossible for the federal courts to fully vindicate *ex post*. Likewise, issuance of the mandate before Supreme Court resolution would subject Hamdan to trial by military commission even as he presses his challenge in Article III courts to the jurisdiction of those commissions to try him. *Cf. Gilliam v. Foster*, 75 F.3d 881, 904 (4th Cir. 1996) (en banc) ("[A] portion of the constitutional protection [the Double Jeopardy Clause] affords would be irreparably lost if Petitioners were forced to endure the second trial before seeking to vindicate their constitutional rights at the federal

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courts-martial and conferring jurisdiction over violations of the laws of war); *id.* § 810 ("When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.").

level." (quoting *Abney v. United States*, 431 U.S. 651, 660 (1997)).

In this respect, the issue is the same as that governing abstention, where the Court in this case has already concluded that "setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction." Slip op. at 6 (citing *Abney*, 431 U.S. at 662); *cf. McSurely v. McClellan*, 697 F.2d 309, 317 (D.C. Cir. 1982) ("A showing of irreparable injury will generally be automatic from invocation of the immunity doctrine if the trial has begun or will commence during the pendency of the petitioner's appeal.").

Second, if the mandate issues before Supreme Court review and the commission resumes, it will irreversibly provide the prosecution a preview of Mr. Hamdan's trial defense. This Circuit has already acknowledged this as an irreparable injury, and in a context that involved simple exclusion from the United States in immigration proceedings, and not the far more burdensome and stigmatizing possibility of a criminal conviction with life imprisonment. In *Rafeedie v. INS*, 880 F.2d 506, 517 (D.C. Cir. 1989), then-Judge Douglas Ginsburg pointed to the "substantial practical litigation advantage" forfeited by forcing the petitioner to go through a summary exclusion proceeding when he claimed he was entitled to a more robust plenary procedure. The Government had argued that he should go through the summary proceeding first, and only if excluded should he be able to challenge the process. This Court disagreed due to the irreparable injury engendered by forcing a preview of the defense:

> Rafeedie will suffer a judicially cognizable injury in that he will thus be deprived of a "substantial practical litigation advantage." Rafeedie spells out this dilemma: if he presents his defense in a § 235(c) proceeding, and a court later finds that section

> inapplicable to him, the INS will nevertheless know his defense in advance of any subsequent § 236 proceeding; if, however, he does not present his factual defense now, he risks forsaking his only opportunity to present a factual defense. . . Rafeedie has thus established a *significant and irreparable injury*.

Id. at 518 (emphasis added). *Cf. United States v. Philip Morris Inc*., 314 F.3d 612, 622 (D.C. Cir. 2003) (granting a stay upon finding that "the general injury caused by the breach of the attorney-client privilege and the harm resulting from the disclosure of privileged documents to an adverse party is clear enough" to satisfy the irreparable injury prong).

Third, if the mandate issues, Judge Robertson's injunction barring Mr. Hamdan's continued placement in solitary confinement will cease. Mr. Hamdan has already been subject to eleven months of solitary confinement, and, as the only evidence relevant to this issue and in the record confirms, continued solitary confinement threatens Mr. Hamdan's health and ability to defend himself at trial. *See* Brief of Amici Curiae Human Rights First, Physicians for Human Rights, *et al*, in Support of Petitioner at 9-18 (solitary confinement seriously impairs an ability to defend, and Mr. Hamdan is vulnerable to the consequences of solitary confinement). The harm to Mr. Hamdan's ability to defend himself by a return to solitary confinement is at least as harmful as the symbolic harms held to favor a stay in other cases. *Postal Service*, 481 U.S. at 1302-03 (equities favor stay where employer will face irreparable harm because "temporary reinstatement of [a discharged employee], a convicted criminal, will seriously impair the applicant's ability to impress the seriousness of the Postal Service's mission upon its workers.").

Fourth, if this Court does not grant a stay, there is a possibility that Mr. Hamdan's trial proceedings at

Guantanamo may occur at the same time as his Reply Brief in the Supreme Court is due. Because commission proceedings have not been scheduled, it is impossible to know whether this possibility will materialize. If it does, Petitioner cannot hope to adequately pursue his claims simultaneously in both Washington and Cuba, given the amorphous and uniquely difficult nature of the proceedings in Guantanamo and the lack of sufficient access to research materials and law libraries. Both Mr. Hamdan and the judicial branch will suffer if the petitioner in such a pivotal case cannot pursue his claims with the utmost vigor. Indeed, the Government itself suffers in that scenario, given its interest in making sure that the proceedings in Guantanamo command the respect of the international community and of its own citizens.

In sum, if military commissions are worth conducting, they are worth conducting lawfully and being *perceived* as so conducted. Their deployment in jurisdictionally dubious contexts or in legally clouded conditions can only work a disservice to their potential utility when confined to proper circumstances and conducted under legally appropriate ground rules. Only the Supreme Court's prompt and decisive resolution of the questions presented by the use of military commissions in the circumstances of this case can dispel those clouds swiftly and with the certitude that those conditions require.

Petitioner has acted with the utmost of dispatch to ensure that the Supreme Court can resolve his Petition at its first available date, the first Conference, on September 26, 2005. Accordingly, only a brief stay is necessary.

CONCLUSION

For all the foregoing reasons, the Motion should be granted and this Court's mandate should be stayed pending the Supreme Court's review of Mr. Hamdan's Petition for Certiorari.

Respectfully submitted this 11th day of August, 2005.

/s/ Neal Katyal
Neal Katyal (D.C. Bar No. 462071)
600 New Jersey Avenue, NW
Washington, D.C. 20001
(202) 662-9000

Lt. Commander Charles D. Swift
Office of Military Commissions
U.S. Department of Defense
1931 Jefferson Davis Hwy. Suite 103
Arlington, VA 22202
(703) 607-1521

Benjamin S. Sharp (D.C. Bar No. 211623)
Joseph M. McMillan (*pro hac vice*)
PERKINS COIE LLP
607 Fourteenth Street, N.W., Suite 800
Washington, D.C. 20005-2011
(202) 628-6600
(202) 434-1690 (facsimile)
Attorneys for Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Hamdan v. Rumsfeld, et al.

No. 04-5393

REPLY IN SUPPORT OF MOTION TO STAY THE COURT'S MANDATE PENDING DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI

B. Mr. Hamdan Has Demonstrated Good Cause for a Stay.

The Government argues that there is not good cause for

a stay because (1) "the government and the public interest" will suffer; and (2) Mr. Hamdan will not be prejudiced if the mandate issues. These arguments lack factual and legal support, and are contradicted by the Government's prior actions.

1. There will be no harm to the Government or to any public interest if the mandate is stayed. Despite the brief stay sought in this motion, the Government nonetheless asserts that both it and an unspecified "public interest" will be harmed by this stay. First, the Government complains that the District Court's injunction constitutes "unwarranted interference" with the President's powers. Resp. at 13. This argument simply restates the Government's merits position in the case, but it does not articulate any harm to the President or the Government that a brief stay of the mandate will engender.

Next, the Government invokes "serious practical consequences" that would flow from staying the mandate. Resp. at 14. It claims that "unduly delayed [] commission proceedings" may dilute the alleged deterrent effect it contends Mr. Hamdan's commission will have. *Id.* at 14. It is incredible that the Government would, in light of the history of its treatment of Mr. Hamdan, now complain of undue delay.[25] Mr. Hamdan's Motion set forth a brief chronology of this delay, Motion at 14-15, a list that was by no means exhaustive and that the Response did not contest. Some of the more telling examples that belie the Government's claim of harm caused by delay are: (1) Mr. Hamdan has been detained since November 2001, the President did not declare Mr. Hamdan eligible for trial by military commission until July 3, 2003, and Mr. Hamdan was not charged with any offense until July 13, 2004; (2) in the nine months since the District Court's November 8, 2004

[25] Mr. Hamdan agrees that the international community is observing and scrutinizing the Government's use of commissions, but he disagrees that the Government has thus far ever chosen a course of action that suggests it intends to conduct his commission quickly, openly, or fairly.

Order, the Government has not referred charges against any of the other fourteen persons designated as eligible for trial by military commissions, and has released three of them. This "undue delay" is an argument of convenience, and it should be viewed in light of the Government's actions, not its words.

2. Mr. Hamdan will be harmed if the mandate issues. The Government contends that because Mr. Hamdan's opening Petition "did not raise any legal challenge to his detention as an enemy combatant" the Government can, at its leisure, detain Mr. Hamdan indefinitely regardless of Supreme Court intervention. Resp. at 10-11. The Government is simply wrong. Mr. Hamdan *did* challenge both procedurally and substantively the determination that he is an enemy combatant, which is the predicate for the indefinite detention the Government threatens. *See* Petition for Writ of Mandamus or, in the Alternative, Writ of Habeas Corpus at 25. And the claim that Hamdan will remain detained cannot be assumed in light of the appeal pending before this Circuit in *Al Odah, supra*.

In a complete contradiction of its argument that the commissions must resume immediately, the Government next argues that Mr. Hamdan's trial will not begin after the mandate issues. Resp. at 11. Of course, even at the outset of the pre-trial motions, Mr. Hamdan will be asked to enter a plea of guilt or innocence. And the indefinite time for commencement of Mr. Hamdan's commission – something which lies completely within the Government's hands – belies the Government's argument that the mandate must issue now.

Finally, the Government attempts to dismiss Mr. Hamdan's claim that he will be harmed if his commission resumes. These attempts to rebut Mr. Hamdan's satisfaction of the "good cause" requirement

are not well supported.[26] First, Mr. Hamdan asserts that this military commission has no jurisdiction to try him, and contrary to the Government's assertion that right is not abstract and cannot be vindicated with post-trial review. Slip op. at 6. Second, this Court has explicitly held elsewhere that being forced to preview a defense does indeed constitute irreparable harm, even though the Government, citing no authority, scoffs at the notion. *Rafeedie v. INS*, 880 F.2d 506, 517 (D.C. Cir. 1989). This concern is particularly heightened here because Mr. Hamdan contends that this military commission does more than "arguably violate…procedural rights." Resp. at 12. Rather, it has procedures that are specifically engineered to violate those rights by permitting Mr. Hamdan's exclusion from his own trial. This increases the likelihood of a second trial, and heightens the potential harm to Mr. Hamdan of previewing his defense. *Rafeedie* fully controls this case.

Third, the Government's assurance that it has no "current plans" to return Mr. Hamdan to solitary confinement is no assurance at all, as it does not prevent the Government from placing Mr. Hamdan back in solitary confinement when his commission re-commences. Last, facilities in Guantanamo Bay do not permit the kind of instant communication needed to litigate two cases in two fora simultaneously, which is what Mr. Hamdan will have to do if the mandate issues, and the prospect of doing so need not be "insurmountable" to satisfy good cause. Again, any one of these harms satisfies "good cause" as that requirement has been interpreted under Fed. R. App. P. 41(d)(2). *Postal Service v. Nat'l Assn. of Letter Carriers*, 481 U.S. 1301, 302-03 (1987); *Books v. City of Elkhart*, 239 F.3d 826,

[26] In fourteen pages of briefing, the Government fails to cite a single case that establishes the showing necessary to stay a circuit court's mandate pending a petition for certiorari under Fed. R. App. P. 41(d)(2). This includes a lack of any legal authority supporting its assertions that Mr. Hamdan has failed to establish "good cause" as it has been interpreted by courts.

829 (7th Cir. 2001).

CONCLUSION

For all the foregoing reasons, the Motion should be granted.

Respectfully submitted this
29th day of August, 2005.

/s/ Neal Katyal

Neal Katyal (D.C. Bar No. 462071)
600 New Jersey Avenue, NW
Washington, D.C. 20001
(202) 662-9000

Lt. Commander Charles D. Swift
Office of Military Commissions
U.S. Department of Defense
1931 Jefferson Davis Hwy. Suite 103
Arlington, VA 22202
(703) 607-1521

Benjamin S. Sharp (D.C. Bar No. 211623)
Joseph M. McMillan (*pro hac vice*)
PERKINS COIE LLP
607 Fourteenth Street, N.W., Suite 800
Washington, D.C. 20005-2011
(202) 628-6600
(202) 434-1690 (facsimile)
Attorneys for Petitioner

REPLY APPENDIX L

December 5, 2001

The Honorable Patrick J. Leahy
Chairman, Senate Judiciary Committee
433 Russell Senate Office Bldg.
United States Senate
Washington, DC 20510

Dear Senator Leahy:

We, the undersigned law professors and lawyers, write to express our concern about the November 13, 2001, Military Order, issued by President Bush and directing the Department of Defense to establish military commissions to decide the guilt of non-citizens suspected of involvement in terrorist activities.

The United States has a constitutional court system of which we are rightly proud. Time and again, it has shown itself able to adapt to complex and novel problems, both criminal and civil. Its functioning is a worldwide emblem of the workings of justice in a democratic society.

In contrast, the Order authorizes the Department of Defense to create institutions in which we can have no confidence. We understand the sense of crisis that pervades the nation. We appreciate and share both the sadness and the anger. But we must not let the attack of September 11, 2001 lead us to sacrifice our constitutional values and abandon our commitment to the rule of law. In our judgment, the untested institutions contemplated by the Order are legally deficient, unnecessary, and unwise.

In this brief statement, we outline only a few examples of the serious constitutional questions this Order raises:

• The Order undermines the tradition of the Separation of Powers. Article I of the Constitution provides that the Congress, not the President, has the power to "define and punish . . . Offenses against the Law of Nations." The Order, in contrast, lodges that power in the Secretary of Defense, acting at the direction of the President and without Congressional approval.
• The Order does not comport with either constitutional or international standards of due process. The President's proposal permits indefinite detention, secret trials, and no appeals.
• The text of the Order allows the Executive to violate the United States' binding treaty obligations. The International Covenant on Civil and Political Rights, ratified by the United States in 1992, obligates State Parties to protect the due process rights of all persons subject to any criminal proceeding. The third Geneva Convention of 1949, ratified by the United States in 1955, requires that every prisoner of war have a meaningful right to appeal a sentence or a conviction. Under Article VI of the Constitution, these obligations are the "supreme Law of the Land" and cannot be superseded by a unilateral presidential order.

No court has upheld unilateral action by the Executive that provided for as dramatic a departure from constitutional norms as does this Order. While in 1942 the Supreme Court allowed President Roosevelt's use of military commissions during World War II, Congress had expressly granted him the power to create such commissions.

Recourse to military commissions is unnecessary to the successful prosecution and conviction of terrorists. It presumes that regularly constituted courts and military courts-martial that adhere to well-tested due process are unable to handle prosecutions of this sort. Yet in recent years, the federal trial courts have successfully tried and convicted international terrorists, including members of the al-Qaeda network.

It is a triumph of the United States that, despite the attack of September 11, our institutions are fully functioning. Even the disruption of offices, phones, and the mail has not stopped the United States government from carrying out its constitutionally-mandated responsibilities. Our courts should not be prevented by Presidential Order from visibly doing the same.

Finally, the use of military commissions would be unwise, as it could endanger American lives and complicate American foreign policy. Such use by the United States would undermine our government's ability to protest effectively when other countries do the same. Americans, be they civilians, peace-keepers, members of the armed services, or diplomats, would be at risk.

The United States has taken other countries to task for proceedings that violate basic civil rights. Recently, for example, when Peru branded an American citizen a "terrorist" and gave her a secret "trial," the United States properly protested that the proceedings were not held in "open civilian court with full rights of legal defense, in accordance with international judicial norms."

The proposal to abandon our existing legal institutions in favor of such a constitutionally questionable endeavor is misguided. Our democracy is at its most resolute when we meet crises with our bedrock ideals intact and unyielding.

Respectfully submitted,

Benjamin Aaron
Professor of Law Emeritus
University of California-Los Angeles
School of Law

Kenneth Abbott
Elizabeth Froehling Horner
Professor of Law and Commerce
Director, Center for International
and Comparative Studies
Northwestern University

Richard L. Abel
Visiting Professor, New York
University Law School

Connell Professor, University of California-Los Angeles School of Law

Khaled Abou El Fadl
Acting Professor
University of Califorina-Los Angeles School of Law

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

Bryan Adamson
Associate Professor of Law
Case Western Reserve University School of Law

Raquel Aldana-Pindell
Assistant Professor of Law
University of Nevada-Las Vegas, William S. Boyd School of Law

Alison Grey Anderson
Professor of Law
University of California-Los Angeles School of Law

Michelle J. Anderson
Associate Professor of Law
Villanova University School of Law

Professor Penelope Andrews
City University of New York School of Law

Fran Ansley
Professor of Law
University of Tennessee College of Law

Keith Aoki
Associate Professor of Law
University of Oregon School of Law

Annette Appell
Associate Professor
University of Nevada-Las Vegas, William S. Boyd School of Law

Jennifer Arlen
Visiting Professor of Law
Yale Law School

Ivadelle and Theodore Johnson
Professor of Law & Business, USC Law School

Michael Asimow
Professor of Law Emeritus
University of California-Los Angeles School of Law

Barbara Atwood
Mary Anne Richey Professor of Law
University of Arizona, James E. Rogers College of Law

Michael Avery
Associate Professor
Suffolk Law School

Jonathan B. Baker
Associate Professor of Law
American University, Washington College of Law

Jack Balkin
Knight Professor of Constitutional Law and the First Amendment
Yale Law School

Susan Bandes
Professor of Law
DePaul University College of Law

Taunya Lovell Banks
Professor of Law
University of Maryland School of Law

Roger M. Baron
Professor of Law
University of South Dakota School of Law

Joseph Bauer
Professor of Law
University of Notre Dame School of Law

Linda M. Beale
University of Illinois College of Law

John S. Beckerman
Associate Dean for Academic Affairs
Rutgers School of Law – Camden

Leslie Bender
Associate Dean & Professor of Law
and Women's Studies
Syracuse University College of Law

Robert Bennett
George C. Dix Professor of
Constitutional Law
Northwestern University School of
Law

Morris D. Bernstein
Assistant Clinical Professor
University of Tulsa College of Law

Arthur Best
Professor of Law
University of Denver College of Law

Jerry P. Black, Jr.
Associate Clinical Professor
University of Tennessee College of
Law

Gary Blasi
Professor of Law
University of California-Los Angeles
School of Law

Cynthia Grant Bowman
Professor of Law
Northwestern University School of
Law

Francis A. Boyle
Professor of Law
University of Illinois College of Law

Lynn Branham
Visiting Professor of Law
University of Illinois College of Law

Pamela D. Bridgewater
Associate Professor of Law
American University, Washington
College of Law

Thomas F. Broden
Professor Emeritus
University of Notre Dame School of
Law

Mark S. Brodin
Professor of Law
Boston College Law School

Ralph Brill
Professor of Law
Chicago-Kent College of Law

Theresa J. Bryant
Executive Director and Director of
Public Interest, Career Development
Office
Yale Law School

Elizabeth M. Bruch
Practitioner-in-Residence
American University, Washington
College of Law

Robert A. Burt
Alexander M. Bickel Professor of
Law
Yale Law School

Emily Calhoun
Professor of Law
University of Colorado

Deborah Cantrell
Clinical Lecturer and Director of the
Arthur Liman Public Interest
Program
Yale Law School

Manuela Carneiro da Cunha
Professor, Department of
Anthropology and the College
University of Chicago

William M. Carter, Jr., Esq.
Assistant Professor of Law
Case Western Reserve University
School of Law

Douglas Cassel
Director, Center for International
Human Rights

Northwestern University School of Law

Anthony Chase
Center for International Studies
University of Chicago

Alan K. Chen
Associate Professor
University of Denver College of Law

Ronald K. Chen
Associate Dean for Academic Affairs
Rutgers School of Law – Newark

Paul G. Chevigny
Professor of Law
New York University School of Law

Gabriel J. Chin
Rufus King Professor of Law
University of Cincinnati College of Law

Hiram E. Chodosh
Professor of Law
Director, Frederick K. Cox International Law Center
Case Western Reserve University School of Law

Carol Chomsky
Associate Professor of Law
University of Minnesota Law School
Co-President, Society of American Law Teachers

George C. Christie
James B. Duke Professor of Law
Duke University School of Law

Michael J. Churgin
Raybourne Thompson Centennial Professor in Law
University of Texas School of Law

Kathleen Clark
Professor, Washington University School of Law

Roger S. Clark
Board of Governors Professor
Rutgers School of Law – Camden

Sarah Cleveland
Professor of Law
University of Texas School of Law

George M. Cohen
Professor of Law
University of Virginia

David Cole
Georgetown University Law Center

Melissa Cole
St. Louis University School of Law

Robert H. Cole
Professor of Law Emeritus
School of Law (Boalt Hall)
University of California at Berkeley

James E. Coleman, Jr.
Professor of the Practice of Law
Duke University Law School

Jules Coleman
Wesley Newcomb Hohfeld Professor of Jurisprudence
Yale Law School

Frank Rudy Cooper
Assistant Professor of Law
Villanova University School of Law

Charlotte Crane
Professor of Law
Northwestern University School of Law

Cathryn Stewart Crawford
Assistant Clinical Professor
Northwestern University School of Law

Lisa A. Crooms
Associate Professor
Howard University School of Law

Jerome McCristal Culp
Professor of Law
Duke University Law School

Dennis E. Curtis
Clinical Professor of Law
Yale Law School

Molly D. Current
Visiting Assistant Professor of Law
Chicago-Kent College of Law

Harlon Dalton
Professor of Law
Yale Law School

Karen L. Daniel
Clinical Assistant Professor
Northwestern University School of Law

Thomas Y. Davies
Associate Professor of Law
University of Tennessee College of Law

Angela J. Davis
Professor of Law
American University, Washington College of Law

Ellen E. Deason
Associate Professor
University of Illinois College of Law

Judith E. Diamond
Associate Professor

Brett Dignam
Clinical Professor of Law
Yale Law School

Diane Dimond
Clinical Professor of Law
Duke University Law School

Don Doernberg
James D. Hopkins Professor of Law
Pace University School of Law

Peter A. Donovan
Boston College Law School

Michael B. Dorff
Assistant Professor
Rutgers School of Law – Camden

Norman Dorsen
Fred I. and Grace A. Stokes
Professor of Law
New York University School of Law

David M. Driesen
Associate Professor of Law
Syracuse University College of Law

Steven Duke
Professor of Law
Yale Law School

Melvyn R. Durchslag
Professor of Law
Case Western Reserve University School of Law

Fernand N. Dutile
Professor of Law
University of Notre Dame School of Law

Stephen Dycus
Professor of Law
Vermont Law School

Howard Eglit
Professor of Law
Chicago-Kent College of Law

Daniel C. Esty
Professor of Environmental Law and Policy
Yale University

Cynthia R. Farina
Professor of Law
Cornell Law School

Neal Feigenson
Professor of Law
Quinnipiac University

Professor Jay M. Feinman
Rugters School of Law – Camden

Stephen M. Feldman
University of Tulsa

Barbara J. Fick

Associate Professor of Law
University of Notre Dame School of Law

Matthew W. Finkin
Albert J. Harno Professor of Law
University of Illinois

David H. Fisher, Ph.D.
Professor of Philosophy
North Central College

Stanley Z. Fisher
Professor of Law
Boston, MA

Scott FitzGibbon
Professor of Law
Boston College Law School

Martin S. Flaherty
Professor of Law
Fordham Law School

Brian J. Foley
Widener University School of Law

Gregory H. Fox
Professor of Law
Chapman University School of Law
Orange, CA

Gary Forrester
Visiting Assistant Professor of Law
University of Illinois College of Law

Mary Louise Frampton
Director, Boalt Hall Center for Social Justice
University of California at Berkeley

Daniel J. Freed
Clinical Professor Emeritus of Law and Its Administration
Yale Law School

Eric Freedman
Professor of Law
Hofstra University School of Law

Peter B. Friedman
Director of Research, Analysis, and Writing
Case Western Reserve University School of Law

Nicole Fritz
Crowly Fellow in International Human Rights
Fordham School of Law

Joseph W. Glannon, Esq.

Maggie Gilmore
Supervising Attorney
Indian Country Environmental Justice Clinic
Vermont Law School

Peter Goldberger, YLS '75
Attorney, Ardmore, PA

Phyllis Goldfarb
Professor of Law
Boston College Law School

Carmen Gonzalez
Assistant Professor of Law
Seattle University School of Law

Jonathan Gordon
Instructor of Law
Case Western Reserve University School of Law

Robert Gordon
Johnston Professor of Law and History
Yale University

Neil Gotanda
Professor of Law
Western State University

Stephen E. Gottlieb
Professor of Law
Albany Law School

Grayfred B. Gray
Associate Professor Emeritus
University of Tennessee College of Law

Suzanne Greene
Visiting Professor of Law
Chicago-Kent College of Law

Kent Greenfield
Associate Professor
Boston College Law School

Susan R. Gzesh
Director, Human Rights Program
The University of Chicago

Elwood Hain
Professor, Whittier Law School
Colonel (JAG), USAFR (ret)

Louise Halper
Professor of Law
Washington & Lee University
School of Law

Robert W. Hamilton
University of Texas School of Law

Joel F. Handler
University of California-Los Angeles
School of Law

Hurst Hannum
Professor of International Law
The Fletcher School of Law and
Diplomacy
Tufts University

Patricia Isela Hansen
Professor of Law
University of Texas Law School

Angela Harris
Professor of Law
School of Law (Boalt Hall)
University of California at Berkeley

Mark I. Harrison, Esq.

Robert Harrison
Yale Law School

Melissa Hart
Associate Professor of Law
University of Colorado School of
Law

Kathy Hartman
Assistant Dean for Admissions and
Financial Aid
Vermont Law School

Lew Hartman
381 VT Route 66
Randolph, VT 05060

Philip Harvey
Associate Professor of Law &
Economics
Rutgers School of Law – Camden

Oona Hathaway
Associate Professor
Boston University School of Law

Joan MacLeod Heminway
University of Tennessee College of
Law

Lynne Henderson
Visiting Professor of Law
University of California-Davis
School of Law

Susan Herman
Professor of Law
Brooklyn Law School

Kathy Hessler
Case Western Reserve University
School of Law

Steven J. Heyman
Professor of Law
Chicago-Kent College of Law

Tracey E. Higgins
Professor of Law, Fordham Law
School
Co-Director, Crowley Program in
International Human Rights

Barbara Hines
Lecturer/Director of the
Immigration Clinic
University of Texas School of Law

W. William Hodes

President, The William Hodes Professional Corporation
Professor Emeritus of Law, Indiana University

Joan H. Hollinger
Visiting Professor of Law
Director, Child Advocacy Program
School of Law (Boalt Hall)
University of California at Berkeley

Ruth-Arlene W. Howe
Boston College Law School

Marsha Cope Huie
Visiting Professor of Law
Tulane University

Darren Lenard Hutchinson
Assistant Professor of Law
Southern Methodist University

Deena Hurwitz
Cover/Lowenstein Fellow in International Human Rights Law
Yale Law School

Alan Hyde
Professor and Sidney Reitman Scholar
Rutgers School of Law – Newark

Jonathan M. Hyman
Professor of Law
Rutgers School of Law – Newark

Allan Ides
Loyola Law School

Sherrilyn A. Ifill
Associate Professor of Law
University of Maryland School of Law

Lisa C. Ikemoto
Professor of Law
Loyola Law School

Craig L. Jackson
Professor of Law
Texas Southern University, Thurgood Marshall School of Law

Quintin Johnstone
Emeritus Professor of Law
Yale Law School

Paul W. Kahn
Robert W. Winner Professor of Law and the Humanities
Yale Law School

David Kairys
James E. Beasley Professor of Law
Beasley School of Law, Temple University

Amy H. Kastely
Professor of Law
St. Mary's University School of Law

Harriet N. Katz
Clinical Professor
Rutgers School of Law – Camden

Lewis R. Katz
John C. Hutchins Professor of Law
Case Western Reserve University School of Law

Andrew H. Kaufman, Esq.

Eileen Kaufmann
Professor of Law
Touro Law School

Conrad Kellenberg
Professor of Law
University of Notre Dame School of Law

Robert B. Kent
Professor Emeritus
Cornell Law School

Jeffrey L. Kirchmeier
Associate Professor of Law
City University of New York School of Law

Kimberly Kirkland
Professor of Law
Franklin Pierce Law Center

Thomas Kleven
Professor of Law
Thurgood Marshall School of Law

Alvin K. Klevorick
John Thomas Smith Professor Law
Yale Law School

Harold Hongju Koh
Gerard C. and Bernice Latrobe
Smith Professor of International
Law

Yale Law School
Susan P. Koniak
Professor of Law
Boston University School of Law

Juliet P. Kostritsky
John Homer Kapp Professor of Law
Case Western Reserve University
School of Law

Harold J. Krent
Interim Dean and Professor
Chicago-Kent College of Law

Christopher Kutz
Assistant Professor of Law
School of Law (Boalt Hall)
University of California at Berkeley

Maury Landsman
Clinical Professor
University of Minnesota Law School

Frederick M. Lawrence
Law Alumni Scholar and Professor
of Law
Boston University School of Law

Robert P. Lawry
Professor of Law and Director,
Center for Professional Ethics
Case Western Reserve University
School of Law

Sylvia R. Lazos
Associate Professor
University of Missouri-Columbia
School of Law

Terri LeClercq, Ph.D.
Fellow, Norman Black Professorship
in Ethical Communication in Law
University of Texas School of Law

Brant T. Lee
Associate Professor of Law
University of Akron School of Law

Brian Leiter
Charles I. Francis Professor
University of Texas School of Law

John Leubsdorf
Professor of Law
Rutgers School of Law – Newark

Sanford Levinson
University of Texas School of Law

Cynthia Crawford Lichtenstein
Professor Emerita, Boston College
School of Law
Visiting Professor, George
Washington University School of
Law

Joseph Liu
Assistant Professor
Boston College Law School

Claudio Lomnitz
Professor of History
University of Chicago

Jean Love
Martha-Ellen Tye Distinguished
Professor of Law
University of Iowa College of Law

John S. Lowe
George W. Hutchison Professor of
Energy Law
Southern Methodist University

Edmund B. Luce
Director of Graduate Programs and
Legal Writing Professor
Widener University School of Law

Carroll L. Lucht
Clinical Professor of Law

Yale Law School

Jeana L. Lungwitz
University of Texas School of Law

David Lyons
Boston University

Marko C. Maglich
Attorney, New York

Daniel Markovits
Associate Professor of Law
Yale Law School

Inga Markovits
"Friends of Jamail" Regents' Chair in Law
University of Texas

Richard Markovits
John B. Connally Chair in Law
University of Texas

Stephen Marks
Associate Dean for Academic Affairs
Boston University School of Law

Jerry L. Mashaw
Sterling Professor of Law and Management
Yale Law School

Professor Judith L. Maute
University of Oklahoma College of Law

Carolyn McAllaster
Clinical Professor of Law
Duke University School of Law

Marcia L. McCormick
Visiting Assistant Professor
Chicago-Kent College of Law

Melinda Meador
Bass, Berry, and Sims PLC
Knoxville, TN

Michael Meltsner
Visiting Professor of Law
Harvard Law School

Roy M. Mersky
Harry M. Reasoner Regents Chair in Law and Director of Research
Jamail Center for Legal Research
Tarlton Law Library
University of Texas School of Law

Frank I. Michelman
Harvard University

Alice M. Miller, J.D.
Assistant Professor of Clinical Public Health
Law and Policy Project
Columbia University School of Public Health

Jonathan Miller
Professor of Law
Southwestern University School of Law

Joseph Scott Miller
Visiting Assistant Professor of Law
Northwestern University School of Law

Elliot S. Milstein
Professor of Law
American University, Washington College of Law

JoAnne Miner
Senior Lecturer
Cornell Law School

Satish Moorthy
Coordinator, Human Rights Program
University of Chicago

Margaret Montoya
University of New Mexico School of Law
Co-President, Society of American Law Teachers

Frederick C. Moss
Associate Professor of Law
Southern Methodist University School of Law

Eleanor W. Myers
Temple University, Beasley Law School

Molly O'Brien
Associate Professor of Law
University of Akron School of Law

Paul O'Neil
Visiting Professor of Law
CUNY School of Law

J.P. Ogilvy
Associate Professor of Law
Columbus School of Law
The Catholic University of America

Diane Orentlicher
American University, Washington College of Law

Nancy K. Ota
Professor of Law
Albany Law School

Professor Daniel G. Partan
Boston University School of Law

Teresa Gotwin Phelps
Professor of Law
University of Notre Dame School of Law

Sidney Picker, Jr.
Professor of Law
Case Western Reserve University Law School

Sydelle Pittas, Esq.
Pittas/Koenig
Winchester, MA

Zygmunt J.B. Plater
Professor of Law
Boston College Law School

Nancy D. Polikoff
Professor of Law
American University, Washington College of Law

Robert J. Quinn, Esq.
Human Rights Program
University of Chicago

Vernellia R. Randall
Professor of Law
University of Dayton

Frank S. Ravitch
Visiting Associate Professor of Law
Syracuse University College of Law

Anthony F. Renzo
Assistant Professor
Vermont Law School

Judith Resnik
Arthur Liman Professor of Law
Yale Law School

Wilhelmina M. Reuben-Cooke
Professor of Law
Syracuse University College of Law

Annelise Riles
Professor of Law
Northwestern University School of Law

David W. Robertson
Professor of Law
University of Texas School of Law
Professor Mary Romero
School of Justice Studies
Arizona State University

Professor Michael Rooke-Ley
Co-President-elect, Society of American Law Teachers

Susan Rose-Ackerman
Henry R. Luce Professor of Law and Political Science
Yale Law School

Rand E. Rosenblatt
Professor of Law
Rutgers School of Law – Camden

Stephen A. Rosenbaum
Lecturer in Law
School of Law (Boalt Hall)

University of California at Berkeley

Clifford J. Rosky
Post-Graduate Research Fellow
Yale Law School

Gary Rowe
Acting Professor
University of California-Los Angeles
School of Law

Len Rubinowitz
Professor of Law
Northwestern University School of
Law

William Rubenstein
Acting Professor
University of California-Los Angeles
School of Law

David S. Rudstein
Professor of Law
Chicago-Kent College of Law

Richard Sander
Professor of Law
University of California-Los Angeles
School of Law

Jane L. Scarborough
Associate Professor of Law
Northeastern University School of
Law

Elizabeth M. Schneider
Rose L. Hoffer Professor of Law
Brooklyn Law School

Ora Schub
Associate Clinical Professor
Children and Family Justice Center
Northwestern University School of
Law

Ann Seidman
Adjunct Professor
Boston University School of Law

Robert B. Seidman
Professor Emeritus
Boston University School of Law

Jeff Selbin
Lecturer
School of Law (Boalt Hall)
University of California at Berkeley

Elisabeth Semel
Acting Clinical Professor
School of Law (Boalt Hall)
University of California at Berkeley

Ann Shalleck
Professor of Law
American University, Washington
College of Law

Julie Shapiro
Associate Professor of Law
Seattle University School of Law

Richard K. Sherwin
Professor of Law
New York Law School

Seanna Shiffrin
Professor of Law and Associate
Professor of Philosophy
University of California-Los Angeles

Steven Shiffrin
Professor of Law
Cornell University

James J. Silk
Executive Director
Orville H. Schell, Jr. Center for
International Human Rights

Yale Law School
Richard Singer
Distinguished Professor
Rutgers Law School – Camden

Professor Ronald C. Slye
Seattle University School of Law

Roy M. Sobelson
Professor of Law
Georgia State University College of
Law

Norman W. Spaulding

Acting Professor of Law
School of Law (Boalt Hall)
University of California at Berkeley

Christina Spiesel
Senior Research Associate, Yale Law School
Adjunct Professor of Law,
Quinnipiac University School of Law
And Adjunct Professor Of Law,
New York Law School

Peter J. Spiro
Professor of Law
Hofstra University Law School

Joan Steinman
Distinguished Professor of Law
Chicago-Kent College of Law

Barbara Stark
Professor of Law
University of Tennessee College of Law

Margaret Stewart
Professor of Law
Chicago-Kent School of Law

Katherine Stone
Professor of Law
Cornell Law School

Victor J. Stone
Professor Emeritus of Law
University of Illinois at Urbana-Champaign

Robert N. Strassfeld
Professor of Law
Case Western Reserve University School of Law

Peter L. Strauss
Betts Professor of Law
Columbia Law School

Beth Stephens
Associate Professor of Law
Rutgers-Camden School of Law

Ellen Y. Suni
Professor of Law
University of Missouri-Kansas City School of Law

Michael Sweeney, Esq.

Eleanor Swift
Professor of Law
School of Law (Boalt Hall)
University of California at Berkeley

David Taylor
Professor of Law
Northern Illinois College of Law

Kim Taylor-Thompson
Professor, New York University School of Law

Peter R. Teachout
Professor of Constitutional Law
Vermont Law School

Harry F. Tepker
Calvert Chair of Law and Liberty and Professor of Law
University of Oklahoma

Beth Thornburg
Professor of Law
Dedman School of Law
Southern Methodist University

Lance Tibbles
Professor of Law
Capital University Law School

Mark Tushnet
Georgetown University Law Center

Kathleen Waits
Associate Professor
University of Tulsa College of Law

Neil Vidner
Duke University Law School

Joan Vogel
Professor of Law
Vermont Law School

Rhonda Wasserman
Professor of Law
University of Pittsburgh School of Law

Mark Weber
Professor of Law
DePaul University College of Law

Harry H. Wellington
Sterling Professor of Law Emeritus, Yale Law School
Professor of Law, New York Law School

Carwina Weng
Assistant Clinical Professor
Boston College Law School

Jamison Wilcox
Associate Professor
Quinnipiac University School of Law

Cynthia Williams
Associate Professor
University of Illinois College of Law and
Visiting Professor Fordham University Law School

Verna Williams
Assistant Professor of Law
University of Cincinnati College of Law

Harvey Wingo
Professor Emeritus of Law
Southern Methodist University

Steven L. Winter
Professor of Law
Brooklyn Law School

Zipporah B. Wiseman
Thomas H. Law Centennial Professor of Law
University of Texas

Stephen Wizner
William O. Douglas Clinical Professor of Law
Yale Law School

Barbara Bader Aldave
Loran L. Stewart Professor of Law
University of Oregon

Carolyn Patty Blum
Clinical Professor of Law and Director, International Human Rights Law Clinic
School of Law (Boalt Hall)
University of California at Berkeley

Anthony D'Amato
Leighton Professor of Law
Northwestern University School of Law

Nancy Ehrenreich
Associate Professor of Law
University of Denver College of Law

Maryam Elahi, Esq.
Director, Human Rights Program
Trinity College

John Hart Ely
Richard Hausler Professor of Law
University of Miami (formerly Dean, Stanford Law School)

Elizabeth Lutes Hillman
Assistant Professor of Law
Rutgers School of Law – Camden

Henry T. King, Jr.
Professor
Case Western Reserve University School of Law

Kit Kinports
Professor
University of Illinois College of Law

Professor Martin Levy
Thurgood Marshall School of Law

Garth Meintjes
Associate Director, Center for Civil and Human Right
University of Notre Dame School of Law

Dawn Clark Netsch
Professor of Law Emerita
Northwestern University School of Law

Edward D. Ohlbaum
Professor of Law
Temple University

Tamara Piety
Visiting Assistant Professor
University of Tulsa College of Law

Judith Royster
Professor of Law
University of Tulsa

Herman Schwartz
American University, Washington College of Law

Riva Siegel
Nicholas deB. Katzenbach Professor of Law
Yale Law School

Connie J. Sipe, Esq.
Sitka, Alaska

Aviam Soifer
Boston College Law School

Robert Solomon
Clinical Professor (Adjunct) of Law
Yale Law School

Cynthia Soohoo
Director, Bringing Human Rights Home
Human Rights Institute at Columbia Law School

David Abraham
Professor
University of Miami School of Law

Roger Abrams
Dean and Richardson Professor of Law
Northeastern University School of Law

Kathryn Abrams
Professor of Law, University of California-Berkeley School of Law
Professor of Law, Cornell Law School

John Adler
Professor of Law
University of San Francisco School of Law

Catherine Adcock Admay
Lecturer of Law, Director IDC
Duke Law School

Lee A. Albert
State University of New York, University at Buffalo School of Law

Richard Alderman
University of Houston Law Center

Ted Alevizos
Professor of Law, Retired
Suffolk University Law School

George Alexander
Professor of Law
Santa Clara University Law School

James J. Alfini
Professor of Law
Northern Illinois University College of Law

Reginald Alleyne
Visiting Professor of Law
Boston College Law School

Jose Alvarez
Professor of Law
Columbia Law School

Anthony G. Amsterdam

Judge Edward M. Weinfeld
Professor of Law
New York University School of Law

Alexis Anderson
Visiting Associate Clinical Professor

Boston College Law School

Claudia Angelos
Professor of Clinical Law
New York University School of Law

Amy Applegate
Clinical Associate Professor
Indiana University School of Law

Susan Appleton
Associate Dean of Faculty
Lemma Barkeloo & Phoebe Couzins Professor of Law
Washington University School of Law in St. Louis

Marianne Artusio
Associate Professor of Law
Jacob D. Fuchsberg Law Center, Touro College

Sameer M. Ashar
Acting Assistant Professor of Clinical Law
New York University School of Law

Frank Askin
Professor
Rutgers School of Law

Hope Babcock
Professor of Law
Georgetown University Law Center

James Francis Bailey, III
Indiana University School of Law

Katherine Baker
Associate Professor of Law
Chicago-Kent College of Law

Brook K. Baker
Professor of Law
Northeastern University School of Law

C. Edwin Baker
Professor of Law
University of Pennsylvania Law School

Milner Ball
Caldwell Professor of Constitutional Law
University of Georgia School of Law

Beverly Balos
Clinical Professor of Law
University of Minnesota Law School

Sylvia Barboza
Fenwick & West, LLP

John J. Barcelo
William Nelson Cromwell Professor of International and Comparative Law
Cornell Law School

Kimberly Barlow
UCLA School of Law

Robert Batey
Professor of Law
Stetson University College of Law

Jeffrey Bauman
Professor
Georgetown University Law Center

Loftus E. Becker, Jr.
University of Connecticut School of Law

Gordon J. Beggs
Staff Attorney, Employment Law Clinic
Cleveland-Marshall College of Law, Cleveland State University

Theresa M. Beiner
Professor of Law
UALR William H. Bowen School of Law

G. Andrew Benjamin
Affiliate Professor of Law and Clinical Professor of Medicine and Director, Parenting Evaluation/Training Program
University of Washington School of Law

Sue Bentch
Clinical Professor of Law
St. Mary's University School of Law

Laura Berend
Professor of Law
University of San Diego School of Law

Marilyn Berger
Professor of Law
Seattle University School of Law

Bethany R. Berger
Research Professor of Law
University of Connecticut School of Law

Mary Berkheiser
Associate Professor and Director of Clinical Programs
University of Nevada Las Vegas, William S. Boyd School of Law

Paul Schiff Berman
Associate Professor of Law
University of Connecticut School of Law

Susan Bitensky
Professor of Law
Michigan State University - Detroit College of Law

Brian Bix
Frederick W. Thomas Professor for the Interdisciplinary Study of Law and Language
University of Minnesota Law School

M. Gregg Bloche
Professor of Law
Georgetown University Law Center

Michael Blum
Professor of Law
Lewis and Clark Law School

Eric Blumenson
Professor
Suffolk University Law School

Charles S. Bobis
Professor of Law
St. John's University School of Law

Kenneth Bobroff
Associate Professor of Law
University of New Mexico School of Law

Jocelyne Boissonneault
Fenwick & West, LLP

Danny Bradlow
Professor of Law
American University, Washington College of Law

Deborah L. Brake
Assistant Professor of Law
University of Pittsburgh School of Law

Melinda Branscomb
Associate Professor of Law
Seattle University School of Law

Jean Braucher
Roger Henderson Professor of Law
University of Arizona, James E. Rogers College of Law

Lisa Brodoff
Assisant Clinical Professor
Seattle University School of Law

Darryl Brown
Professor
Washington & Lee University School of Law

Robert Brownstone
Fenwick & West, LLP

Jerome Bruner
University Professor and Research Professor of Psychology
New York University School Law

Susan Bryant
City University of New York School of Law

Ann M. Burkhart
Professor of Law
University of Minnesota Law School

John M. Burkoff
Associate Dean & Professor of Law
University of Pittsburgh School of Law

Sarah E. Burns
Professor of Clinical Law
New York University School of Law

Paul Cain
Internship Clinical Fellow
University of Denver College of Law

Janet M. Calvo
City University of New York School of Law

Stacy Caplow
Professor of Law and Director of Clinical Programs
Brooklyn Law School

David Carney
Instructor of Law
Case Western Reserve University School of Law

Kenneth Casebeer
University of Miami School of Law

Francis Catania
Associate Professor of Law
Widener University School of Law

David L. Chambers
Professor of Law
University of Michigan Law School

Howard Chapman
Professor of Law
Chicago-Kent College of Law

Erwin Chemerinsky
Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science
University of Southern California, The Law School

Margaret Chon
Seattle University School of Law

Richard H. Chused
Professor of Law
Georgetown University Law Center.

Karin Ciano
Lawyering Program
New York University School of Law

Donald C. Clarke
Professor of Law
University of Washington School of Law

Jerome A. Cohen
Professor of Law
New York University School Law

Laura Cohen
Visiting Assistant Clinical Professor of Law
Rutgers Law School

William Cohen
C. Wendell and Edith M. Carlsmith Professor Emeritus
Stanford Law School

Marjorie Cohn
Associate Professor of Law
Thomas Jefferson School of Law

Donna Coker
Professor
University of Miami School of Law

Doug Colbert
Professor
University of Maryland School of Law

Rodger R. Cole, Esq.
Fenwick & West, LLP

Nancy Cook
Director, Clinical Law Programs
Cornell Law School

Peggy Cooper Davis

Shad Professor of Law
New York University School of Law

Lois Cox
Clinical Professor of Law
University of Iowa College of Law

Randall Coyne
Professor
University of Oklahoma College of Law

Phyllis Crocker
Associate Professor of Law
Cleveland-Marshall College of Law, Cleveland State University

Cathy E. Crosson
Indiana University School of Law

Melissa Crow
International Human Rights Law Clinic
American University, Washington College of Law

John Culhane
Professor of Law
Widener University School of Law

E. Cunningham
Howard University School of Law

Mary C. Daly
Professor of Law
Fordham University School of Law

Erin Daly
Associate Professor of Law
Widener University School of Law

Margaret Danielson
Clinical Assistant Professor
University of Wisconsin Law School

Ellen Dannin
Professor of Law
California Western School of Law

Jacqueline Daunt
Fenwick & West, LLP

Julie Davies
Professor of Law
University of the Pacific, McGeorge School of Law

Michael Davis
Professor of Law
Cleveland-Marshall College of Law, Cleveland State University

Peter Davis
Associate Professor of Law
Jacob D. Fuchsberg Law Center, Touro College

Toni Hahn Davis
Associate Dean
Yale Law School

Kim Dayton
University of Kansas School of Law

Connie de la Vega
Professor of Law
University of San Francisco

Susan DeJarnatt
Associate Professor
Temple University, Beasley School of Law

John Delaney
Associate Professor (retired)
City University of New York School of Law

John Denvir
Professor of Law
University of San Francisco School of Law

Daniel H. Derby
Professor and Director of International Programs
Jacob D. Fuchsberg Law Center, Touro College

Laura Dickinson
Associate Professor of Law
University of Connecticut School of Law

Matthew Diller
Fordham University School of Law

Jane Dolkart
Associate Professor of Law
Southern Methodist University,
Dedmun School of Law

Sharon Dolovich
Acting Professor of Law
UCLA School of Law
David Dorfman
Assistant Professor
Pace University School of Law

Mary L. Dudziak
Judge Edward J. and Ruey L.
Guirado Professor of Law and
History
University of Southern California,
The Law School

Jill Elijah
Clinical Instructor
Criminal Justice Institute, Harvard
Law School

Russell Engler
New England School of Law

Peter Enrich
Professor of Law
Northeastern University School of
Law

Deborah Epstein
Associate Professor of Law
Georgetown University Law Center

Peter Erlinder
Professor
William Mitchell College of Law

Timothy H. Everett
Clinical Professor of Law
University of Connecticut School of
Law

Mary Jo Eyster
Clinical Associate Professor
Brooklyn Law School

Bryan K. Fair
Thomas E. Skinner Professor of Law
The University of Alabama School of
Law

Richard Falk
Albert G. Milbank Professor of
International Law and Practice
Emeritus
Princeton University

Christine Farley
Assistant Professor
American University, Washington
College of Law

Stephanie Farrior
Professor of Law
Pennsylvania State University,
Dickinson School of Law

Katherine Federle
Associate Professor of Law and
Director Justice for Children Project
Michael E. Moritz College of Law,
The Ohio State University

Marvin Fein
Professor of Law
University of Pittsburgh School of
Law

Heidi Feldman
Professor of Law
Georgetown University Law Center

Mary Louise Fellows
Professor of Law
University of Minnesota Law School

Todd D. Fernow
Professor of Law
University of Connecticut School of
Law

Rebecca A.E. Fewkes
Fenwick & West, LLP

Keith A. Findley
Clinical Associate Professor
University of Wisconsin Law School

Martha Albertson Fineman
Cornell University School of Law

Nancy Fink
Brooklyn Law School

Lucinda Finley
Frank Raichle Professor of Law
State University of New York,
University at Buffalo School of Law

Linda E. Fisher
Associate Professor of Law
Seton Hall University School of Law

James Fleming
Professor of Law
Fordham University School of Law

George P. Fletcher
Cardozo Professor of Jurisprudence
Columbia Law School

John Flynn
Professor of Law
Northeastern University School of Law

Denise Fort
Professor of Law
University of New Mexico School of Law

Cyril A. Fox
Professor of Law
University of Pittsburgh Law School

Darren Franklin
Fenwick & West, LLP

Ann E. Freedman
Associate Professor of Law
Rutgers Law School - Camden

Niels W. Frenzen
Clinical Assistant Professor of Law
University of Southern California,
The Law School

Clark Freshman
Professor
University of Miami School of Law

Bruce W. Frier
H.K. Ransom Professor of Law
University of Michigan Law School

Lawrence Frolik
Professor of Law
University of Pittsburgh Law School

Michael Froomkin
University of Miami School of Law
Maryellen Fullerton
Professor of Law
Brooklyn Law School

Marc Galanter
Professor of Law
University of Wisconsin Law School

Mary Gale
Professor of Law
Whittier Law School

William Galloway
Legal Writing Instructor
Seattle University School of Law

Paula Galowitz
Clinical Professor of Law
New York University School of Law

David Garland
Arthur T. Vanderbilt Professor of Law
New York University School of Law

Eileen Gauna
Professor of Law
Southwestern University School of Law

Frederick Gedicks
Professor of Law
Brigham Young University Law School

David H. Getches
Raphael J. Moses Professor of Natural Resources Law
University of Colorado School of Law

Franklin E. Gill
Research Professor
University of New Mexico School of Law

Brian Glick
Associate Clinical Professor of Law
Fordham University School of Law

Pamela Goldberg
Associate Professor of Law
City University of New York School of Law

Toby Golick
Clinical Professor of Law and Director, Bet Tzedek Legal Services Clinic
Benjamin N. Cardozo School of Law

Victor M. Goode
Associate Professor of Law
City University of New York School of Law

Michael H. Gottesman
Professor of Law
Georgetown University Law Center

William Gould, IV
Charles A. Beardsley Professor of Law
Stanford Law School

Judith Greenberg
New England School of Law

Edwin Greenebaum
Professor Emeritus of Law
Indiana University School of Law-Bloomington

Leigh Hunt Greenhaw
Lecturer in Law
Washington University School of Law in St. Louis

Lawrence Grosberg
Professor of Law
New York Law School

Samuel Gross
Professor of Law
University of Michigan Law School

Martin Guggenheim
Professor of Clinical Law
New York University School of Law

Phoebe Haddon
Professor of Law
James E. Beasley School of Law, Temple University

Daniel Halperin
Professor of Law
Harvard Law School

Gail Hammer
Family Law/Domestic Violence Project Director and Visiting Professor of Clinical Law
Gonzaga University School of Law

Henry Hansmann
Sam Harris Professor of Law
Yale Law School

Frances Hardy
Clinical Associate Professor
Indiana University School of Law

Sidney L. Harring
Professor of Law
City University of New York School of Law

Hendrik Hartog
Class of 1921 Bicentennial Professor of the History of American Law and Liberty
Princeton University

Mark J. Heyrman
Clinical Professor of Law
University of Chicago Law School

Craig Hoffman
Associate Professor of Law
Georgetown University Law Center

Candice Hoke
Cleveland-Marshall College of Law, Cleveland State University

Wallace Holohan
Clinical Professor of Law
Northeastern University School of Law

Wythe Holt
University Research Professor of Law
University of Alabama School of Law

Joan W. Howarth
Professor of Law
Boyd School of Law, University of Nevada

Charlotte Ann Hughart
Clinical Professor of Law
Texas Wesleyan University School of Law

Marsha Huie
Professor of Law
St. Mary's University School of Law

Sarah Ignatius
Lecturer
Boston College Law School

Suzanne H. Jackson
Clinical Fellow
University of Baltimore Family Law Clinic

Ellen Moses James
Professor of Law, Retired
City University of New York School of Law

Peter Jaszi
Professor of Law
American University, Washington College of Law

Emma Jordan
Professor of Law
Georgetown University Law Center

Peter Joy
Professor
Washington University School of Law in St. Louis

Jose Roberto Juarez, Jr.
Visiting Professor of Law
University of Oregon School of Law

Ann Juergens
Professor of Law
William Mitchell College of Law

Daniel Kanstroom
Associate Clinical Professor of Law
Boston College Law School

Leonard Kaplan
Mortimer Jackson Professor of Law
University of Wisconsin School of Law

Ratna Kapur
Global Visiting Professor of Law
New York University School of Law

Alice Kaswan
Associate Professor
University of San Francisco School of Law

Stan Katz
Professor
Woodrow Wilson School, Princeton University

Gregory Keating
Professor of Law
University of Southern California, The Law School

Patrick A. Keenan
Professor of Law
University of Detroit Mercy

Walter Kendall
John Marshall Law School

Duncan Kennedy
Professor
Harvard Law School

Linda Kerber

Lecturer in Law and May Brodeck
Professor in the Liberal Arts and Sciences
University of Iowa

Pauline Kim
Professor of Law
Washington University School of Law in St. Louis

Patricia King
Professor
Georgetown University Law Center

Karl Klare
Professor
Northwestern University School of Law

Ruth Kovnat
Professor of Law
University of New Mexico School of Law

Stanton D. Krauss
Professor
Quinnipiac University School of Law

Ellen Kreitzberg
Associate Professor of Law
Santa Clara University Law School

Stefan H. Krieger
Professor of Law
Hofstra University School of Law

Richard Kuhns
Professor of Law
Washington University

Bailey Kuklin
Brooklyn Law School

Madeleine Kurtz
Professor of Law
New York University School of Law

James A. Kushner
Professor of Law
Southwestern University School of Law

Nickolas J. Kyser
Associate Professor of Law
University of Detroit Mercy

D. Bruce La Pierre
Washington University School of Law in St. Louis

Maivân Clech Lâm
Professor
American University, Washington College of Law

Heidi Lamb
Fenwick & West, LLP

Karen A. Lash
Associate Dean
University of Southern California, The Law School

Kenneth Lasson
University of Baltimore Law School

Stephen Latham
Assistant Professor of Law
Quinnipiac University School of Law

Sylvia Law
Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry
New York University School of Law

Lydia Lazar
Assistant Dean for International Law and Policy Development
Chicago-Kent College of Law

Donna H. Lee
Acting Assistant Professor
New York University School of Law

Lisa Lerman
Professor of Law and Director, Law and Public Policy Program
Catholic University Law School

Alan Lerner
Practice Professor of Law

University of Pennsylvania Law School

Howard Lesnick
Jefferson B. Fordham Professor of Law
University of Pennsylvania Law School

Leslie C. Levin
Professor of Law
University of Connecticut School of Law

Alan Levine
Levine & Mandelbaum

Jerome Levinson
Distinguished Lawyer in Residence
American University, Washington College of Law

Degna P. Levister
Associate Professor of Law
City University of New York School of Law

Suzanne J. Levitt
Professor of Law
Drake Law School

L. Hope Lewis
Professor of Law
Northeastern University School of Law

Raven Lidman
Clinical Professor of Law
Seattle University School of Law

Richard Litvin
Associate Professor of Law
Quinnipiac University School of Law

Jules Lobel
Professor of Law
University of Pittsburgh Law School

Stephen Loffredo
Associate Professor of Law
City University of New York School of Law

Antoinette Sedillo Lopez
Professor of Law
University of New Mexico School of Law

Gerald P. López
Professor of Law
New York University School Law

David Luban
Frederick Haas Professor of Law and Philosophy
Georgetown University Law Center

William V. Luneburg
Professor of Law
University of Pittsburgh School of Law

Mary Lynch
Clinical Professor of Law
Albany Law School

Beth Lyon
Assistant Professor of Law and Director, Farmworker Legal Aid Clinic
Villanova University School of Law

Hugh MacGill
Dean Emeritus and Professor of Law
University of Connecticut School of Law

Holly Maguigan
Professor of Clinical Law
New York University School of Law

Martha Mahoney
Professor of Law
University of Miami School of Law

Karl Manheim
Professor of Law
Loyola Law School

Lynn Marcus

Director of the Immigration Law
Clinic and Assistant Adjunct
Professor of Law
James E. Rogers College of Law,
University of Arizona

Nancy Marder
Chicago-Kent College of Law

Susan M. Marsh
Fenwick & West, LLP

Elizabeth Phillips Marsh
Professor of Law
Quinnipiac University School of
Law

Lynn Martell
Clinical Professor of Law
New York University School of Law

Peter W. Martin
Jane M.G. Foster Professor of Law
Cornell Law School

Alfred D. Mathewson
Associate Dean & Professor
University of New Mexico School of
Law

Mari Matsuda
Professor
Georgetown University Law Center

James R. Maxeiner
Visiting Professor of Law
Jacob D. Fuchsberg Law Center,
Touro College

Claire C. Robinson May
Lecturer in Legal Writing, Research
and Advocacy
Cleveland-Marshall College of Law,
Cleveland State University

Linda McClain
Professor of Law
Hofstra University School of Law

Susan McClellan
Legal Writing Instructor
Seattle University School of Law

Martha McCluskey
State University of New York,
University at Buffalo School of Law

Elizabeth McCormick
William R. Davis Clinical Teaching
Fellow
University of Connecticut School of
Law

Patricia McCoy
Professor of Law
Cleveland-Marshall College of Law,
Cleveland State University

Susan E. McGuigan
Associate Dean of Student Services
Whittier Law School

Joyce McIntyre
Family Defense Clinic
New York University School of Law

Robert F. Meagher
Emeritus Professor in International
Law
Fletcher School of Law and
Diplomacy, Tufts University

Alan Meisel
Dickie, McCamey & Chilcote
Professor of Bioethics and Professor
of Law
University of Pittsburgh Law School

Miguel Mendez
Adelbert H. Sweet Professor of Law
Stanford Law School

Naomi Mezey
Associate Professor of Law
Georgetown University Law Center

Binny Miller
Professor of Law
American University, Washington
College of Law

David W. Miller
Professor of Law

University of the Pacific, McGeorge School of Law

Chester L. Mirsky
New York University School of Law

Mary Harter Mitchell
Indiana University School of Law-Indianapolis

Jennifer Moore
Associate Professor of Law
University of New Mexico School of Law

David A. Moran
Assistant Professor of Law
Wayne State University Law School

Nancy Morawetz
Professor of Clinical Law
New York University School of Law

Ziyad Motala
Professor of Law and Director Graduate Studies
Howard University School of Law

Suzanne Mounts
Professor
University of San Francisco School of Law

Mary-Beth Moylan
University of the Pacific, McGeorge School of Law

Ann Moynihan
Fordham University School of Law

Millard Murphy
Lecturer at Law
University of California, Davis, King Hall School of Law

Aaron Myers
Fenwick & West, LLP

Dorothy Nelkin
New York University School Law

Joel Newman
Wake Forest Law School
Clayton Noble
Attorney and Counselor at Law
Fenwick & West LLP

Robert L. Oakley
Director of the Law Library and Professor of Law
Georgetown University Law Center

Kimberly E. O'Leary
Associate Professor of Law
Thomas Cooley Law School

Kelly Browe Olson
Visiting Professor and Director of the Mediation Clinic
University of Arkansas at Little Rock Bowen School of Law

Mark S. Ostrau
Fenwick & West, LLP

Joan O'Sullivan
University of Maryland School of Law

Richard Ottinger
Dean Emeritus
Pace Law School

Laura Owen
University of Houston Law Center

Calvin Pang
Visiting Professor of Law
University of Minnesota Law School

Patrick Parenteau
Professor of Law
Vermont Law School

Margaret L. Paris
Associate Professor
University of Oregon School of Law

Inga L. Parsons
New York University School of Law

Elizabeth Patterson
Associate Professor of Law
Georgetown University Law Center

Jeremy Paul
Professor of Law
University of Connecticut School of Law

Rudolph Peritz
Professor of Law
New York Law School

Michael L. Perlin
Professor of Law
New York Law School

Henry Perritt
Dean and Professor of Law
Chicago-Kent College of Law

Michael J. Perry
University Distinguished Chair in Law
Wake Forest University School of Law

Tram Phi
Fenwick & West, LLP

Jed Phillips
Fenwick & West, LLP

Michele Pistone
Assistant Professor and Director of Clinical Programs
Villanova University School of Law

Ellen S. Podgor
Professor of Law
Georgia State University College of Law

Geri Pomerantz
Visiting Professor
Albany Law School

Mary Prosser
Deputy Director, Criminal Justice Institute and Lecturer at Law
Harvard Law School

William Quigley
Professor of Law
Loyola University New Orleans

Margaret Radin
William Benjamin Scott and Luna M. Scott Professor of Law and Director, Program in
Law, Science and Technology
Stanford Law School

Noel Ragsdale
Clinical Professor of Law
University of Southern California, The Law School

Aparna Rajagopal
Fenwick & West, LLP

Elizabeth Rapaport
Professor of Law
University of New Mexico School of Law

Martha Rayner
Associate Clinical Professor of Law
Fordham University School of Law

Victoria Read
Clinical Instructor
Harvard Law School

Peter L. Reich
Professor of Law
Whittier Law School

Allison Rice
Duke University Law School

Robert Rich
Professor of Law and Political Science
University of Illinois College of Law

Judith Ritter
Professor
Widener University School of Law

Ira P. Robbins
Professor of Law
American University, Washington College of Law

Joel Rogers
Professor

University of Wisconsin Law School

Florence Wagman Roisman
Professor of Law and Paul Beam Fellow
Indiana University School of Law--Indianapolis

Richard A. Rosen
Professor of Law and Senior Associate Dean
University of North Carolina School of Law

Howard Rosenberg
Professor of Law
University of Denver College of Law

S. James Rosenfeld
Visiting Professor of Clinical Law
Seattle University School of Law

Joy Rosenthal McIntyre
Attorney, Family Defense Clinic
New York University School Law

Thomas Ross
Professor of Law
University of Pittsburgh Law School

Merrick T. Rossein
Professor of Law
City University of New York School of Law

Tanina Rostain
Professor of Law
New York Law School

Patricia Roth
Director, Law Alumni Affairs
Georgetown University Law Center

James Rowan
Northeastern University School of Law

Michael H. Rubin
Fenwick & West, LLP

David Rudovsky
University of Pennsylvania Law School

Teema Ruskola
Assistant Professor of Law
American University, Washington College of Law

Susan Rutberg
Professor
Golden Gate University School of Law

Leila Sadat
Professor of Law
Washington University School of Law in St. Louis

Leslie Salzman
Clinical Professor of Law
Benjamin N. Cardozo School of Law

Daniel Schaffer
Professor of Law
Northeastern University School of Law

Michael P. Scharf
Professor of Law and Director of the Center for International Law and Policy
New England School of Law

Barbara A. Schatz
Director of Clinical Programs
Columbia Law School

George Schatzki
Professor of Law
Arizona State University College of Law

Anne Schroth
Clinical Assistant Professor
University of Michigan Law School

Stephen J. Schulhofer
Professor of Law
New York University School of Law

Rob Schwartz
Professor of Law

University of New Mexico School of Law

Bettie Scott
Associate Professor
City University of New York School of Law

Anthony J. Sebok
Professor of Law
Brooklyn Law School

Robert A. Sedler
Distinguished Professor of Law and Gibbs Chair in Civil Rights and Civil Liberties
Wayne State University Law School

Butler Shaffer
Professor of Law
Southwestern University School of Law

Tracy R. Shapiro
Fenwick & West, LLP

Carole Shapiro
Professor of Legal Methods
Jacob D. Fuchsberg Law Center, Touro College

Karen Shatzkin
Shatzkin & Mayer, P.C.

Katherine C. Sheehan
Southwestern University School of Law

Jeffrey Sherman
Professor of Law
Chicago-Kent College of Law

Belinda Sifford
Visiting Professor
Vermont Law School

Marjorie A. Silver
Professor of Law
Jacob D. Fuchsberg Law Center, Touro College

Marcella Silverman
Associate Clinical Professor of Law
Fordham University School of Law

Andrew Silverman
Joseph M. Livermore Professor of Law & Director, Clinical Programs
University of Arizona, James E. Rogers College of Law

Eileen Silverstein
Zephaniah Swift Professor of Law
University of Connecticut School of Law

Dan Simon
Associate Professor
University of Southern California, The Law School

David Skover
Professor of Law
Seattle University School of Law

Cindy R. Slane
Assistant Clinical Professor of Law & Director of Field Placement Programs
Quinnipiac University School of Law

Lloyd Snyder
Professor of Law
Cleveland-Marshall College of Law, Cleveland State University

Gemma Solimene
Clinical Associate Professor of Law
Fordham University School of Law

Jeff Sovern
Professor of Law
St. John's University School of Law

Girardeau Spann
Professor of Law
Georgetown University Law Center

Mary Spector
Associate Professor of Law
Southern Methodist University, Dedmun School of Law

Emily A. Spieler
Professor
West Virginia University College of Law, U.S. Fulbright Scholar Fall 2001, University
College Cork, Ireland

Theodore St. Antoine
Degan Professor Emeritus of Law
University of Michigan Law School

James Stark
Professor of Law
University of Connecticut School of Law

Andrej Starkis
Assistant Professor
Massachusetts School of Law

Jean R. Sternlight
John D. Lawson Professor of Law
University of Missouri-Columbia School of Law

June Stewart
Associate Professor and Library Director
Gonzaga University School of Law

Randolf N. Stone
Clinical Professor of Law
University of Chicago Law School

Irwin P. Stotzky
Professor of Law & Director, Center for the Study of Human Rights
University of Miami School of Law

Kelly Strader
Professor of Law
Southwestern University School of Law

John Strait
Associate Professor
Seattle University School of Law

George Strickler, Jr.
Tulane Law School

Nadine Strossen
Professor of Law
New York Law School

Linda Sugin
Visiting Professor, NYU School of Law
Associate Professor, Fordham University School of Law

Susan D. Susman
Assistant Professor of Legal Writing
Brooklyn Law School

Brian Tamanaha
Professor of Law
St. John's University School of Law

Susan Taylor
Clinical Adjunct Professor
City University of New York School of Law

Ruti Teitel
Stiefel Professor of Comparative Law
New York Law School

Kellye Testy
Associate Professor
Seattle University School of Law

David Thomas
Clinical Professor of Law
Chicago-Kent College of Law

David Thronson
Acting Assistant Professor of Law
New York University School of Law

Victor Thuronyi
Adjunct Professor of Law
Georgetown University Law Center

Adam Thurschwell
Cleveland-Marshall College of Law, Cleveland State University

Michael E. Tigar
Professor of Law
American University, Washington College of Law

Margaret A. Tonon
Dir. for Student Affairs and Clinical Supervisor
UM School of Law

Paul Tractenberg
Board of Governors Distinguished Service Professor and Alfred C. Clapp Distinguished
Public Service Professor of Law
Rutgers Law School - Newark

Dr. Martha Traylor
Professor Emerita
Seton Hall University School of Law

Melissa C. Trousdale
Fenwick & West, LLP

Gerald Uelmen
Professor of Law
Santa Clara University School of Law

Stephen Utz
Professor of Law
University of Connecticut School of Law

William Van Alstyne
Perkins Professor of Constitutional Law
Duke University Law School

Dominick Vetri
Professor of Law
University of Oregon School of Law

Valorie Vojdik
Assistant Professor
Western New England College, School of Law

Adrienne Volenik
Associate Clinical Professor of Law
T.C. Williams School of Law, University of Richmond

Leti Volp
Associate Professor
American University, Washington College of Law

Rachel Vorspan
Associate Professor
Fordham University School of Law

Elaine Wallace
Fenwick & West, LLP

Judith Wegner
Professor of Law
University of North Carolina

Mark E. Weinstein
Associate Professor of Business and Law
University of Southern California, The Law School

David Weissbrodt
Fredrikson and Byron Professor of Law
University of Minnesota Law School

Deborah Weissman
Associate Professor of Law
University of North Carolina School of Law

Catherine Wells
Professor of Law
Boston College Law School

Stefanie Wen
Fenwick & West, LLP

Marianne Wesson
Professor and Wolf-Nichol Fellow
University of Colorado Law School

Robert Westley
Associate Professor of Law
Tulane Law School

Carter White
Lecturer at Law
University of California at Davis, King Hall School of Law

William M. Wiecek
Congdon Professor of Public Law
Maxwell School of Law Syracuse University

Philip Wile
Professor
University of the Pacific, McGeorge School of Law

Carolyn Wilkes Kaas
Associate Professor of Law and Director of Clinical Skills
Quinnipiac University School of Law

Joan Williams
Professor of Law and Director, Program on Gender, Work and Family
American University, Washington College of Law

Gary Williams
Professor of Law
Loyola Law School

Lucy A. Williams
Professor of Law
Northeastern University School of Law

Richard J. Wilson
American University, Washington College of Law

Ken Wing
Professor of Law
Seattle University School of Law

Peter Winship
Professor of Law
Southern Methodist University, Dedmun School of Law

David Wippman
Professor of Law
Cornell Law School

Michael Wishnie
Associate Professor of Clinical Law
New York University School of Law

Mark E. Wojcik
Professor of Law
The John Marshall Law School

Karen Worthington
Director, Barton Child Law & Policy Clinic
Emory University School of Law

Theresa Wright
Clinical Professor
Northwestern School of Law of Lewis and Clark College

Jennifer Wright
Assistant Professor of Law and Director, Clinical Law Program
Williamette University College of Law

David Yamada
Professor of Law
Suffolk University Law School

George Yeannakis
Visiting Clinical Professor of Law
Seattle University School of Law

Mary Zanolli Natkin
Associate Clinical Professor
Washington and Lee University School of Law

Mitchell Zimmerman
Coordinator, Law Professors for the Rule of Law
Fenwick & West, LLP

Clifford Zimmerman
Clinical Associate Professor of Law
Northwestern University School of Law

Richard Zitrin
Director, Center for Applied Legal Ethics

No. 05-184

In the Supreme Court of the United States

SALIM AHMED HAMDAN, PETITIONER

v.

DONALD H. RUMSFELD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
GREGORY G. KATSAS
Deputy Assistant Attorney General
DOUGLAS N. LETTER
ROBERT M. LOEB
ERIC D. MILLER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether courts should abstain from interfering with ongoing military commission proceedings.

2. Whether the President has the authority to establish military commissions.

3. Whether the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, creates judicially enforceable rights.

4. Whether courts may disregard the President's determination as Commander in Chief that al Qaeda combatants are not covered by the Geneva Convention.

5. Whether petitioner has a colorable claim of prisoner-of-war status under the Geneva Convention.

6. Whether the federal regulations governing military commissions must conform to the provisions in the Uniform Code of Military Justice that apply only to courts-martial.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 415 F.3d 33. The opinion of the district court (Pet. App. 20a-49a) is reported at 344 F. Supp. 2d 152.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2005. The petition for a writ of certiorari was filed on August 8, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The government sought the dismissal of all but Secretary Rumsfeld as respondents in this case. The district court's docket sheet indicates that all of the respondents save the Secretary were terminated on November 23, 2004, after the government filed its notice of appeal, which listed all of the original respondents in the caption.

STATEMENT

1. On September 11, 2001, the United States endured a foreign enemy attack more savage, deadly, and destructive than any sustained by the Nation on any one day in its history. That morning, agents of the al Qaeda terrorist network hijacked and crashed four commercial airliners while targeting the Nation's financial center and its seat of government. The attacks killed approximately 3000 people and caused injury to thousands more, destroyed billions of dollars in property, and exacted a heavy toll on the Nation's infrastructure and economy.

The President took immediate action to defend the country and to prevent additional attacks. Congress swiftly enacted its support of the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224.

The President ordered the armed forces of the United States to subdue the al Qaeda terrorist network and the Taliban regime in Afghanistan that supported it. In the course of these armed conflicts, which remain ongoing, the United States, consistent with the Nation's settled practice in times of war, has seized numerous persons and detained them as enemy combatants. And consistent with historical practice, the President ordered the establishment of military commissions to try members of al Qaeda and others involved in international terrorism against the United States for violations of the laws of war and other applicable laws. In doing

so, the President expressly relied on "the authority vested in me * * * as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the [AUMF] * * * and sections 821 and 836 of title 10, United States Code." *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (2001) (Military Order).[2]

2. In July 2003, the President, acting pursuant to the Military Order, designated petitioner for trial before a military commission, finding "that there is reason to believe that [petitioner] was a member of al Qaeda or was otherwise involved in terrorism directed against the United States." Pet. App. 1a-2a. Petitioner was charged with a conspiracy to commit attacks on civilians and ci-

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[2] Section 821 of Title 10, United States Code, provides in relevant part:

> **Art. 21. Jurisdiction of courts-martial not exclusive**
>
> 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[.]

Section 836 of Title 10, United States Code, provides in relevant part:

> **Art. 36. President may prescribe rules**
>
> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, * * * may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

vilian objects, murder and destruction of property by an unprivileged belligerent, and terrorism. *Id.* at 62a-67a.

The Charge against petitioner arises out of his close connection to Osama bin Laden and his participation from February 1996 to November 2001 in al Qaeda's campaign of international terrorism against the United States. Pet. App. 65a-67a. The Charge states that petitioner served as bin Laden's bodyguard and personal driver. In that capacity, he delivered weapons and ammunition to al Qaeda members and associates; transported weapons from Taliban warehouses to the head of al Qaeda's security committee at Qandahar, Afghanistan; purchased or otherwise secured trucks for bin Laden's bodyguard detail; and transported bin Laden and other high-ranking al Qaeda operatives in convoys with armed bodyguards. *Ibid.*

The Charge also states that petitioner was aware that bin Laden and his associates had participated in terrorist attacks against U.S. citizens and property, including the September 11 attacks. Pet. App. 65a. Petitioner received terrorist training himself, learning to use machine guns, rifles, and handguns at an al Qaeda training camp in Afghanistan. *Id.* at 67a.

The military commission proceedings at Guantanamo accord petitioner numerous procedural protections. He has the right to legal counsel and is provided with trained counsel. 32 C.F.R. 9.4(c)(2). He has a right to a copy of the Charge in a language he understands, 32 C.F.R. 9.5(a), the presumption of innocence, 32 C.F.R. 9.5(b), and proof beyond a reasonable doubt, 32 C.F.R. 9.5(c). He may confront witnesses against him, 32 C.F.R. 9.5(i), and may subpoena his own witnesses, if reasonably available, 32 C.F.R. 9.5(h). Petitioner will have access to all evidence, except classified and other

national security material (protected information), which nevertheless must be provided to his detailed defense counsel before being admitted against him. 32 C.F.R. 9.5(e), 9.6(d)(5), 9.9.[3] If petitioner is found guilty by the commission, that judgment will be reviewed by a review panel comprised of three military officers (which may include civilians commissioned as such), at least one of whom has experience as a judge,[4] the Secretary of Defense, and ultimately the President, if he does not designate the Secretary as the final decisionmaker. 32 C.F.R. 9.6(h).[5]

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[3] On August 31, 2005, Secretary Rumsfeld approved changes to the military commission procedures, including new language providing that the accused and civilian defense counsel "shall be provided access to Protected Information * * * to the extent consistent with national security, law enforcement interests, and applicable law." See Revised Military Commission Order No. 1 § 6(D)(5)(b) (Aug. 31, 2005) <http://www.defenselink.mil/news/Sep2005/d20050902order.pdf>. The revised procedures further provide that, to the extent such access is denied and "an adequate substitute for that information[] * * * is unavailable, the Prosecution shall not introduce the Protected Information as evidence without the approval of the Chief Prosecutor" and the presiding officer "shall not admit the Protected Information as evidence if" its admission "would result in the denial of a full and fair trial." *Ibid.*

[4] As the district court acknowledged, the review panel is comprised of "some of the most distinguished civilian lawyers in the country," Pet. App. 39a, including Griffin B. Bell, a former federal appeals court judge and Attorney General, and William T. Coleman, a former cabinet secretary, *id*. at 39a n.13.

[5] Prior to the district court's order enjoining the commission proceedings, the Appointing Authority for Military Commissions, see 32 C.F.R. 9.2, granted in part petitioner's motion to remove several of the commission members based on questions regarding their impartiality. Referencing standards applied in federal and international courts, the Authority ordered the removal of three commission members. See http://www.defenselink.mil/news/Oct2004/d20041021panel.pdf.

While at Guantanamo, petitioner has also been given a hearing before a Combatant Status Review Tribunal, which confirmed that he is subject to continued detention as an enemy combatant who is "either a member of or affiliated with Al Qaeda." C.A. App. 249; see *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633 (2004) (plurality opinion) (concluding that Congress has authorized the detention of enemy combatants by enacting the AUMF); *id.* at 2678-2679 (Thomas, J., dissenting).

3. Petitioner's counsel instituted these proceedings by filing a petition for habeas corpus and/or mandamus in the United States District Court for the Western District of Washington, alleging in relevant part that trial before a military commission rather than a court-martial convened under the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801 *et seq*., would be unconstitutional and a violation of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 (the Geneva Convention). See C.A. App. 38-68. While petitioner acknowledged that he worked for bin Laden for many years before his capture, see *id.* at 50-51 (paras. 15-16), he asserted that he was unaware of bin Laden's terrorist activities, *id.* at 52 (para. 19). The district court transferred the case to the United States District Court for the District of Columbia. *Id.* at 195.

4. The district court granted the petition in part, holding that petitioner could not be tried before a military commission. Pet. App. 49a. The court first declined to abstain to allow proceedings to continue before the military commission, which was in the midst of a hearing to consider the very claims that petitioner raises in his federal-court petition, and was a month away from the scheduled trial date. See C.A. App. 250. The court instead held that abstention was "neither required nor

appropriate" because petitioner challenged the jurisdiction of the commission over him. Pet. App. 24a.

Next, the district court ruled that the military commission lacked jurisdiction over petitioner because a "competent tribunal" had yet to determine whether he was entitled to prisoner-of-war (POW) status under the Geneva Convention, a status that the court believed would preclude his trial by military commission. See Pet. App. 29a-31a. In so holding, the district court determined that the Convention grants petitioner rights enforceable in federal court and disregarded the President's determination that al Qaeda combatants are not covered by the Convention. *Id*. at 29a-30a, 36a.

The district court further held that, even if a "competent tribunal" were to determine that petitioner is an unlawful enemy combatant rather than a POW, he could still not be tried by a military commission unless the commission rules are amended to conform with Article 39 of the UCMJ, 10 U.S.C. 839, which governs the presence of the accused at a court-martial. Pet. App. 46a-47a.

Based on these legal rulings, the district court took the extraordinary and unprecedented step of enjoining the ongoing military commission proceedings, and it ordered that petitioner be released to the general detention population at Guantanamo Bay Naval Base. Pet. App. 49a.

After the government filed a notice of appeal, petitioner filed a petition for a writ of certiorari before judgment, which this Court denied on January 18, 2005.

5. The court of appeals reversed. Pet. App. 1a-18a. With respect to the claims that it viewed as going to the power of the military commission to try petitioner, the court declined to abstain. *Id*. at 3a-4a. On the merits,

however, the court of appeals rejected petitioner's claims. Specifically, it held that, through the AUMF and Articles 21 and 36 of the UCMJ, 10 U.S.C. 821, 836, Congress has given the President authority to establish military commissions. Pet. App. 4a-7a.

The court of appeals also rejected petitioner's reliance on the Geneva Convention. Pet. App. 7a-13a. It held that the 1949 Geneva Convention does not create judicially enforceable rights. The court based this conclusion on the principle that treaties, "even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." *Id*. at 7a-8a (quoting Restatement (Third) of the Foreign Relations Law of the United States § 907 cmt. (a) at 395 (1987)). In particular, it observed that in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), this Court held that the 1929 version of the Geneva Convention did not create judicially enforceable rights. The court found *Eisentrager* dispositive with respect to the current version of the Convention, because none of the differences between the 1949 and 1929 Conventions undermined *Eisentrager*'s analysis. Pet. App. 9a-10a.

The court of appeals held in the alternative that, even if the Geneva Convention were judicially enforceable, petitioner could not claim its protection. The court agreed with the President's determination that the Convention does not apply to members of al Qaeda, which, as a non-state terrorist organization, is not one of the "High Contracting Parties" to the Convention. Pet. App. 11a. And petitioner did not qualify as a member of a group that met the Convention's requirements for POW status. *Ibid.* The court found petitioner's reliance on Army Regulation 190-8 to establish POW status

equally unavailing. The court explained that the President had determined that al Qaeda operatives such as petitioner are not prisoners of war and that, to the extent the regulation required a "competent tribunal" to determine his status, the military commission itself could make that determination. Pet. App. 16a.

The court of appeals further held that petitioner was not protected by Common Article 3 of the Geneva Convention, 6 U.S.T. 3318, which applies only to "armed conflict not of an international character." Pet. App. 12a. The court observed that the President has determined that this provision is inapplicable to the conflict with al Qaeda, because the conflict is "international in scope." *Ibid.* The court explained that the President's interpretation of a treaty provision is entitled to "great weight," *ibid.*, and it upheld his "reasonable view of the provision," *id.* at 13a. It went on to explain that, even if Common Article 3 did apply, abstention would be appropriate because his claims under Common Article 3 concern "not *whether* the Commission may try him, but rather *how* the Commission may try him," which is "by no stretch a jurisdictional objection." *Ibid.* Accordingly, even if (contrary to the court's ruling) his claim had merit, it could properly be brought "in federal court after he exhausted his military remedies." *Ibid.*

Finally, the court of appeals rejected the district court's conclusion that Article 36 of the UCMJ, 10 U.S.C. 836, see note 2, *supra*, requires that the rules governing military commissions comply with the UCMJ provisions applicable by their express terms to courts-martial only. The court of appeals observed that, because "the UCMJ takes care to distinguish between 'courts-martial' and 'military commissions,'" the district

court's reading "would obliterate" the distinction the UCMJ draws between them. Pet. App. 14a.

Judge Williams concurred. He took issue only with the court's analysis of Common Article 3, which he believed to be applicable to the conflict with al Qaeda. Pet. App. 18a. Because he agreed with the majority that the Geneva Convention is not enforceable in court and that any claims under Common Article 3 should be deferred until the completion of the military-commission proceedings, Judge Williams "fully agree[d] with the court's judgment." *Id*. at 17a.

ARGUMENT

The decision of the court of appeals is interlocutory. It simply reversed the district court's erroneous decision to enjoin ongoing military commission proceedings a month before the scheduled trial date. Petitioner's trial before a military commission has not yet begun. The military commission may acquit petitioner or may resolve some or all of petitioner's claims in his favor, and some may not even arise (*e.g.*, if classified materials are not presented at trial). In the event petitioner is convicted, an actual trial would create a record that would facilitate any review by this Court. Moreover, the decision of the court of appeals on the merits is correct and does not conflict with any decision of this Court or any other court of appeals. Thus, further review at this time is unwarranted.

1. a. The interlocutory nature of the court of appeals' decision makes plenary review premature, just as it was eight months ago. See 125 S. Ct. 972 (2005). Proceedings before petitioner's military commission had just begun when they were enjoined by the district court. Under the decision of the court of appeals, those

proceedings will now be allowed to continue. Further proceedings before the military commission may make it unnecessary for this Court to address any number of the questions currently presented in the case. If the commission finds petitioner not guilty, the Court can avoid these issues altogether.

Even if petitioner is convicted, many of the issues that petitioner presses now may never arise in his case. For example, petitioner objects to military commission rules providing that a defendant *may* be excused from proceedings at which classified evidence is presented. Although petitioner was excused from a portion of voir dire in which classified information was discussed, it is entirely possible that no classified evidence will be introduced by the prosecution at petitioner's trial. The classified material at issue in the voir dire was related to a recusal issue entirely collateral to the merits of the case against petitioner. It involved evidence concerning the impartiality of the commission, not evidence against the accused. Accordingly, the voir dire proceedings in no way suggest that classified evidence will be introduced against petitioner.[6] Even if such evidence is sought to be introduced, however, the commission's rules, as amended on August 31, 2005, provide for it to be shared with the defendant "to the extent consistent with na-

[6] In light of the August 31, 2005 revisions to the allocation of responsibilities between the presiding officer and the other commission members and to the number of commission members, see Revised Military Commission Order No. 1 §§ 4(A)(2), (5) and (6), the composition of petitioner's commission (other than the presiding officer) is likely to change. Accordingly, petitioner's present complaint about his exclusion from portions of the voir dire (he was not excluded from voir dire of the presiding officer) may well be rendered moot. These changes to the military commission procedures highlight why it would be unwise for this Court to review the case in this interlocutory posture.

tional security, law enforcement interests, and applicable law," and require its exclusion if "admission of such evidence would result in the denial of a full and fair trial." Revised Military Commission Order No. 1 § 6(D)(5)(b). See note 3, *supra*.

Finally, even if the commission does consider such evidence, petitioner's counsel can argue that the evidence should be given minimal or no weight in light of petitioner's inability personally to review and respond to it. 32 C.F.R. 9.6(d)(2). Then, if petitioner is convicted, and the admission of the evidence is deemed erroneous, the error would be subject to harmless-error analysis. This Court has recognized that even "constitutional errors can be harmless," *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991), and it has applied that analysis to claims similar to those advanced by petitioner. See, *e.g.*, *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986) (violation of Confrontation Clause); *Rushen* v. *Spain*, 464 U.S. 114 (1983) (per curiam) (violation of right to be present at every phase of trial). Post-trial application of the harmless-error rule might even make it unnecessary for the Court to determine whether the commission's procedures had in fact resulted in error.

For all of those reasons, review of petitioner's claims at this juncture would be premature. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (interlocutory status of the case "of itself alone furnishe[s] sufficient ground for the denial" of the petition); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari). Indeed, this Court routinely denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of criminal proceedings. See Robert L. Stern et al.,

Supreme Court Practice § 4.18, at 258 n.59 (8th ed. 2002); see, *e.g.*, *Moussaoui* v. *United States*, 125 S. Ct. 1670 (2005). The rationale behind this Court's general practice in criminal cases applies with even greater force to the circumstances presented here, where the legal issues raised by petitioner would require the Court to make possibly unnecessary determinations affecting the exercise of the President's core Commander-in-Chief and foreign affairs authority.

b. Petitioner has not shown that he will be prejudiced by deferring resolution of his claims until after an adverse military-commission judgment, if he is convicted. Petitioner notes that he has been detained for several years at Guantanamo Bay. Pet. 29. But as an individual who has been determined by a Combatant Status Review Tribunal to be "either a member of or affiliated with Al Qaeda," Pet. App. 2a, petitioner is subject to detention as an enemy combatant regardless of the outcome of this litigation or whether he is ultimately convicted of a specific war crime, see *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633 (2004) (plurality opinion); *id.* at 2678-2679 (Thomas, J., dissenting); *Ex parte Quirin*, 317 U.S. 1, 28 (1942); see also Pet. App. 47a (the district court noting that petitioner "may be detained for the duration of the hostilities in Afghanistan if he has been appropriately determined to be an enemy combatant"). Petitioner was captured in Afghanistan, where military operations are ongoing. See, *e.g.*, Bryan Bender, *U.S. Endures Deadliest Year in Afghanistan*, Boston Globe, July 3, 2005 <http://www.boston.com/news/world/middleeast/articles/2005/07/03/us_endures_deadliest_year_in_afghanistan/>. Tellingly, petitioner's federal action challenged only the commission process and did not advance any legal claims challenging his

detention as an enemy combatant. See C.A. App. 56-64; Pet. App. 47a n.18.

Petitioner objects that he may be prejudiced by having to present a defense before a commission, because reversal of its judgment would result in a retrial. Pet. 28a. But this supposed burden is no different from that faced by any criminal defendant subject to trial before a tribunal that has arguably violated the defendant's rights. It provides no basis for deviating from this Court's ordinary practice of avoiding interlocutory consideration of a defendant's claims in a criminal proceeding.[7]

Petitioner misplaces reliance on *Ex parte Quirin*, 317 U.S. 1 (1942), to justify interlocutory review. The petitioners there, who included a presumed U.S. citizen captured on U.S. soil, faced imminent execution, which is not the case here. Interlocutory review there, which

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[7] As petitioner notes (Pet. 28), the court of appeals concluded that post-trial review of his jurisdictional challenges would be insufficient to protect his "right not to be tried by a tribunal that has no jurisdiction." Pet. App. 4a. That aspect of the court of appeals' decision is anomalous, because there is no general right to interlocutory review of jurisdictional challenges, and a confirmed alien enemy combatant should have no greater right to pre-trial federal review of his challenge to military jurisdiction than an American service-member, see *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), especially when the challenge is not to military jurisdiction generally, but to the type of military tribunal in which he will be tried. See Pet. 8 ("Petitioner asks simply for a trial that comports with this nation's traditions, * * * such as a court-martial under 10 U.S.C. 818 (authorizing courts martial to try law-of-war violations)."). But even if the court of appeals were correct as to either the appropriateness of abstention or as to *its* jurisdiction over an appeal as of right, that does not inform this Court's discretionary exercise of certiorari review. The interlocutory posture of a case counsels against Supreme Court review even if the error ultimately to be corrected is of a jurisdictional dimension.

took place in the midst of proceedings, provided an alternative to staying an execution. But the Court did not intervene to stop trial proceedings from commencing to prevent the "injury" of undergoing trial by a commission of questionable jurisdiction.[8] Because petitioner faces a maximum sentence of life imprisonment, this Court will have the opportunity to review petitioner's claims at the appropriate time in the event an adverse final judgment is entered against him. See Pet. App. 16a (noting that petitioner's commission "consists of three colonels"); Revised Military Commission Order No. 1 § 6(G) (Aug. 31, 2005) (commission may sentence defendant to death only if comprised of at least seven members in addition to presiding officer).[9] Moreover, this case involves an alien enemy combatant captured abroad, a context in which the jurisdiction of military commissions has long been clear, and in which the Court has been content to resolve jurisdictional questions after a trial before the commission. See *Johnson* v. *Eisentrager*, 339 U.S. 763, 786 (1950).

While petitioner claims (Pet. 30) that the court of appeals' decision implicates "the integrity of our judicial system," there is no reason this Court could not protect the judicial system's integrity by reviewing the case in the ordinary course. That approach not only would avoid the possibility that the Court would unnecessarily

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[8] Specifically, the Court heard the case at the close of the presentation of evidence before the commission. The Court never entered a stay, and closing arguments commenced before the Court issued its decision. See Louis Fisher, *Nazi Saboteurs on Trial* 64-79 (2003).

[9] As mentioned in note 6, *supra*, the composition of petitioner's commission is likely to change, but in all events, like his original commission, the reconstituted commission will contain less than the number of members required to impose a death sentence.

decide questions implicating the most sensitive national security concerns without the benefit of a complete and concrete record, but would also promote the public interest in bringing to justice in an expeditious manner those members of enemy forces who have violated the laws of war. The district court's ill-considered and unprecedented injunction has already resulted in delaying military commission proceedings for nearly a year. A grant of certiorari now would only compound the delay.

c. Finally, petitioner cites the need for guidance in other pending cases as supporting review before a final judgment in his case. But the number of other cases raising claims about the military commissions is small, and those individuals likewise can raise their claims in the commissions in the first instance and post-conviction in the event they are found guilty. Moreover, to the extent other detainees not currently subject to trial by a military commission have an interest in some of the issues decided by the court of appeals here, they have the opportunity to litigate those issues in the specific contexts implicated by their detention and can seek clarity and guidance from the court of appeals in their own cases (up to and including guidance from the en banc court, a step petitioner here bypassed).

2. Petitioner contends that the decision of the court of appeals creates a variety of conflicts with decisions of other courts of appeals. None of those asserted conflicts withstands scrutiny.

a. Petitioner suggests that, when the court of appeals interpreted the AUMF to authorize military commissions, it created a conflict with decisions of the Court of Military Appeals. Pet. 13. The cases cited considered only the interpretation of Article 2(10) of the UCMJ, which "[i]n time of war" subjects to court-martial juris-

diction "persons serving with or accompanying an armed force in the field." 10 U.S.C. 802(10). See *Zamora* v. *Woodson*, 42 C.M.R. 5, 6 (C.M.A. 1970); *United States* v. *Averette*, 41 C.M.R. 363, 363 (C.M.A. 1970). In each case, which involved the court-martial *of a civilian*, the Court of Military Appeals construed the language "in time of war" to refer to a declared war. Those holdings in no way conflict with the decision of the court of appeals here.

First, Congress has authorized the President to establish procedures for military commissions, 10 U.S.C. 836(a), and it has explained that court-martial jurisdiction does not "deprive military commissions * * * of concurrent jurisdiction," 10 U.S.C. 821. Neither of those provisions uses the language "in time of war" to limit the availability of commissions, which have been employed in conflicts without regard to whether they followed formal declarations of war. See, *e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2129 (2005) (observing that military commissions "have been used in connection with formally declared wars as well as other military conflicts, such as the Civil War and conflicts with Indian tribes"). Further, the court of appeals in this case properly determined that the AUMF, which directed the President to use "all necessary and appropriate force" against al Qaeda, had authorized him to establish military commissions. See Pet. App. 5a-7a.

Second, it is well settled that the UCMJ applies generally to armed conflicts, including the Vietnam conflict at issue in *Zamora* and *Averette*, in which the United States has engaged without a formal declaration of war. See, *e.g.*, *United States* v. *Anderson*, 38 C.M.R. 386, 387 (C.M.A. 1968) ("The current military involvement of the

United States in Vietnam undoubtedly constitutes a 'time of war' in that area, within the meaning of Article 43."); *United States* v. *Bancroft*, 11 C.M.R. 3, 5-6 (C.M.A. 1953) (finding that conflict in Korea is "time of war" under the UCMJ). The decisions cited by petitioner are inapposite, because they apply only to civilians subjected to a court-martial, see *United States* v. *Reyes*, 48 C.M.R. 832, 835 (A.C.M.R. 1974) (en banc); *Averette*, 41 C.M.R. at 365-366; *Zamora*, 42 C.M.R. at 6, unlike petitioner, a confirmed enemy combatant charged before a military commission with violating the laws of war applicable to combatants.

b. Petitioner next asserts that there is a circuit conflict with respect to "the basic question of whether those facing trials at Guantanamo can assert *any* constitutional protection." Pet. 16. The court of appeals did not resolve that issue, and the decision below therefore neither creates nor implicates any split of authority on that issue.[10] Pet. App. 4a-5a. Instead, the court assumed that petitioner could raise constitutional claims; it simply rejected petitioner's separation-of-powers argument on the merits. *Id.* at 5a-7a. That decision implicates no conflict among the circuits and rests on a straightforward application of the AUMF, the statutes referring to military commissions, and this Court's decisions interpreting them. *Ibid.* (discussing *Quirin*, 317 U.S. at 28-29; *In re Yamashita*, 327 U.S. 1, 11, 19-20 (1946); and

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[10] The issue of whether the detainees held as enemy combatants at the Guantanamo Bay Naval Base can assert rights under the United States Constitution is more squarely presented in appeals (*Al Odah* v. *United States*, Nos. 05-5064, 05-5095 through 05-5116 (D.C. Cir.), and *Boumediene* v. *Bush*, Nos. 05-5062 & 05-5063 (D.C. Cir.)) set for argument before the D.C. Circuit on September 8, 2005.

Hamdi v. *Rumsfeld*, 124 S. Ct. 2633, 2640-2642 (2004) (plurality opinion)).[11]

c. Petitioner further contends that the court of appeals created a conflict with other circuits when it held that he could not seek court enforcement of the Geneva Convention. Pet. 20-25. Petitioner does not argue that *any* other court of appeals has held the Convention to be judicially enforceable, for *none* has. Instead, he claims that he is entitled to enforce the Convention through the habeas statute, 28 U.S.C. 2241. That argument overlooks that the habeas statute is merely a grant of jurisdiction, see, *e.g.*, *Bowrin* v. *INS*, 194 F.3d 483, 489 (4th Cir. 1999); it does not create any substantive rights, see, *e.g.*, *Jimenez* v. *Aristeguieta*, 311 F.2d 547, 557 n.6 (5th

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[11] In any event, there is no bona fide conflict in regard to whether aliens outside the United States have due process rights under the Federal Constitution. Indeed, this Court has been "emphatic" in rejecting "the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990); see *Eisentrager*, 339 U.S. at 781-785; *Zadvydas* v. *Davis*, 533 U.S. 678 (2001). The Circuit rulings cited by petitioner are not to the contrary. See *Cuban Am. Bar Ass'n* v. *Christopher*, 43 F.3d 1412, 1425 (11th Cir.) (holding that Cubans detained at the Guantanamo Bay Naval Base have no constitutional right to due process or speech), cert. denied, 515 U.S. 1142 (1995). In *Rein* v. *Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748 (2d Cir. 1998), cert. denied, 527 U.S. 1003 (1999) (see Pet. 16 n.11), the court of appeals did not address the constitutional due process rights of aliens abroad. The other cited circuit cases serve petitioner no better: *Haitian Ctrs. Council, Inc.* v. *McNary*, 969 F.2d 1326 (2d Cir. 1992), was vacated by this Court, *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993), and has no precedential value. *Government of the Canal Zone* v. *Scott*, 502 F.2d 566 (5th Cir. 1974), discussed constitutional rights in the former Panama Canal Zone. At the time, the Canal Zone was deemed an unincorporated sovereign territory of the United States. See *id*. at 568.

Cir. 1962), and its reference to treaties does not make treaties that provide for enforcement only at the State-to-State level judicially enforceable any more than does 28 U.S.C. 1331's reference to "treaties." The authorities petitioner cites do not support his argument. In *Ogbudimka* v. *Ashcroft*, 342 F.3d 207, 218 n.22 (2003), the Third Circuit expressly declined to consider an argument similar to that advanced by petitioner, while in *Wang* v. *Ashcroft*, 320 F.3d 130, 140-141 & n.16 (2003), the Second Circuit allowed a habeas petitioner to seek enforcement of rights created by a *statute*, not by a treaty, see *id*. at 140 (noting Wang's argument that the Foreign Affairs Reform and Restructuring Act "creates individual rights based on" the Convention Against Torture).

d. Finally, petitioner suggests that there is a "split in authority about Common Article 3" of the Geneva Convention. Pet. 27. Even if there were such a split, this case would be a poor vehicle for considering that issue. The court of appeals expressly held, in the alternative, that the Geneva Convention is not judicially enforceable and that petitioner's Common Article 3 claims are subject to abstention. Accordingly, there are two independent legal obstacles—neither of which implicates a split of authority—to reaching the Common Article 3 question. In any event, no split of authority exists. The case cited by petitioner, *Kadic* v. *Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995), held that Common Article 3 (6 U.S.T. 3318) "binds parties to internal conflicts" even if they are not states. It did not consider the applicability of Common Article 3 to a conflict, such as that between the United States and al Qaeda, that is not internal to a state. As the court of appeals explained in this case, Pet. App. 12a-13a, such a conflict may reasonably be de-

scribed as being "of an international character" and therefore outside the scope of Common Article 3, as the President determined.[12]

3. a. Given the interlocutory nature of the petition, the government will not engage in a point-by-point rebuttal of petitioner's lengthy arguments on the merits for reversal of the court of appeals' holding. As an initial matter, however, there is a substantial likelihood that this Court would not even reach the merits of petitioner's arguments, because, if the Court were to review the case now, it first would have to consider the threshold question of abstention to allow the pending military commission proceedings to move forward.

In the past, this Court has recognized the need for judicial abstention in the face of proceedings before a military tribunal. As the Court has explained, the need for protection against judicial interference with the "primary business of armies and navies to fight or be ready to fight wars" "counsels strongly against the exercise of equity power" to intervene in an ongoing court-martial. *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975). The Court has held that even a case with relatively limited potential for interference with military action—*i.e.*, the prosecution of a serviceman for possession and sale of marijuana—implicated "unique military exigencies." *Ibid.* These exigencies normally preclude a court from entertaining "habeas petitions by military

[12] *Kadic* was not a habeas case, but looked to Common Article 3 in evaluating the viability of the plaintiffs' claims under the Alien Tort Statute (ATS). This Court's decision in *Sosa* v. *Alvarez-Machain*, 124 S. Ct. 2739, 2763, 2767 (2004), superseded the Second Circuit's approach to the ATS, making clear that the ATS does not render judicially enforceable those treaties that themselves do not create judicially enforceable rights.

prisoners unless all available military remedies have been exhausted." *Id.* at 758. Accord *Gusik* v. *Schilder*, 340 U.S. 128, 133 (1950); *Noyd* v. *Bond*, 395 U.S. 683, 696 (1969).

The concern for interference with military exigencies is only heightened where, as here, the military proceedings involve enforcement of the laws of war against an enemy force targeting civilians for mass death. See *Yamashita*, 327 U.S. at 11 ("trial and punishment of enemy combatants" for war crimes is "part of the conduct of war operating as a preventive measure against such violations"); *Hirota* v. *MacArthur*, 338 U.S. 197, 208 (1949) (Douglas, J., concurring) ("punishment of war criminals * * * dilut[es] * * * enemy power and involv[es] retribution for wrongs done").

The court of appeals relied on *Quirin* in declining to abstain with respect to petitioner's jurisdictional claims. That reliance was misplaced, because no party argued for abstention in *Quirin*, and the case is distinguishable in a number of other key respects. As explained above, pp. 14-15, the petitioners in *Quirin* included a presumed U.S. citizen captured in the United States and facing imminent execution, unlike Hamdan, an alien enemy combatant captured abroad whose commission cannot sentence him to death. The urgency that attended *Quirin* thus does not exist here. Moreover, the legal landscape has changed considerably since 1942. The *Quirin* decision itself, recently reaffirmed in *Hamdi*, 124 S. Ct. at 2643 (plurality opinion); *id.* at 2682 (Thomas, J., dissenting), and *Yamashita* and *Eisentrager* (both of which were decided post-military trial) make clear that military commissions in a variety of circumstances may try enemy combatants for offenses against the laws of war. Permitting petitioner's military

commission to go forward under the authority of these decisions hardly constitutes the type of exigency that justifies halting a military proceeding conducted during an ongoing armed conflict.

In short, the court of appeals erred in declining to abstain. That decision does not implicate a split in circuit court authority or otherwise independently merit the Court's review. Indeed, all of the reasons that this Court has held abstention to be appropriate in similar circumstances counsel, *a fortiori*, against interlocutory review of this petition. Considerations of separation of powers, deference to military proceedings, avoiding abstract questions and unnecessary decisions all favor deferring judicial review, including review by this Court, until after the commission proceedings run their course. Moreover, the prospect that review at this time would lead to nothing more than the reaffirmation of *Councilman* also militates against interlocutory review.

b. Moreover, petitioner has not shown that the court of appeals' decision is inconsistent with the Constitution, the UCMJ, or international law, much less that it is so glaringly inconsistent that it warrants this Court's review notwithstanding both the petition's interlocutory nature and the absence of any circuit conflict.

i. Petitioner suggests that his trial by military commission would be inconsistent with *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). *Milligan* has no application to this case. *Milligan* involved the military trial of a U.S. citizen who was detained within the United States and was not "part of or associated with the armed forces of the enemy," *Quirin*, 317 U.S. at 45. As an alien captured overseas and confirmed to be an enemy combatant, petitioner cannot liken his predicament to Milligan's. See *Hamdi*, 124 S. Ct. at 2642 (plurality opinion). In any

event, as petitioner acknowledges, Pet. 11, to whatever extent *Milligan* might have limited the use of military commissions, it was superseded by *Quirin*. And as the plurality in *Hamdi* recognized, *Quirin* establishes that "the capture, detention, *and trial* of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" 124 S. Ct. at 2640 (quoting *Quirin*, 317 U.S. at 28) (emphasis added). Because *Quirin* "both postdates and clarifies *Milligan*," it provides "the most apposite precedent" here. *Id*. at 2643.

ii. Petitioner contends that his trial by military commission would be inconsistent with the UCMJ. Pet. 16-20. This is not a claim of the right not to be tried, but rather simply a challenge as to how petitioner will be tried. That is a matter to be reviewed, if at all, at the end of the commission proceedings. In any event, the argument is without merit. As the court of appeals explained, the UCMJ expressly preserves military-commission jurisdiction, and the UCMJ provisions regulating courts-martial cannot be read to impose the same procedural requirements on military commissions. Congress has never sought to regulate military commissions comprehensively; rather, it has recognized and approved the President's historic use of military commissions as he deems necessary to prosecute offenders against the laws of war. Pet App. 14a-15a (citing *Madsen* v. *Kinsella*, 343 U.S. 341, 346-348 (1952)). If military commissions were required to follow the same procedures as courts-martial, there would be no point in having a military commission, whose jurisdiction the UCMJ recognizes precisely because of the historic authority and flexibility the President has had to administer justice to enemy fighters who commit offenses against the laws of war.

iii. Petitioner invokes two additional statutes that were not addressed by the court of appeals: 10 U.S.C. 3037(c)(3), which directs the Judge Advocate General of the Army to "receive, revise, and have recorded the proceedings of courts of inquiry and military commissions"; and 18 U.S.C. 242, a criminal statute that prohibits various forms of discriminatory conduct against aliens. Pet. 17. Because these statutory claims were never adequately raised before the court of appeals and never addressed by that court, they have not been preserved and are not properly presented to this Court. See *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975) (declining to consider issue "raised for the first time in the petition for certiorari").[13]

iv. Petitioner contends that his trial by military commission would violate international law. Pet. 13-16. To the extent he relies upon the Geneva Convention, his claim is fully addressed by the thorough opinion of the court of appeals, which explained that the Convention does not create judicially enforceable rights. Pet. App.

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[13] Moreover, these new statutory arguments lack merit. Even assuming that 10 U.S.C. 3037(c) creates privately enforceable rights, petitioner's claim is meritless. That provision, which merely identifies a duty of the Judge Advocate General, has been interpreted in its predecessor form as setting out a clerical function; the provision does not authorize the Judge Advocate General to engage in substantive review of military commission proceedings. See *Ex parte Mason*, 256 F. 384, 387 (C.C.N.D.N.Y. 1882). As for 18 U.S.C. 242, that provision does not apply to petitioner, because he is not a "person in any State, Territory, Commonwealth, Possession, or District" within the meaning of the statute. 18 U.S.C. 242. Moreover, petitioner cites no authority for the proposition that this criminal statute is privately enforceable, let alone that it has any application in the context of war, in which enemy aliens have always been subjected to different treatment from citizens. See generally *Eisentrager*.

7a-10a. There is no circuit conflict on this issue warranting this Court's review, and the court of appeals' ruling is fully consistent with this Court's construction of the prior version of the treaty in *Eisentrager*. Petitioner has identified nothing in the current Convention's text or drafting and ratification history to suggest the revolutionary intent to create judicially enforceable rights. To the contrary, the enforcement provisions of the 1949 Convention, like its predecessor, make clear that disagreements and alleged violations are to be addressed via State-to-State negotiations and neutral-party oversight, not by domestic courts. Compare art. 11, 6 U.S.T. 3326 and art. 132, 6 U.S.T. 3420 (1949 Convention), with art. 31, 47 Stat. 2041 and art. 87, 47 Stat. 2061 (Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343).

In any event, even if the issue of the enforceability of the Convention in court by a person captured as part of an armed conflict were deemed to present an issue warranting this Court's review, this case would not provide an appropriate vehicle for addressing the issue. As the court of appeals held, petitioner would not qualify for POW protection under the Convention in any event. Petitioner now claims that he could obtain POW status under Articles 4A(1) and (4), 6 U.S.T. 3320.[14] Pet. 27. But those claims were not raised in the court of appeals, see Pet. App. 11a, and are contradictory. Article 4A(1)

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[14] Petitioner asserts that, because he claims POW status under Articles 4A(1) and (4), he need not satisfy the criteria set out in Article 4A(2). Pet. 27. That assertion lacks merit because the term "armed forces" in Articles 4A(1) and (4) is properly read as limited to armed forces that comply with the criteria set out in Article 4A(2). See *Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War* 62-63 (Red Cross 1952).

grants POW status to "members 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," whereas Article 4A(4) grants such status to persons who are *not* members of the armed forces, but who accompany them. Moreover, petitioner's assertion of Article 4A(1) status conflicts with his assertion in his habeas petition that he is an innocent civilian. See C.A. App. 51-52. And petitioner's assertion of Article 4A(4) status conflicts with the finding by the Combatant Status Review Tribunal that petitioner is a combatant. In any event, petitioner may raise his claim that he is an innocent civilian (which is a refutation of the Charge) as a defense in his trial before the military commission. Thus, that fact-bound issue is not properly presented to this Court.

Finally, petitioner asserts rights under Article 3 of the Convention, but in doing so he disregards the phrase that limits the Article's application to conflicts "not of an international character." Pet. App. 12a (quoting Common Article 3). The President has determined that this provision is inapplicable to the conflict with al Qaeda because the conflict is "international in scope." *Ibid.* As the court of appeals observed, even if Common Article 3 did apply, it would not affect whether petitioner could be tried by a military commission, but only what procedures the commission would have to use. *Id.* at 13a. For this reason, any claim under that article should be brought, if at all, after trial, if petitioner is convicted.

v. Petitioner further contends that the laws of war do not apply to his case because the conflict between the United States and al Qaeda is not a war between two states. Pet. 13-16. That contention lacks merit. As an

initial matter, whether there exists a state of armed conflict against an enemy to which the laws of war apply is a political question for the President, not the courts. See *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862) ("Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.") (emphasis in original). In any event, the suggestion that the laws of war do not apply to conflicts against non-state entities is flatly incorrect. It is well established that the laws of war fully apply to armed conflicts involving groups or entities other than traditional nation-states: "it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign states." *Id*. at 666; see also Ingrid Detter, *The Law of War* 134 (2d ed. 2000) ("non-recognition of groups, fronts or entities has not affected their status as belligerents nor the ensuing status of their soldiers as combatants").

The President recognized that al Qaeda's repeated attacks against the United States created a state of armed conflict, see Military Order § 1(a), as did Congress when it supported the President's exercise of his Commander-in-Chief authority against the "nations, *organizations*, *or persons* he determines" were responsible for the September 11 attacks. AUMF, 115 Stat. 224 (emphasis added). Moreover, NATO, upon concluding that al Qaeda was responsible for directing those attacks from abroad, took the unprecedented step of

invoking Article 5 of the North Atlantic Treaty, which provides that an "armed attack against one or more of [the parties] shall be considered an attack against them all." North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2244, 34 U.N.T.S. 246; see Statement of NATO Secy. Gen. (Oct. 2, 2001) <http://www.nato.int/docu/speech/2001/s011002a.htm>. All of those actions eliminate any possible doubt concerning the applicability of the laws of war to the conflict with al Qaeda, and nothing in the Geneva Convention indicates that a state of armed conflict cannot exist when a State is attacked by an entity that is not entitled to the Convention's protections.[15]

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[15] Petitioner's related contention that the charge against him is not "prosecutable by a commission" (Pet. 14) is equally meritless. Conspiracy to commit offenses against the laws of war—the offense with which petitioner is charged—has been prosecuted before military commissions throughout this Nation's history. See *Quirin*, 317 U.S. at 23; *Colepaugh* v. *Looney*, 235 F.2d 429, 432 (10th Cir. 1956) (upholding military-commission trial of Nazi saboteur charged with conspiracy), cert. denied, 352 U.S. 1014 (1957); Charles Howland, *Digest of Opinions of the Judge Advocate General of the Army* 1071 (1912) (identifying conspiracy "to violate the laws of war by destroying life or property in aid of the enemy" as an offense against the laws of war that was "punished by military commissions" during the Civil War).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
GREGORY G. KATSAS
Deputy Assistant Attorney General
DOUGLAS N. LETTER
ROBERT M. LOEB
ERIC D. MILLER
Attorneys

SEPTEMBER 2005

No. _____

IN THE
Supreme Court of the United States

SALIM AHMED HAMDAN,
Petitioner,

v.

DONALD H. RUMSFELD, ET AL.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

Lieutenant Commander
Charles Swift
Office of
Military Commissions
1931 Jefferson Davis Hwy.
Suite 103
Arlington, VA 22202
(703) 607-1521

Neal K. Katyal
Counsel of Record
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9000

Benjamin S. Sharp
Harry H. Schneider, Jr.
Joseph M. McMillan
Kelly A. Cameron
David R. East
Charles C. Sipos

PERKINS COIE LLP
607 14th St., NW
Washington, DC 20005
(202) 628-6600

Date: August 8, 2005

QUESTIONS PRESENTED

1. Whether the military commission established by the President to try petitioner and others similarly situated for alleged war crimes in the "war on terror" is duly authorized under Congress's Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224; the Uniform Code of Military Justice (UCMJ); or the inherent powers of the President?

2. Whether petitioner and others similarly situated can obtain judicial enforcement from an Article III court of rights protected under the 1949 Geneva Convention in an action for a writ of habeas corpus challenging the legality of their detention by the Executive branch?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below.

The Petitioner here and in the United States Court of Appeals for the District of Columbia is Salim Ahmed Hamdan, a citizen of Yemen who is currently detained at Guantanamo Bay.

The Respondents here and in the United States Court of Appeals for the District of Columbia are Donald H. Rumsfeld, United States Secretary of Defense; John D. Altenburg, Jr., Appointing Authority for Military Commissions, Department of Defense; Brigadier General Thomas L. Hemingway, Legal Advisor to the Appointing Authority for Military Commissions; Brigadier General Jay Hood, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; George W. Bush, President of the United States.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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Mr. Salim Hamdan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. 1a-18a) is reported at 2005 WL 1653046. The opinion of the district court (App. 20a-49a) is reported at 344 F. Supp. 2d 152.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND INTERNATIONAL LAW PROVISIONS

The relevant constitutional, statutory, and international law provisions involved are set forth in Appendix D, *infra.*

STATEMENT

In the immediate wake of the treacherous violence committed against the United States, Congress authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." 115 Stat. 224 (Sept. 18, 2001) (AUMF). Under the AUMF, the United States commenced armed conflict in Afghanistan in October, 2001.

The next month, despite the limited scope of the AUMF, the President issued a Military Order to authorize military commission trials. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). Commission rules are starkly different than the fundamental protections mandated by Congress in the Uniform Code of Military Justice (UCMJ). *See, e.g.,* Military Order No.1, 68 Fed. Reg. 39374-01 (July 1, 2003). They allow the accused to be excluded from portions of his trial, *id.* § 6(B)(3); permit the admission of unsworn

statements in lieu of testimony, *id.* § 6(D); and vest the Secretary of Defense with the judicial power to rule in matters that terminate the proceedings, *id.* § 6 (H)(1)-(6). The rules even state that the limited protections provided to defendants, such as not being forced to testify and the presumption of innocence, are not "right[s]" that are in any way "enforceable", *id.* § 10, and warn that these protections, such as they are, can be withdrawn at any time. *Id.* § 11.

1. Almost four years ago, Petitioner Hamdan was captured by indigenous forces while attempting to flee Afghanistan and return his family to Yemen. After being turned over to American forces, he was taken in June 2002 to Guantanamo Bay Naval Base, where he was placed with the general detainee population at Camp Delta. App. 78a. In July 2003, the President found that Petitioner was eligible for trial by commission. Accordingly, he was placed in solitary confinement from December 2003 until late October 2004 (four days before this case was argued in the District Court).

2. In December 2003, pursuant to a request by the Prosecutor that defense counsel be appointed for the limited purpose of negotiating a plea, Lieutenant Commander Swift was detailed to serve as Mr. Hamdan's military counsel. Mr. Hamdan first met Swift on January 30, 2004. Twelve days later, Mr. Hamdan filed a demand for charges and a speedy trial under UCMJ Article 10. That demand was rejected in a legal opinion claiming that Petitioner was not protected by the UCMJ. In July, 2004, eight months after the start of his solitary detention, he was charged with a single count of conspiracy that allegedly began in 1995. App. 63a-67a.

3. On April 6, 2004, a Petition for Mandamus or, in the Alternative, Habeas Corpus, was filed in the United States District Court for the Western District of Washington. In light of the Court's decision in *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004), the case was transferred to the United States District Court for the District of Columbia in August, 2004.

On November 8, 2004, following oral argument, the district court (Robertson, J.) granted the petition in part and denied Respondents' motion to dismiss. The court rejected

Respondents' argument to abstain from the merits until after the trial. Abstention was not appropriate because Mr. Hamdan had "'raised substantial arguments denying the right of the military to try [him] at all.'" App. 24a (citing *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975)).

The district court then ruled that commissions may be used only to hear offenses that are triable under the laws of war, including the Geneva Conventions; that the Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 (1949) (GPW) is judicially enforceable; and that, as long as his prisoner-of-war (POW) status is in doubt, Petitioner must be tried by court-martial. *Id.* 25a-37a. The court found that the Military Order did not satisfy either the GPW or the UCMJ, particularly as it deprived Petitioner of the right to attend his trial and hear the evidence presented against him. *Id.* 37a-47a. For the President to stray from the UCMJ placed him in the zone where his power is at "its lowest ebb" under *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). App. 28a.

4. On November 16, 2004, the government filed a notice of appeal and a Motion for Expedited Appeal. The court of appeals expedited the case the next day.[1]

5. On July 15, 2005, following oral argument, the court of appeals reversed the district court in an opinion written by Judge Randolph and joined by Judge Roberts (in full) and Judge Williams (in part).[2] It first rejected Respondents' claim that abstention was appropriate, finding that *Ex parte Quirin*, 317 U.S. 1 (1942) "provides a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions." App. 3a. Rationales for *Councilman* abstention, comity and

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[1] On November 22, 2004, Mr. Hamdan filed a petition for certiorari before judgment. *Hamdan v. Rumsfeld*, No. 04-702. The Court denied the Petition on January 18, 2005.

[2] Twenty amicus briefs were filed in Mr. Hamdan's case, including briefs from retired American Generals and Admirals, hundreds of European and U.K. Parliament members, dozens of law-of-war experts, and several nongovernmental organizations. These briefs are available at http://www.law.georgetown.edu/faculty/nkk/publications.html#h.

speed, "do not exist in Hamdan's case and we are thus left with nothing to detract from *Quirin*'s precedential value." *Id.*

The court also held that Petitioner's challenges fell within an abstention exception because "setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction. *See Abney v. United States*, 431 U.S. 651, 662 (1977)." App. 4a. Because Mr. Hamdan "contend[s] that a military commission has no jurisdiction over him and that any trial must be by court-martial," the court did not abstain and fully reached the merits of his claims. *Id.*

The court then held that Congress authorized commissions in the AUMF. It found further authorization in 10 U.S.C. 821, which states that the UCMJ does not "deprive military commissions . . . of concurrent jurisdiction" to try war crimes, and 10 U.S.C. 836, which permits the President to prescribe some procedures for military trials. *Id.* 5a-7a.

The court of appeals next rejected the district court's holding that the Geneva Conventions constrain Hamdan's trial. It found that *Johnson v. Eisentrager*, 339 U.S. 763 (1950) precluded the GPW's judicial enforcement. Acknowledging that *Eisentrager* involved only the 1929 Convention and that it reached the question in an "alternative holding," the court opined that the GPW is not substantively different. *Id.* 7a-9a.

With respect to Common Article 3 of the Convention, which prohibits "the passing of sentences . . . without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as essential by a civilized people," the court deferred to the President's interpretation that the conflict with al Qaeda is international and therefore exempt. *Id.* 12a.

The court rejected the district court's conclusion that provisions in the UCMJ, such as 10 U.S.C. 839, which requires an accused's presence at all stages of his trial, apply.

Judge Williams concurred, disagreeing with the court's treatment of Common Article 3 because "the Convention's language and structure compel the view that Common Article 3 covers the conflict with al Qaeda." App. 16a-18a.

REASONS FOR GRANTING THE PETITION

Two Terms ago, a plurality of this Court warned that "a state of war is not a blank check for the President." *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004). The court of appeals, by rejecting longstanding constitutional, international-law, and statutory constraints on military commissions, has given the President that power in tribunals that impose life imprisonment and death. Its decision vests the President with the ability to circumvent the federal courts and time-tested limits on the Executive. No decision, by any court, in the wake of the September 11, 2001 attacks has gone this far.

This Court has always closely scrutinized the Executive's use of commissions, recognizing that any encroachment on the jurisdiction of civilian courts by military tribunals poses momentous questions in a Republic committed to the rule of law and to separation of powers. As *Ex parte Milligan* put it, "Had this tribunal the *legal* power and authority to try and punish this man? No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people." 71 U.S. (4 Wall.) 2, 118-19 (1866). That this case involves the first commission since World War II, and the first since the enactment of the UCMJ and the GPW, makes certiorari particularly appropriate.

Despite these intervening statutes and treaties, the court of appeals largely based its ruling on this Court's *Eisentrager* decision, accepting the President's claim of power to convene a commission to try most any offense, against any offender (including a United States citizen or nationals of any country in the world), in any place (including the United States). The President was allowed that power not for a fixed time, such as a war declared against a specific nation-state, but rather for perpetuity against an amorphous enemy that could include nationals of every country in the world. In these tribunals, the President was given the power to disregard not only American common-law and military law, but international law--despite the fact that the *raison d'être* of commissions is to enforce international law.

The decision below expands the powers of the President beyond those recognized in *Ex parte Quirin*, 317 U.S. 1 (1942). Unlike that World War II case, whose parameters were fixed by the Court's declaration that its opinion was limited "only" to the "particular acts" of the saboteurs and "the conceded facts," *id.*, at 46, the court of appeals' decision has no limits at all. Canonical cases that restrict presidential action, including *Ex parte Milligan, supra*, and *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), the latter decided *after Quirin*, went completely *unmentioned* by the court below.

The ruling below enables hundreds of terrorism cases prosecuted by the Justice Department to be tried by commission. It is not plausible to think that the AUMF handed such sweeping power to the President by permitting *force*. Force includes authorization to *detain* prospectively, but does not by itself comprise adjudication to look *retrospectively* at questions of guilt and innocence. *Hamdi*, 124 S. Ct. at 2682 (Thomas, J., dissenting) ("[T]he Court referred frequently and pervasively to the criminal nature of the proceedings instituted against Milligan....[T]he punishment-nonpunishment distinction harmonizes all of the precedent").

To interpret "force" more broadly, the court of appeals not only had to resuscitate two precedents of this Court that have not been invoked to conduct commissions in a half-century, *Quirin* and *Eisentrager*; the court also had to extend them radically. In those cases, Congress had declared a war against a fixed enemy with a definite end in sight. And the commission rules in place did not depart from fundamental principles of military law and the laws of war, and were employed against admitted unlawful combatants.

None of those limits exist under the court of appeals' sweeping holding in this case. As the district court held, an emblematic example of the break with our country's traditions is the denial of Mr. Hamdan's right to be present at his own trial. Respondents have offered *no* instance, either civilian or military, in our nation's 229-year history where trial procedures were specifically engineered to force a non-disruptive defendant to be excluded from his trial. This is

not speculative; petitioner has already been excluded from his trial. Despite weighty state secrets at issue in *Quirin*, the saboteurs were always present at their trial. In Iraq, under rules written by the U.S. Department of Defense, Saddam Hussein and his henchmen will be present, despite much classified material in play there. As the district court found, the right to be present is universal, echoed in pronouncements of the Court, international law, and UCMJ.

Indeed, while claiming that commissions are "commonlaw war courts," App. 15a, the court failed to apply *any* common-law constraints, not even the longstanding guarantee of confrontation, which is "founded on natural justice." *Crawford v. Washington*, 541 U.S. 36, 49 (2004) (quoting *State v. Webb*, 2 N.C. 103, 104 (1794)).

The court also misread *Eisentrager* to strip Article III courts of their constitutional and statutory power and duty to use the Great Writ. Its decision is in deep tension with other circuits, several of which have enforced treaty-based rights under the habeas corpus statute. The case for enforcement in this case is even stronger since 10 U.S.C. 821 expressly requires that commissions act in conformity with the laws of war. That statute, like 10 U.S.C. 836, must be read consistently with international law, for "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains," *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

In the end, the court of appeals held that the President has the power to decide how a detainee is classified (as protected by the GPW or not), how he is treated, what criminal process he will face, what rights he will have, who will judge him, how he will be judged, upon what crimes he will be sentenced, and how the sentence will be carried out. The President is entitled to "pas[s] sentences and...carr[y] out...executions" through commissions, even if they do not "affor[d] all the judicial guarantees which are recognized as indispensable by a civilized people." GPW Art. 3. Under the panel's ruling, the determination that the President made to disregard this GPW provision is *unreviewable* by courts.

This reversal of the district court cannot be correct. The Revolution was fought to ensure that no man, or branch of government, could be so powerful. In a system of checks and balances, there can never be a time when the rule of law does not circumscribe power as fundamental as adjudicating culpability and punishment. Our forefathers paid a heavy price in blood to establish these principles, and it is our duty to defend them from all threats, foreign or domestic.

Limited precedents like *Quirin* and *Eisentrager* simply cannot serve as full frameworks for the legal war on terror, yet the Solicitor General routinely cites them as such.[3] As the past four years have shown, too many doubts–both international and domestic–have been generated by excessive reliance on these decisions.

Petitioner asks simply for a trial that comports with this nation's traditions, Constitution, and commitment to the laws of war, such as a court-martial under 10 U.S.C. 818 (authorizing courts martial to try law-of-war violations).

It will be some years before another military commission challenge reaches this Court again, and significant damage to the fabric of American law will ensue in the interim if the court of appeals' ruling is left undisturbed.

I. THE COURT OF APPEALS' DECISION FULLY RESOLVED SEVERAL ISSUES, EACH OF WHICH IS APPROPRIATE FOR CERTIORARI, AND ITS RESOLUTION IS INCONSISTENT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

The court of appeals vastly expanded Presidential power. Far from the battlefield–however broadly defined–and remote from any military occupation, the President convened commissions without explicit statutory authority,

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[3] *See, e.g.*, Petr. Br., *Rumsfeld v. Padilla*, No. 03-1027, at 6; Resp. Br., *Hamdi v. Rumsfeld*, No. 03-6696, at 6; Resp. Br., *Rasul v. Bush and Al Odah v. Bush*, Nos. 03-334 and 03-343, at 4; Petr., *Bush v. Gherebi*, No. 03-1245, at 12; Br. Opp., *Hamdan v. Rumsfeld*, No. 04-702, at 10; Resp. Br., *Loving v. United States*, No. 94-1966, at *16; U.S.Br., *United States v. Moussaoui*, No. 03-4792, 2003 WL 22519704 at *25 (4th Cir. 2003); Appellee Br., *Boumediene v. Bush*, Nos. 05-5062, 05-5063, 2005 WL 1387147 (D.C. Cir. 2005), at 15; Appellant Br., *Padilla v. Hanft*, No. 05-6396, 2005 WL 1656804 (4th Cir. 2005).

justified not as ancillary to the invasion of Iraq but rather by the far more amorphous rubric of the "war" on terrorism. That "war" manifestly is not a war in any sense of that term against any nation or well-defined enemy, nor is it a war with any definable geographic arena of conflict, nor a war in which one can pinpoint a date when hostilities end, and it most assuredly is not a war ever declared by Congress. In an undeclared war, unbounded by time, place or the identity of the enemy, the court of appeals radically extended legal precedents set during conventional wars.

The application of conventional-war concepts to a war on terrorism (where terrorism is an identifiable *method*, rather than an identifiable *enemy*) raises profound legal issues with which this Court in due course will grapple. Many of these questions, including those surrounding the President's use of troops and armaments, are not presented here. This case challenges (1) a commission without explicit Congressional authorization, (2) in a place far removed from hostilities, (3) to try an offense unknown to the laws of war, (4) under procedures that flout basic tenets of military justice, (5) against a civilian who contests his unlawful combatancy.

The court of appeals gave the President the authority and power to launch a commission in each circumstance. That any one of them, by itself, might merit certiorari, due to the departure from norms of Article III and court-martial adjudication, is incontrovertible. Taken together, they present questions of enormous importance on which the Court's guidance is needed, just as it was in *Quirin*, where the Court sat in Special Term despite the exigencies of war:

> In view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay, we directed that petitioners' applications be set down for full oral argument at a special term of this Court.

317 U.S. at 19. The Court did not wait until the defendants were convicted, echoing the dispatch it applied in other

cases involving separation of powers challenges even when life imprisonment and the death penalty were not at stake.[4] *See also Eisentrager, supra* (certiorari from military commission); *In re Yamashita*, 327 U.S. 1 (1946); *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864). Indeed, the flurry of legislative activity preceding William McCardle's pretrial commission challenges suggests the way the Court has handled them in the past. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869); *Ex parte McCardle*, 73 U.S. (6 Wall.) 318 (1868).

For the reasons that follow, "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). The decision below also is inconsistent with those of other courts of appeal in multiple ways.

A. The Court of Appeals Erroneously Decided that the AUMF and UCMJ Authorize this Military Commission

1. *Petitioner's military commission violates the separation of powers.* The court of appeals' decision conflicts deeply with the fundamental principles set forth in this Court's landmark *Milligan* opinion. "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction," for the Constitution "is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." 71 U.S. at 120-21, 127.

Today, the President's unilateral creation of commissions, his single-handed definition of the offenses and persons subject to their jurisdiction, and his promulgation of the

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[4] *E.g., Dames & Moore v. Regan*, 453 U.S. 654 (1981) (certiorari before judgment granted); *United States v. Nixon*, 417 U.S. 927 (1974); *Wilson v. Girard*, 354 U.S. 524, 526 (1957); *Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. Krueger*, 351 U.S. 470, 473 (1956); *Youngstown*, 343 U.S. at 588-89; *cf. Mistretta v. United States*, 488 U.S. 361, 371 (1989).

rules of procedure combine to violate separation of powers. Yet the court of appeals did not even mention *Milligan.*

This disregard of *Milligan* might be explained by the subsequent *Quirin* case. But see *Duncan,* 327 U.S. at 322-24 (relying on *Milligan*).[5] Without this Court's direction, *Quirin* quite simply is too unstable an edifice on which to build further expansions of presidential power. See *Hamdi,* 124 S. Ct. at 2670 n.4 (Scalia, J., dissenting) ("The plurality's assertion that *Quirin* somehow 'clarifies' *Milligan* is simply false...[T]he *Quirin* Court propounded a mistaken understanding of *Milligan*; but nonetheless its holding was limited to 'the case presented by the present record,' and to 'the *conceded facts,*' and thus avoided conflict with the earlier case.") (internal citations omitted); *id.* at 2682 (Thomas, J., dissenting); P. O'Donnell, *In Time of War* 255 (2005) (stating that, in writing *Quirin,* Chief Justice Stone thought stripping JAG review and other aspects "probably conflict[ed]" with the Articles of War but the men had been executed); *id.* 265 (describing criticisms of Frankfurter, J., Douglas, J., and others); Danelski, *The Saboteurs' Case,* J. S. Ct. Hist. 61 (1996).

If *Quirin* is to have such unbounded vitality sixty years later to subject people to death and life imprisonment, in the wake of much criticism from members of the Court (including those in the *Quirin* majority) and elsewhere, its resurrection–and an overruling of *Milligan*'s core-must come from the Court, in a case squarely presenting the issue.

2. *The AUMF does not authorize military commissions.* The

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[5][The Founders] were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws....We have always been especially concerned about the potential evils of summary criminal trials...*see Milligan.* Legislatures and courts are not merely cherished American institutions; they are indispensable to our Government.

...[T]he only [other] time this Court had ever discussed the supplanting of courts by military tribunals in a situation other than ...recently occupied enemy territory, it had emphatically declared that "civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish." *Milligan.*

Duncan, 327 U.S. at 322-24; see *Reid,* 354 U.S. at 30 (plurality) (describing *Milligan* as "one of the great landmarks in this Court's history").

panel analogized the AUMF to the Declaration of War in World War II, finding that in authorizing "force," Congress also implicitly authorized commissions. The AUMF is conspicuously silent on the subject. While "force" implies the power to detain those captured in battle, it does not imply a power to set up judicial tribunals far removed from zones of combat or military occupation. "Such a latitudinarian interpretation...would be at war with the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority." *Reid v. Covert*, 354 U.S. 1, 30 (1957) (plurality).

The court of appeals broadly read *Hamdi v. Rumsfeld, supra*, to suggest that military commissions may try U.S. citizens. App. 6a.[6] But *Hamdi* dealt only with detention, not trial.[7] While the law on detention has changed somewhat since World War II, the law of military trial has changed dramatically. Moreover, Mr. Hamdi faced detention because he bore arms against U.S. forces on the Afghani battlefield. Here, Respondents do not rest upon the Afghani conflict, but rather upon Petitioner's purported status as a member of al Qaeda. And there are deep questions as to whether the procedure relied upon by the court of appeals to say that

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[6] *Hamdi* expressly declined to rule on the scope of the President's authority. 124 S. Ct. at 2639 (plurality). It emphasized that the AUMF only authorized continuing detention of individuals who were confirmed enemy combatants, whose status had to be determined "in a proceeding that comports with due process." *Id.* at 2643. And it repeatedly looked to the GPW to outline government powers. *Id.* at 2641 (citing Art. 118 and article mentioning Arts. 85, 99, 119, 129); *id.* (stating that "our understanding is based on longstanding law-of-war principles").

[7] *Hamdi*'s historical description is not in dispute: "The 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.' *Ex parte Quirin*, 317 U.S. at 28." 124 S. Ct. at 2640. But even this does not answer the question of what type of tribunal can try such combatants. *See also id.* (referring to "mere detention"); *id.* at 2643 (stating that *Quirin* is "the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances").

Justice Thomas' opinion in *Hamdi*, which Respondents relied upon to suggest a fifth vote for the lawfulness of commissions, was carefully circumscribed to detention, mentioning the term (or derivations of the term such as "detain") over forty times. *Id.* at 2674, 2677-85. Justice Thomas acknowledged that *punishment* stands on an entirely different footing than detention, specifically isolating the *Milligan* case. *Id.* at 2682.

Hamdan is an "enemy combatant" subject to a commission meets the requirements of *Hamdi*. To avoid confusion about the reach of *Hamdi* is ample reason itself for certiorari.

Moreover, the court of appeals' conflation of the AUMF with a Declaration of War creates a circuit split. The Court of Appeals for the Armed Forces has precluded military jurisdiction over civilians because, under the UCMJ, the "words 'in time of war' mean ...a war formally declared by Congress" and "a strict and literal construction of the phrase 'in time of war' should" confine jurisdiction. *United States v. Averette*, 19 C.M.A. 363, 365 (1970); *see Zamora v. Woodson*, 19 C.M.A. 403 (1970) (holding that "in time of war" means "a war formally declared by Congress," and that Vietnam did not qualify); *Robb v. U.S.*, 456 F.2d 768 (Ct. Cl. 1972) (similar).[8]

3. *There is a substantial question as to whether the laws of war permit commission trial of Petitioner.* In other recent authorizations of force, such as those for Iraq and Vietnam, the United States has not used military commissions. The AUMF lacks even the traditional tether of an authorization confined to a specific nation-state or a specific conflict; it permits force when "terrorism" is at issue. That the President can exercise power over armaments and troops to fight terrorism anywhere is unquestionable under domestic law; but the AUMF does not give the President the further ability to redefine the laws of war. And this Court has never found that the laws of war authorize commissions, and their attendant supplanting of open civil and military courts, in circumstances where only "force" was authorized.

In the World War II cases relied upon by the court of appeals, commissions tried crimes in a war between nation-states. There was no question as to whether the conflict implicated the laws of war. Equally there was no serious

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[8] Additional circuit conflict exists regarding the need for explicit authorization. *Compare El Shifa Pharm. Indus. v. United States* 378 F.3d 1346, 1362 (Fed. Cir. 2004) (not requiring explicit statutory authority under *Quirin*) *with Padilla v. Hanft*, 2005 U.S. Dist. LEXIS 2921, *24 (D.S.C. Feb. 28, 2005) (requiring specific authorization) (currently on appeal); *Padilla v. Rumsfeld*, 352 F.3d 695, 716 (2d Cir. 2003) (requiring "clear congressional authorization" under *Quirin*), *rev'd on other grounds*, 542 U.S. 426 (2004).

factual question as to whether the defendants fell within the jurisdiction of commissions. The question was answered in all but the case of the American citizen in *Quirin* by the fact that the accused was a citizen of a country with which we were at war and therefore an enemy.[9] *E.g., Eisentrager*, 339 U.S., at 772-73 ("when two states are at war, the citizens of each state regard in war, the subjects of each country were enemies to each other, and bound to regard and treat each other as such") (citations omitted). Al Qaeda, however, is not a nation state. An accused's enemy status cannot be determined simply by citizenship. The facts are not undisputed as to whether the accused is in fact an enemy within the laws of war. This case more closely resembles the Civil War cases, where the nature of the conflict and the status of detained individuals were both open to question.

The Court determined when the civil war began by looking to the "common law" test of whether "the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open[.]" *The Prize Cases*, 67 U.S. 635, 667 (1862); *id.*, at 682 (returning certain seized property because the war had not yet begun). *Milligan* followed that test, examining whether the courts were "open." 71 U.S., at 121. It did so, notably, even though the Government told the Court that Lambdin Milligan was an unlawful combatant who "plotted to seize" arsenals and "conspired with and armed others." *Id.* at 17.

Yet here, the court of appeals has pointed to no source of law showing that a specific act in this conflict or this specific offender is prosecutable by a commission. The question of whether the AUMF makes this case more like *Quirin* or *Milligan* cannot be dealt with *sub silentio*; there must be some showing that the laws of war permit such commissions.

Such a showing is particularly important because the

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[9] *Quirin* found that notwithstanding Haupt's U.S. citizenship the undisputed fact that he had joined the German military made him an enemy under "the Hague Convention and the law of war." 317 U.S. at 38. Haupt's relatives on the other hand were properly tried by civilian courts because they had not joined the German military and therefore could not be considered enemies under those laws of war.

panel found that the conflict was neither an international armed conflict covered by the Geneva Conventions, nor an internal armed conflict covered by Common Article 3. App. 10a-13a. If the laws of war do not recognize this conflict, however, commissions cannot proceed, for their jurisdiction is set by "the common law of war." *Vallandigham*, 68 U.S. at 249; 15a. The law of war is a body of international law "established by the usage of the world." *Dooley v. United States*, 182 U.S. 222, 231 (1901); see also Manual for Courts-Martial, Part I, Preamble. As Colin Powell warned, a finding that the Geneva Conventions do not apply "undermines the President's Military Order by removing an important legal basis for trying the detainees before Military Commissions." Secretary of State Memorandum, Jan. 26, 2002, http://msnbc.msn.com/id/4999363/site/newsweek.

Indeed, when Congress defined war crimes in 18 U.S.C. 2441, it defined them as violations of the Geneva Conventions, Common Article 3, and the Hague Convention and Mining Protocol. If these sources of law do not apply, a common-law commission has no offense to try. *See Quirin*, 317 U.S. at 29-31 (examining whether charge violates the laws of war and looking to Congress and common-law). Nothing in the AUMF suggests that Congress enabled the President to try charges that stray from the laws of war. If the panel correctly determined that this conflict falls outside of the GPW, then commissions lack authority to operate.

The essence of the court of appeals' contrary position is that while Petitioner has no rights under the Constitution, treaties, common-law, and statutes, he is subject to the penalties and pains of each. This Court has always rejected such claims. *See Milligan*, 71 U.S. at 131 ("If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?"). The court of appeals' complete disregard of *Milligan* raises more questions than it answers.

It might be thought, as the court below suggested, that Petitioner, an alien, has no rights (unlike Milligan). App. 4a-5a (citing cases). That claim, however, militates in favor of

certiorari, for it appears to ignore *Rasul v. Bush* and other decisions of this Court.[10] Indeed, the Second Circuit, Fifth Circuit, Federal Circuit, and U.S. Court for Berlin have all declined to follow the D.C. Circuit on this question.[11] But the Ninth Circuit has followed it. *United States v. Davis*, 905 F.2d 245 (9th Cir. 1990). Certiorari is appropriate to resolve the basic question of whether those facing trials at Guantanamo can assert *any* constitutional protection.[12] To convene trials without an answer to that basic question when the courts are in such flux is to countenance human experimentation.

4. *The UCMJ does not authorize this military commission*. The court of appeals relied on 10 U.S.C. 821 as authorization for commissions, but failed to acknowledge the limits on jurisdiction established by that very statute.[13] It lacks any

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[10] 124 S. Ct. 2686, 2698 n.15 (2004) ("Petitioners' allegations ...unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. 2241(c)(3). *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring), and cases cited therein"); *id.* at 2700 (Kennedy, J., concurring) ("Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities"). It is separately in tension with *Zschernig v. Miller*, 389 U.S. 429 (1968), and *Asahi Metal v. Superior Court*, 480 U.S. 102 (1987), which permit nonresident aliens to raise constitutional objections.

[11] *See Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 762 (2d Cir. 1998) (permitting Libya to assert that Foreign Sovereign Immunities Act "unconstitutionally delegate[d] legislative power"); *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992) (applying due process clause to Guantanamo), *vacated as moot sub nom. Sale v. Haitian Ctrs. Council*, 509 U.S. 918 (1993); *Canal Zone v. Scott*, 502 F.2d 566, 569 (5th Cir. 1974) (applying Sixth Amendment); *United States v. Tiede*, 86 F.R. D. 227, 242, 249, 259 (U.S. Ct. Berlin 1979)("there has never been a time when United States authorities exercised governmental powers in any geographical area--whether at war or in times of peace--without regard for their own Constitution. *Ex parte Milligan*....[T]he *Insular Cases* do not apply when the United States is acting as prosecutor in its own court" finding *Milligan* a chief restraint on military tribunals); *El Shifa*, 378 F.3d at 1352 ("[W]e decline to hold, as the government asks, that the Takings Clause does not protect the interests of nonresident aliens").

[12] Indeed, one district court has held that Guantanamo detainees are entitled to constitutional rights, and another has disagreed. *Compare In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 464 (D.D.C. 2005) ("In light of the Supreme Court's decision in *Rasul*, it is clear that Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply.") *with Khalid v. Bush*, 355 F. Supp. 2d 311, 321 (D.D.C. 2005). Both decisions are on appeal.

[13] 10 U.S.C. 821 provides: "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with

affirmative statement of jurisdiction. Neal Katyal & Laurence Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1280-93 (2002). And Respondents point to no law that identifies Petitioner as an "offender" or conspiracy as a triable "offense" under it. Indeed, their reading transforms the statute into an unconstitutional delegation of power. *Id.*, at 1290.[14]

Far from authorizing the commission trying Mr. Hamdan, Congress forbade it. 10 U.S.C. 3037(c) provides:

> The Judge Advocate General . . . shall receive, revise, and have recorded the proceedings of courts of inquiry and military commissions.

"The Judge Advocate General adds integrity to the system of military justice by serving as a reviewing authority." Louis Fisher, *Military Tribunals and Presidential Power* 124 (2005). But the Military Order cuts the JAG, who is presidentially appointed and Senate confirmed, entirely out of the process.

Moreover, Congress has forbidden two-track justice whereby a non-citizen is "subject to...different punishments, pains, or penalties, on account of such person being an alien." 18 U.S.C. 242.[15] By its very terms, the Military Order funnels non-citizens, and only non-citizens, through this separate and unequal system. No commission has taken such a step; past ones, including the one in *Quirin*, applied to

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respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals."

Congress has not had occasion to modify 10 U.S.C. 821 since commissions have not been used since World War II. Congress' silence suggests little, since a bicameral supermajority is needed to correct a court interpretation of a statute that gives the President unintended authority. See U.S. Const. art. I, § 7, cl. 2 (veto override clause); White House, Statement of Policy, July 21, 2005 (stating that AUMF should not be altered and recommending veto of bill to govern detention and trial of enemy combatants).

[14] *See Clinton v. City of New York*, 524 U.S. 417, 449-53 (1998) (Kennedy, J., concurring); *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 545 (1981) (Rehnquist, J., dissenting); *Cal. Bankers Ass'n v. Schultz*, 416 U.S. 21, 91-93 (1974) (Brennan, J., dissenting); *Panama Refining. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry v. United States*, 295 U.S. 495 (1935).

[15] See also 42 U.S.C. 1981 ("[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons.")

citizens and aliens alike. Today's two-track system means, in effect, that it is difficult for the legislature to modify statutes that have been read to authorize commissions. "[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Ry. Express v. N.Y.*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

The Military Order therefore wanders far beyond the "zone of twilight" of concurrent authority. The court of appeals' effort to squeeze every drop of meaning from the AUMF and other statutes cannot authorize *this* system of tribunals. Here, the President's powers are at their "lowest ebb." *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring). To sustain the commission in this case, when Respondents have ignored statutory constraints on its jurisdiction, procedures, and composition, jeopardizes the "equilibrium established by our constitutional system." *Id.*[16] Congress, after all, is vested with the power to "define and punish . . . Offenses against the Law of Nations." U.S. Const. art. I. § 8, cl. 10.

5. *The court of appeals erroneously decided that the UCMJ does not require the presence of the accused at all stages of his trial.* The court of appeals found the commission authorized by 10 U.S.C. 836, which provides that procedures prescribed by the President for commissions "may not be contrary to or inconsistent with" the UCMJ. But that very statute forbids Petitioner's commission. As the district court put it, while

[16] For example, the court of appeals' decision would apparently permit hundreds of terrorism cases to be transferred out of civilian courts to commissions, supplanting the careful jurisprudence and procedures of Article III courts and courts-martial. See Danny Hakim, *After Convictions, the Undoing of a Terror Prosecution*, N.Y. Times, Oct. 7, 2004, at A1 (describing Article III oversight of prosecutorial abuse, particularly access to exculpatory information, in Detroit terrorism cases); U.S. Dept. of Justice, United States Attorneys' Annual Statistical Report, FY 2003, at 21 (572 terrorism cases against 786 defendants filed in FY2003); U.S. Dept. of Justice, United States Attorneys' Annual Statistical Report, FY 2002, at 21 (1046 terrorism cases filed against 1112 defendants).

"the language of Article 36 does not require rigid adherence to all of the UCMJ's rules for courts-martial...I cannot stretch the meaning of the Military Commission's rule enough to find it consistent with the UCMJ's right to be present." App. 42a, 46a. The court also found support for the right to be present in *Crawford*, 124 S. Ct. at 1363, where the Court recognized the right as ancient, "founded on natural justice."

Quirin and its progeny never authorized a commission to violate basic precepts of military justice, such as the right to be present. Yet as the district court held, Hamdan's commission has *already* violated that right. For what very well may be the first time since the Founding, a nondisruptive criminal defendant has been ejected from his own trial. This did not happen in *Quirin*, despite the most highly classified and damaging state secrets at issue in the trial, nor will it happen in Iraq or American courts-martial.[17] And there is absolutely no legal basis for it to happen here, at least in the absence of a statute authorizing such a dramatic departure from our traditions.

Hamdan is being tried by the first commission ever in which the UCMJ applies.[18] Even before the UCMJ, of course, fundamental rights from courts-martial extended to

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[17] *See* Amicus Br. of Noah Feldman, *Hamdan v. Rumsfeld*, D.C. Cir., http://www.law.georgetown.edu/faculty/nkk/documents/feldman.pdf.

[18] The UCMJ, unlike the predecessor Articles of War, extends its protections to leased territories, like Guantanamo, controlled by the Secretary of Defense. *Compare Yamashita*, 327 U.S. at 20 (stating that Yamashita was "not a person made subject to the Articles of War by Article 2") *and Quirin*, 317 U.S. at 47, *with* 10 U.S.C. 802(12) (expanding those "subject to this chapter" to "persons within an area leased by" the U.S. and subject to defense secretary control).

The court of appeals' narrow reading of 836 fails to give effect to its plain language, which requires that commission procedures not be contrary to or inconsistent with "this chapter," i.e., with the UCMJ, not just a handful of provisions in the UCMJ where the words "military commissions" appear. Under its reading, the President is constrained by UCMJ 849(d), governing deposition transcripts being read into evidence, but not by the UCMJ's fundamental requirement, in 839, that the accused be present for all stages of his own trial. If concerns for fundamental fairness in commission proceedings prompted Congress to regulate details like the introduction of deposition testimony, then it seems highly likely that Congress also intended the right to be present to be guaranteed. Indeed, there is no support for the court of appeals' narrow reading of 836 in any applicable military law or precedent of this Court.

commissions. Colonel Winthrop, "the Blackstone of Military Law," *Reid*, 354 U.S. at 19 n.38, recognized the "general rule, that military commissions are constituted and composed, and their proceedings are conducted, similarly to general courts-martial...Where essential, indeed, to a full investigation or to the doing of justice, these rules and principles will be liberally construed and applied." Winthrop, *Military Law and Precedents* 835 n.81, 842 (2d ed. 1920) (citations omitted); Act of July 2, 1864, 13 Stat. 356 (extending court-martial provisions to commissions).

The right to be present is universal, echoed in pronouncements of this Court, e.g., *Lewis v. United States*, 146 U.S. 370, 372, 375 (1892); common law; international law; and the UCMJ, 10 U.S.C. 839. In the Civil War, the JAG exercised his review, a power stripped in today's commissions, to invalidate a conviction for denying presence:

> [JAG Holt] repeatedly overturned the decisions of trials by military commission...Holt reviewed the sentence of Mary Clemmens . . . [stating]: "Further, it is stated that the Commission was duly sworn—but does not add 'in the presence of the accused.' Nor does the Record show that the accused had any opportunity of challenge afforded her. These are particulars, in which it has always been held that the proceedings of a Military Commission should be assimilated to those of a Court-martial. And as these defects would be fatal in the latter case, they must be held to be so in the present instance."

Neely, *The Fate of Liberty* 162 (1991) (quoting Holt's opinion).

While the court of appeals recognized that commissions are "commonlaw war courts," App. 15a, it failed to apply longstanding guarantees of presence and confrontation. The result is to break from every commission precedent. *Quirin* and *Eisentrager* do not permit such a result.

B. The Court of Appeals' Erroneous Failure to Enforce the Geneva Conventions Conflicts With Other Circuits

1. *The court of appeals mischaracterized the issue.* Mr. Hamdan's habeas claim asserts that his detention is illegal under the 1949 GPW. The fatal flaw in the court of appeals' analysis of that claim is its conclusion, based on *Eisentrager*, that "the 1949 Geneva Convention does not confer upon

Hamdan a right to enforce its provisions in court." App. 11a. The court stated that international agreements "do not create private rights or provide a private cause of action." *Id.* 8a. But this misapprehends the central issue, which, under the habeas statute, is the legality of detention, not one's standing to assert a private right of action. The former inquiry properly focuses on the conduct of the detaining authority, where attention should be in a habeas action, while the latter often, as here, poses vexing and often unnecessary questions of constitutional and international law. The district court cut through that Gordian knot by observing that "Hamdan has not asserted a 'private right of action' under the Third Geneva Convention." App. 34a. Rather, he alleges that he is being held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2241(c)(3).

Moreover, quite apart from the habeas aspect of this case, "it is axiomatic that, while treaties are compacts between nations, 'a treaty may also contain provisions which confer certain rights upon...subjects of one of the nations...which are capable of enforcement as between private parties in the courts of the country.'" *Medellin v. Dretke*, 125 S. Ct. 2088, 2099-2100 (2005) (O'Connor, J., dissenting, joined by Justices Stevens, Souter, and Breyer) (quoting *Head Money Cases*, 112 U.S. 580, 598 (1884)). The panel lost sight of this fact, as its truncated quotation from *Head Money Cases* reveals. App. 7a.

The court of appeals also lost sight of the fact that "[t]his Court has repeatedly enforced treaty-based rights of individual foreigners, allowing them to assert claims arising from various treaties. These treaties...do not share any special magic words. Their rights-conferring language is arguably no clearer than the Vienna Convention's is, and they do not specify judicial enforcement." *Medellin*, 125 S. Ct. at 2104 (O'Connor, J., dissenting) (citing cases).

2. *The court of appeals misread Eisentrager.* The court of appeals based its holding primarily on *dicta* in *Eisentrager* concerning a different treaty, the 1929 Geneva Convention. *Eisentrager* held that alien enemy combatants did not have habeas rights. That portion of *Eisentrager* is no longer good

law after *Rasul* held that such combatants could file such petitions. After deciding the habeas issue, *Eisentrager* stated that the 1929 Convention did not protect the defendants. It further stated, in what three Justices criticized as "gratuitous" *dicta*, 339 U.S. at 794 (Black, J., dissenting, joined by Douglas, J., and Burton, J.)) that "responsibility for observance and enforcement of these rights is upon political and military authorities." *Id.* at 789 n.14.

From this *dicta*, the court of appeals erroneously concluded that Hamdan could not enforce the GPW. But the *Eisentrager* Court considered a different issue than that raised by Hamdan—whether, separate from the habeas petition (a right denied by that opinion), an alien enemy combatant had an independent cause of action under the 1929 Convention. *Eisentrager* had to have considered this claim as a cause of action independent from the habeas petition or the first part of the opinion would have wholly foreclosed its consideration. Unlike petitioners in *Eisentrager*, Hamdan claims in a habeas petition (his right being confirmed under *Rasul*), that his detention is inconsistent with the laws and treaties of the United States, including the 1949 GPW. Were habeas law as found by the court of appeals below, no habeas petitioner could assert a valid claim unless the statute or treaty invoked expressly conferred a cause of action or judicially enforceable private rights. Because few treaties or statutes contain such express provisions, such a holding would largely eviscerate habeas rights in all but the most limited of circumstances.

The court of appeals' interpretation of the 1949 GPW, based on some phrases in a footnote about the 1929 Convention, is unpersuasive. This Court has repeatedly enforced treaty-based rights for the benefit of individuals who invoke them, even where those treaties had diplomatic enforcement provisions. *See, e.g.*, *Chew Heong v. United States*, 112 U.S. 536 (1884); *Kolovrat v. Oregon*, 366 U.S. 187, 198 (1961); *Jordan v. Tashiro*, 278 U.S. 123, 130 (1928); *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924).

The very first Article of the GPW requires the Parties "to

respect and to ensure respect for the present Convention in all circumstances." In this country, an essential part of the legal structure that ensures such compliance is the power of Article III courts to interpret and enforce treaties under the Judiciary and Supremacy Clauses, U.S. Const. art. III, § 2, cl. 1; art. VI, § 2, and under the habeas statute. The court of appeals would abdicate this responsibility, yielding to a demand for deference from the President. But this Court, not an intermediate court, must settle the question:

> The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import . . . must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one SUPREME TRIBUNAL.

FEDERALIST No. 22, at 150 (Hamilton) (Rossiter ed. 1961).

Finally, even if the court of appeals had read *Eisentrager* properly, certiorari would still be appropriate to allow this Court to consider the vitality of *Eisentrager* in the aftermath of *Rasul* and the half-century of other developments in national and international law. *See, e.g.*, *Medellin*, 125 S. Ct. at 2105 ("In the past the Court has revisited its interpretation of a treaty when new international law has come to light") (O'Connor, J., dissenting).

The case for reevaluation here is particularly compelling, since the specific treaty provisions at issue in *Eisentrager* have been reversed. In words ignored by the panel below, *Eisentrager* found that, under the 1929 Convention, the individual-rights provisions invoked by the Petitioners *did not* "appl[y] to a trial for war crimes." 339 U.S. at 789.[19] GPW Article 85 was written to *reverse* that interpretation, which originally came from *Yamashita*, 327 U.S. at 22. Yet the panel wrongly insisted, citing anachronistic passages from *Eisentrager*, that the 1929 Convention "protects individual rights." App. 10a. In Eisentrager's time, it didn't. Now the GPW does. By characterizing the 1929 Convention as protecting Eisentrager's rights, the panel erroneously

[19] GPW Arts. 85 and 102 and Art. 146 of the Fourth Convention specifically broke from these limitations and revolutionized the protection of individual rights in war. See, e.g., Geoffrey Best, *War and Law Since 1945* 80-114 (1994).

sidestepped the Court's many precedents, such as the *Head Money Cases*, 112 U.S. at 598, which require enforcement when treaty-based individual rights are at issue.[20]

3. *The court of appeals created a circuit split.* At least two circuits have recently emphasized the distinction between a treaty's creation of a private cause of action and a treaty's creation of rights enforceable through *otherwise available* causes of action, such as the habeas statute. *See Wang v. Ashcroft*, 320 F.3d 130, 141 (2d Cir. 2003) (emphasizing that serious constitutional questions might arise were aliens not entitled to bring habeas claims asserting rights under the Convention Against Torture, CAT, a non-self-executing treaty); *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 218-20 & n.22 (3d Cir. 2003). *See also Auguste v. Ridge*, 395 F.3d 123, 137 (3d Cir. 2005); *Cadet v. Bulger*, 377 F.3d 1173, 1181-82 (11th Cir. 2004); *Singh v. Ashcroft*, 351 F.3d 435, 441-42 (9th Cir. 2003); *Saint Fort v. Ashcroft*, 329 F.3d 191, 202 (1st Cir. 2003). Notably, decisions such as *Wang* and *Ogbudimkpa* enforced rights conferred by a non-self executing treaty despite explicit language in the statute executing the treaty to deny federal jurisdiction. *See* Foreign Affairs Reform and Restructuring Act §2242 (1998), 8 U.S.C. 1231 n. ("[N]othing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under" CAT). The courts held that *INS v. St. Cyr*, 533 U.S. 289 (2001), required that habeas review be preserved and afforded to the petitioners, because Congress had not made the clear, unambiguous statement necessary to preclude such review

In contrast, the panel in this case was of the view that hardly any treaty-based rights are capable of judicial enforcement. That broad statement not only conflicts with

[20] In addition, *Eisentrager* did not involve the provision of the habeas statute at issue here, 28 U.S.C. 2241(c)(3). Eisentrager asserted only one type of habeas jurisdiction, that for "being a citizen of a foreign state and domiciled therein...in custody for an act done or omitted under any alleged...sanction of any foreign state...the validity and effect of which depend upon the law of nations." 28 U.S.C. 2241(c)(4); Br. for Resp't, *Johnson v. Eisentrager*, at 2, 24-26. The Court in *Eisentrager* had no cause to answer the question of whether 2241(c)(3) makes the Geneva Convention, either of 1929 or 1949, enforceable.

this Court's longstanding recognition of habeas as a remedy for treaty violations, *Mali v. Keeper of the Common Jail*, 120 U.S. 1 (1887); taken to its logical extreme, it also reads out of the plain-text of 2241(c)(3) a guarantee that habeas is available for violations of "treaties of the United States."

The case for Hamdan's protection under the Geneva Conventions is far stronger than that presented in the other Circuits, since the court below read two statutes, 10 U.S.C. 821, 836, to authorize commissions. Those statutes must be interpreted consistently with international law, for "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," *The Charming Betsy*, 6 U.S. at 118; U.S. Petr. Br., No. 04-1084, *Gonzales v. O Centro Espirita Etc.*, at 41-47 (relying heavily on *Charming Betsy* to interpret RFRA); *Reid*, 354 U.S., at 18 n.34 ("By the constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation...(I)f the two are inconsistent, the one last in date will control") (internal citations omitted) (plurality); *Cook v. United States*, 288 U.S. 102 (1933). Even if Hamdan is not protected by 2241(c)(3)'s reference to "treaties," he is thus protected by its reference to "custody in violation of the ... laws..."

Finally, even if the GPW does not allow the courts any role in its enforcement, the court of appeals' reliance on *Eisentrager* predates Army Reg. 190-8, §1-6(a), which implements the GPW, as recognized by Souter, J., concurring in the judgment in *Hamdi*, 124 S. Ct. at 2658. It is well-settled that such regulations are judicially enforceable. *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959); *Service v. Dulles*, 354 U.S. 363, 388 (1957). The panel's claim that the President is "competent authority" to make a status determination of Petitioner, a determination essential to providing a commission with jurisdiction, is questionable, and raises conflicts with *Hamdi*.

It may be that this Court will ultimately conclude that the court below reached the right result regarding the 1949 Conventions. But our nation's most important trials in the wake of September 11 simply cannot rest on one sentence of *dicta* in a footnote of a 55-year old case.

4. *The court of appeals misinterpreted the GPW.* Under GPW Article 5, if any doubt exists as to whether an individual is entitled to its protections, that person must be afforded all protections "until such time as their status has been determined by a competent tribunal."

GPW Art. 102 provides that persons "can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power." The district court duly held that a commission "is not such a court. Its procedures are not such procedures." App. 29a.

The court of appeals, however, vested the President with the ability to declare entire conflicts and groups not eligible for the above protections. As the district court recognized, such a decision not only imperils relationships with other nations, it also threatens the ability of our Government to demand compliance with the Geneva Conventions when American troops are captured. App. 34a.[21]

The court also claimed that the GPW does not apply to Petitioner because he is a member of al Qaeda. Not only is the factual premise in doubt, Respondents' interpretation is also refuted by the language and structure of the Convention itself. That language applies in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." GPW, Art. 2. Petitioner was captured in Afghanistan, and Afghanistan and the United States are High Contracting Parties.

The court of appeals suggested that Mr. Hamdan did not meet the criteria for a POW in GPW Art. 4(a)(2). Apart from the problem that Mr. Hamdan denies being part of al Qaeda,

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[21] During World War II, when Japanese Judge-Advocates tried our soldiers in a military commission that, *inter alia*, deprived American soldiers of the right to participate and violated Japanese rules for courts-martial, America responded by prosecuting the Japanese attorneys in our own commissions, despite Japan's claim that unlawful combatants have no rights. *United States v. Uchiyama* Tr., Case 35-36, War Crimes Branch, JAG Records, at 20 (Prosecution's opening statement: "[The accused] applied to them a special type of summary procedure which failed to afford them the minimal safeguards for the guarantee of their fundamental rights which were given them both by the written and customary laws of war."). See Jess Bravin, *Will Old Rulings Play a Role in Terror Cases?*, Wall St. J., Apr. 7, 2005, at B1 (providing other examples of American military commissions prosecuting Japanese JAGs for not providing Geneva Convention and other protections to our captured troops in Japanese war-crimes trials); App. 81a-95a.

his claim for POW status has always rested on other provisions, including GPW Art. 4(a)(1) and (4), as well as Common Article 3. The four requirements mentioned by the court below are not at issue.

Respondents wrongly claim that the Executive's interpretation of a treaty is conclusive and unreviewable. *See, e.g., Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933). The district court correctly applied the longstanding canon that "where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred." *United States v. Stuart*, 489 U.S. 353, 368 (1989) (internal citation omitted).

5. *This court should grant certiorari to resolve the split in authority about Common Article 3.* The divided court below held that Mr. Hamdan is not protected by this Article. It agreed with Respondents that the conflict against al Qaeda was "separate" from the Taliban (who controlled Afghanistan), and that the Article does not extend to armed conflicts against non-state entities. This holding directly conflicts with *Kadic v. Karadzic*, where the Second Circuit held that "all 'parties' to a conflict–which includes insurgent military groups–are obliged to adhere to these most fundamental requirements of the law of war." 70 F.3d 232, 243 (2d Cir. 1995); *see also Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1351 n.39 (N.D. Ga. 2002).

The circuit court conflict regarding Common Article 3 is replicated in this very case, as Judge Williams stated:

> [T]he logical reading of 'international character' is one that matches the basic derivation of the word 'international,' i.e., *between nations*. Thus, I think the context compels the view that a conflict between a signatory and a non-state actor is a conflict 'not of an international character.' In such a conflict, the signatory is bound to Common Article 3's modest requirements.

App. 16a-18a (Williams, J., concurring). To not apply Article 3, moreover, would remove any basis for commissions to exist or to try offenses. See pp.14-16, *supra*. "[A]s a matter of law, there can be no wars in which one side has all the rights and the other has none." Intl. Comte. Red Cross, *International Humanitarian Law*, at 19 (2003) http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5XRDCC/$File/IHLcontemp_armedconflicts_FINAL_ANG.pdf.

C. The Court Should Hear this Case Now

1. Mr. Hamdan faces the first commission since the ratification of the Geneva Conventions and the enactment of the UCMJ. The court of appeals, lacking modern guidance from this Court, had to rely on precedent that predated these developments. But 1942 law, even clear 1942 law, is simply not good enough to decide a case of such gravity.

This case squarely and robustly presents the issues on which the Court's guidance is needed. Petitioner did not receive an Article 5 hearing under the GPW or under AR 190-8 before his criminal trial began; he is being prosecuted in the name of the laws of war, and the President has invoked 10 U.S.C. 821, 836. He receives different protections than all others who face courts-martial under the UCMJ, and his right to be present has already been taken away.

As the court of appeals held, Mr. Hamdan challenges the legitimacy and jurisdiction of the commission, so "setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction." App. 4a (citing *Abney*, 431 U.S. at 662); *Gilliam v. Foster*, 75 F.3d 881 (4th Cir. 1996) (en banc). To force Hamdan to endure a trial whose legitimacy is not finally resolved will also preview his trial defense for the prosecution, vitiating his rights.[22] This point is particularly salient in the wake of reports that the commission's own prosecutors stated that "the chief prosecutor had told his subordinates that the members of the military commission that would try the first four defendants [which include Hamdan] would be 'handpicked' to ensure that all would be convicted." Neil Lewis, *Two Prosecutors Faulted Trials for Detainees*, N.Y. Times, Aug. 1, 2005, at A1; App 96a-102a.

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[22] *See Rafeedie v. INS*, 880 F.2d 506, 517 (D.C. Cir. 1989) (holding that, even in immigration context, a "substantial practical litigation advantage" is lost by forcing someone to go through a summary proceeding because "if he presents his defense in [the summary] proceeding, and a court later finds that section inapplicable to him, the INS will nevertheless know his defense in advance of any [plenary] proceeding; if, however, he does not present his factual defense now, he risks foresaking his only opportunity to present a factual defense").

2. Even hefty appreciation for the passive virtues requires a point at which some guidance *ex ante* is appropriate. Like *Quirin*, this is that point. The court of appeals has said that in this new war, there are virtually no ground rules. If that is to be the law, such a statement must come from this Court.

If the Court were to decline certiorari, it may not have occasion to reach these weighty issues again for many years. In an ordinary trial, dispatch is inherent in speedy-trial guarantees and other time-tested limits. Notably, Respondents have claimed that, unlike any other American civilian or military trials, no speedy-trial rights exist here. A conviction may not happen for many months, if not years. After that, the case is submitted to a Review Panel, and then to the Secretary of Defense or President. There are no time limits on this latter review. Bearing in mind that Petitioner was detained for nearly three years before he was charged, and only received charges after this lawsuit was filed and *Rasul* decided, further delays should be expected.

Once the trial, Review Panel, and President/Secretary determination is made regarding Mr. Hamdan's fate, another multi-year delay is likely. Unlike state courts and courts-martial, no direct appeal exists from the commission process to this Court. Even if Mr. Hamdan received a President/Secretary determination tomorrow, and filed a collateral district court lawsuit that day, the pace of litigation in the D.C. Circuit for even *expedited* cases suggests that it would be October Term 2007 at the earliest before his case would reach the Petition stage. *See, e.g., Rasul*, 124 S. Ct. 2686 (decided June, 2004, scheduled on expedited appeal for argument in D.C. Circuit next month). This two-year schedule is derived from purely federal cases, not ones that also require the discovery, pretrial, and trial procedures of a commission. If the Court does not grant certiorari, the sweeping authority given to the President may be his for several years before the Court has another opportunity to clarify even the most basic ground rules for commissions.

Of course, this Court ordinarily does not sit to clarify rules at the outset of criminal trials. But as Respondents and

the court below have stated, this is not an ordinary trial. The Questions Presented go to the heart of the integrity of our judicial system. Just as wars, once started, cannot be undone, so, too, it is with commission trials. They are not regular courts applying established rules and routines. Rather, they are proceedings where not a single right is guaranteed to the defense, making trial strategy impossible, particularly when they hover under a cloud of legal uncertainty, however much temporarily dissipated by the court of appeals.

In similar cases, such as *Quirin* and *Reid*, certiorari *before* judgment was granted. The propriety of certiorari here is even greater, given the broad lower court decision, the interests at stake, and questions surrounding this Court's precedent. This Court's review of the panel's conclusions, no matter what the outcome, will provide authoritative guidance to the Executive, Congress, bench, bar, and world.

3. Due to the consolidation of all commission litigation in Washington, *Padilla*, 124 S. Ct. at 2725 n.16, the court below has crafted a national holding that affords unprecedented deference to the Executive. No "percolation" is possible, and the Court should decide this case now, before the delicate issue of undoing criminal convictions presents itself.

If commissions are worth conducting, they are worth conducting lawfully and being perceived as so conducted. Deploying them under far-reaching intermediate court decisions or in jurisdictionally dubious contexts can only work a disservice to their potential utility when conducted under legally appropriate ground rules. Before embarking on a dangerous experiment to break not only from common-law and international law, but also from our traditions of military justice, Americans and the rest of the world should rest assured that these principles will not be abandoned without at least review by the highest Court in the land.

CONCLUSION

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

Lieutenant Commander
Charles Swift
Office of
Military Commissions
1931 Jefferson Davis Hwy.
Suite 103
Arlington, VA 22202
(703) 607-1521

Neal K. Katyal
Counsel of Record
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9000

Benjamin S. Sharp
Harry H. Schneider
Joseph M. McMillan
Kelly A. Cameron
Charles C. Sipos
David R. East
PERKINS COIE LLP
607 14th St., NW
Washington, DC 20005
(202) 628-6600

August 8, 2005

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

DAVID M. HICKS,
Petitioner,
v.
GEORGE W. BUSH, President of the United States, *et al.*,
Respondents.

Civil Action No. 02-CV-0299 (CKK)

ORDER HOLDING IN ABEYANCE RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW WITH RESPECT TO CHALLENGES TO THE MILITARY COMMISSION PROCESS

By order dated November 18, 2004, counsel for petitioner and respondents were requested to show cause why the respondents' motion to dismiss petitioner David M. Hicks' claims challenging the legality of military commission proceedings should not be held in abeyance pending resolution of the appeal of the recent decision in *Hamdan v. Rumsfeld*, 04-CV-1519 (JR), 2004 WL 2504508 (Nov. 8, 2004) (D.D.C.).

In response to the show cause order, counsel for respondents stated their belief that resolution of the motion in this case should be held in abeyance pending appellate resolution of *Hamdan*. Counsel for the petitioner disagreed, citing the respondents' unwillingness to delay the trial of Mr. Hicks by military commission until this Court had time

to adjudicate his challenges after resolution of *Hamdan*. Petitioner's Brief Showing Cause Why This Case Should Not be Held in Abeyance, dated November 29, 2004, at 5.

On December 13, 2004, counsel for respondents filed a Notice of Recent Issuances informing the Court that "the Appointing Authority for Military Commissions has issued a formal written directive that any trial in David M. Hicks' military commission case ... shall be held in abeyance pending the outcome of the appeal in *Hamdan*." Notice of Recent Issuances at 1. In light of this recent development, it is hereby

ORDERED that resolution of Respondents' Motion to Dismiss or for Judgment as a Matter of Law with Respect to Challenges to the Military Commission Process shall be held in abeyance pending final resolution of all appeals in *Hamdan v. Rumsfeld*. Should the circumstances forming the basis of this decision change, counsel may seek reconsideration of this Order.

IT IS SO ORDERED.
December 15, 2004

JOYCE HENS GREEN
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

IBRAHIM AHMED MAHMOUD AL QOSI,
Plaintiff
v.
GEORGE W. BUSH, *et al.*,
Defendants.

Civil Action No. 04-1937 (PLF)

ORDER

Petitioner Ibrahim Ahmed Mamoud al Qosi is a detainee at the United States Naval Station at Guantanamo Bay, Cuba. On November 8, 2004, Mr. al Qosi filed a petition for a writ of habeas corpus challenging, *inter alia*, his continued detention at Guantanamo, the United States government's designation of Mr. al Qosi as an "enemy combatant," and the government's intention to subject him to trial by military commission.

Many of the arguments raised by Mr. al Qosi were also raised by petitioner Salim Ahmed in *Hamdan v. Rumsfeld*, No. 04-1519 (D.D.C. filed Sept. 2, 2004). On November 8, 2004, Judge Robertson issued a memorandum opinion resolving some of those questions in favor of Mr. Hamdan and denying the government's motion to dismiss the petition. See *Hamdan v. Rumsfeld*, 2004 U.S. DIST LEXIS 22724. The government has noticed an appeal from that ruling, and the Court of Appeals for the District of Columbia Circuit has set oral argument for March 8, 2005. *See Hamdan v. Rumsfeld*, No. 05-5393 (D.C. Cir. filed Nov. 16, 2004).

In light of the court of appeals' consideration in Hamdan of issues that might prove dispositive in this case,

and of news reports indicating that the government has suspended its system for the trial of individuals like Mr. Hamdan and Mr. al Qosi by military commissions at Guantanamo Bay, the Court on November 18, 2004 directed the parties to confer and, if possible, agree on a stipulation that would hold this case in abeyance pending the resolution of Hamdan by the court of appeals. The parties, however, could not agree to a stipulation. Petitioner instead filed a "Statement Opposing Abeyance," and the parties came before the Court for a status conference on December 13, 2004.

At the status conference, counsel for petitioner further articulated his reasons for opposing abeyance, while the government argued in favor of staying proceedings pending resolution of Hamdan. The government also tendered to the Court a directive from John D. Altenburg, Jr., Appointing Authority for Military Commissions in the Office of the Secretary of Defense, indicating that the military commission proceeding against petitioner would be held in abeyance pending resolution of *Hamdan* by the court of appeals. Counsel for the government represented that such abeyance will remain in effect until the court of appeals issues its mandate in *Hamdan*.

Upon consideration of the entire record in this case, and the arguments and representations of counsel, it is hereby

ORDERED that all proceedings in this matter will be held in abeyance pending resolution of *Hamdan v. Rumsfeld* by the court of appeals.

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

DATE: December 17, 2004

*2005 U.S. App. LEXIS 14315, **

SALIM AHMED **HAMDAN,** APPELLEE v. DONALD H. **RUMSFELD,** UNITED STATES SECRETARY OF DEFENSE, ET AL., APPELLANTS

No. 04-5393

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

2005 U.S. App. LEXIS 14315

April 7, 2005, Argued
July 15, 2005, Decided

PRIOR HISTORY: [*1] Appeal from the United States District Court for the District of Columbia. (04cv01519). **Hamdan** v. **Rumsfeld,** 344 F. Supp. 2d 152, 2004 U.S. Dist. LEXIS 22724 (D.D.C., 2004)

CASE SUMMARY

PROCEDURAL POSTURE: Appellee filed a habeas petition in the United States District Court for the District of Columbia. The court enjoined further military commission proceedings against appellee unless a competent tribunal determined that he was not a prisoner of war under the Geneva Convention Relative to the Treatment of Prisoners of War (1949 Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3316, ratified in 1955. Appellant Secretary of Defense challenged the order.

OVERVIEW: The Government alleged that appellee, who was being held in solitary confinement at the Guantanamo Bay Naval Base in Cuba, was Osama bin Laden's personal driver in Afghanistan. The charges further alleged that he served as bin Laden's personal bodyguard, delivered weapons to al Qaeda members, drove bin Laden to al Qaeda training camps and safe havens in Afghanistan, and trained at the al Qaeda-sponsored al Farouq camp. On appeal, the court found that through a joint resolution, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001), and Unif. Code Mil. Justice art. 21 and 36, 10 U.S.C.S. §§ 821 and 836, Congress authorized the military commission that was to try appellee. Additionally, the 1949 Geneva Convention did not confer upon appellee a right to enforce its provisions in court. Finally, to the extent there was ambiguity about the meaning of an article in the 1949 Geneva Convention as applied to al Qaeda and its members, (1) the President's view of the provision prevailed; (2) comity dictated that the court defer to the ongoing military proceedings; and (3) if the article covered appellee, he could contest his conviction in federal court after he exhausted his military remedies.

OUTCOME: The judgment of the district court was reversed.

CORE TERMS: military, military commission, treaty, signatory, enforceable,

individual rights, regulation, court-martial, enemy, prisoner of war, civilian, tribunal, captured, joint resolution, terrorism, competent tribunal, armed conflict, habeas corpus, courts-martial, military order, armed forces, civil war, combatant, camp, jurisdictional, indispensable, civilized, armed, non-state, pronounced

LexisNexis(R) Headnotes ◆ Hide Headnotes

Criminal Law & Procedure > Habeas Corpus > Exhaustion of Remedies
Military & Veterans Law > Military Justice > Appeals & Reviews > Finality
Military & Veterans Law > Military Justice > Jurisdiction > Lack of Jurisdiction
Military & Veterans Law > Military Justice > Jurisdiction > Subject Matter Jurisdiction

HN1 A person need not exhaust remedies in a military tribunal if the military court has no jurisdiction over him. More Like This Headnote

Constitutional Law > Congressional Duties & Powers > Lower Federal Courts

HN2 U.S. Const. art. I, § 8 gives Congress the power to constitute tribunals inferior to the United States Supreme Court. More Like This Headnote

Governments > Federal Government > Domestic Security
Military & Veterans Law > Military Justice > Jurisdiction > Subject Matter Jurisdiction

HN3 The President's Military Order of November 13, 2001, states that any person subject to the order, including members of al Qaeda, shall, when tried, be tried by a military commission for any and all offenses triable by a military commission that such individual is alleged to have committed. 66 Fed. Reg. at 57,834. More Like This Headnote

Constitutional Law > Congressional Duties & Powers > War Powers Clause
Governments > Federal Government > Domestic Security

HN4 In a joint resolution, passed in response to the attacks of September 11, 2001, Congress authorized the President to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the attacks and recognized the President's authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001). More Like This Headnote

Governments > Federal Government > Domestic Security
International Law > Dispute Resolution > Laws of War

HN5 An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede the military effort, have violated the law of war. The trial and punishment of enemy combatants is thus part of the conduct of war. More Like This Headnote

Governments > Federal Government > Domestic Security
Military & Veterans Law > Military Justice > Jurisdiction > Exclusive & Nonexclusive Jurisdiction

HN6 10 U.S.C.S. § 821 states that court-martial jurisdiction does 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. Congress also authorized the President, in another provision to establish procedures for military commissions. 10 U.S.C.S. § 836(a). More Like This Headnote

Constitutional Law > Supremacy Clause
International Law > Treaty Formation

HN7 See U.S. Const. art. VI, cl. 2.

International Law > Treaty Formation
International Law > Treaty Interpretation

HN8 The United States of America has traditionally negotiated treaties with the understanding that they do not create judicially enforceable individual rights. More Like This Headnote

International Law > Treaty Formation
International Law > Treaty Interpretation

HN9 As a general matter, a treaty is primarily a compact between independent nations, and depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. More Like This Headnote

International Law > Dispute Resolution
International Law > Treaty Interpretation

HN10 If a treaty is violated, this becomes the subject of international negotiations and reclamation, not the subject of a lawsuit. More Like This Headnote

International Law > Treaty Interpretation

HN11 International agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts. More Like This Headnote

Governments > Courts > Authority to Adjudicate
International Law > Treaty Interpretation

HN12 The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, ratified in 1955, cannot be judicially enforced. More Like This Headnote

International Law > Dispute Resolution > Laws of War
International Law > Treaty Interpretation

HN13 The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Common art. 1, 6 U.S.T. 3316, ratified in 1955, states that parties to the Convention undertake to respect and to ensure respect for the Convention in all

circumstances. More Like This Headnote

International Law > Treaty Interpretation

HN14 The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 8, 6 U.S.T. 3316, ratified in 1955, states that its provisions are to be applied with the cooperation and under the scrutiny of the Protecting Powers. More Like This Headnote

International Law > Dispute Resolution > Arbitration & Mediation

International Law > Treaty Interpretation

HN15 The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 132, 6 U.S.T. 3316, ratified in 1955, provides that at the request of a party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested parties, concerning any alleged violation of the Convention. If no agreement is reached about the procedure for the enquiry, Article 132 further provides that the parties should agree on the choice of an umpire who will decide upon the procedure to be followed. More Like This Headnote

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Action

Governments > Courts > Authority to Adjudicate

HN16 That a court has jurisdiction over a claim does not mean the claim is valid. More Like This Headnote

Criminal Law & Procedure > Habeas Corpus > Habeas Corpus Procedure

Governments > Legislation > Statutory Remedies & Rights

International Law > Treaty Interpretation

HN17 The availability of habeas corpus may obviate a petitioner's need to rely on a private right of action, but it does not render a treaty judicially enforceable. More Like This Headnote

International Law > Treaty Interpretation

Military & Veterans Law > Military Justice > Jurisdiction > Subject Matter Jurisdiction

HN18 The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 102, 6 U.S.T. 3316, ratified in 1955, provides that a prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Crimes Against the Person > Terrorism

International Law > Treaty Interpretation

HN19 The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, ratified in 1955, does not apply to al Qaeda and its members. More Like This Headnote

International Law > Dispute Resolution > Laws of War

International Law > Treaty Interpretation

HN20 The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, ratified in 1955, appears to contemplate only two types of armed conflicts. The first is an international conflict. Under the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Common art. 2, 6 U.S.T. 3316, ratified in 1955, the provisions of the Convention 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, even if the state of war is not recognized by one of them. There is an exception, set forth in the last paragraph of Common article 2, when one of the "Powers" in a conflict is not a signatory but the other is. Then the signatory nation is bound to adhere to the Convention so long as the opposing Power accepts and applies the provisions thereof. More Like This Headnote

International Law > Dispute Resolution > Laws of War
International Law > Treaty Interpretation

HN21 The second type of conflict covered by the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Common art. 3, 6 U.S.T. 3316, ratified in 1955, is a civil war -- that is, an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties. In that situation, 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 a civilized people. More Like This Headnote

Constitutional Law > The Presidency
International Law > Treaty Interpretation

HN22 Under the Constitution, the President has a degree of independent authority to act in foreign affairs, and, for this reason and others, his construction and application of treaty provisions is entitled to great weight. More Like This Headnote

Governments > Courts > Authority to Adjudicate
International Law > Treaty Interpretation
Military & Veterans Law > Military Justice > Jurisdiction > Subject Matter Jurisdiction

HN23 A requirement in the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Common art. 3(1)(d), 6 U.S.T. 3316, ratified in 1955, is that sentences must be pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. More Like This Headnote

Constitutional Law > The Presidency
Governments > Federal Government > Domestic Security
Military & Veterans Law > Military Justice > Jurisdiction > Subject Matter Jurisdiction

HN24 See Unif. Code Mil. Justice art. 36, 10 U.S.C.S. § 836.

Constitutional Law > The Presidency

Governments > Federal Government > Domestic Security
Military & Veterans Law > Military Justice > Trials

HN25 In establishing military commissions, the President may not adopt procedures that are contrary to or inconsistent with the Uniform Code of Military Justice's provisions governing military commissions. In particular, Unif. Code Mil. Justice art. 39, 10 U.S.C.S. § 839, requires that sessions of a trial by court-martial shall be conducted in the presence of the accused. More Like This Headnote

Military & Veterans Law > Military Justice > Court Members
Military & Veterans Law > Military Justice > Judges
Military & Veterans Law > Military Justice > Jurisdiction > Subject Matter Jurisdiction

HN26 The Uniform Code of Military Justice imposes only minimal restrictions upon the form and function of military commissions. More Like This Headnote

International Law > Treaty Interpretation
Military & Veterans Law > Military Justice > Pretrial Restraint > Pretrial Confinement

HN27 Army Reg. 190-8, which contains many subsections, implements international law, both customary and codified, relating to enemy prisoners of war, retained personnel, civilian internees, and other detainees which includes those persons held during military operations other than war. Army Reg. 190-8, § 1-1(b). The regulation lists the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, ratified in 1955, among the principal treaties relevant to the regulation. Army Reg. 190-8, § 1-1(b)(3). One subsection, Army Reg. 190-8, § 1-5(a)(2), requires that prisoners receive the protections of the Convention until some other legal status is determined by competent authority. More Like This Headnote

Military & Veterans Law > Military Justice > Court Members
Military & Veterans Law > Military Justice > Judges

HN28 Army regulations specify that a competent tribunal shall be composed of three commissioned officers, one of whom must be field-grade. Army Regs. 190-8 § 1.6(c). A field-grade officer is an officer above the rank of captain and below the rank of brigadier general -- a major, a lieutenant colonel, or a colonel. More Like This Headnote

Constitutional Law > The Presidency
Governments > Federal Government > Domestic Security
Military & Veterans Law > Military Justice > Court Members
Military & Veterans Law > Military Justice > Judges

HN29 The President's Order concerning the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism requires military commissions to be composed of between three and seven commissioned officers. 32 C.F.R. § 9.4(a). More Like This Headnote

COUNSEL: Peter D. Keisler, Assistant Attorney General, U.S. Department of Justice, argued the cause for appellants. With him on the briefs were Paul D. Clement, Acting Solicitor General, Gregory G. Katsas, Deputy Assistant Attorney General, Kenneth L. Wainstein, U.S. Attorney, Douglas N. Letter, Robert M. Loeb, August Flentje, Sharon Swingle, Eric Miller and Stephan E. Oestreicher, Jr., Attorneys.

Daniel J. Popeo and Richard A. Samp were on the brief of amici curiae Washington Legal Foundation and Allied Educational Foundation in support of appellants.

Jay Alan Sekulow and James M. Henderson, Jr. were on the brief of amicus curiae The American Center for Law & Justice supporting appellants.

Neal K. Katyal and Charles Swift, pro hac vice, argued the cause for appellee. With them on the briefs were Benjamin S. Sharp, Kelly A. Cameron, Harry H. Schneider, Jr., Joseph M. McMillan, David R. East, and Charles C. Sipos.

Carlos M. Vazquez and David C. Vladeck were on the brief of amici curiae of fifteen law professors in support of appellee.

David R. Berz was on the brief for amici curiae **[*2]** Louise Doswald-Beck, et al. in support of appellee.

Jordan J. Paust was on the brief for amicus curiae International Law and National Security Law Professors in support of appellee.

Jenny S. Martinez, appearing Pro se, was on the brief for amici curiae Jenny S. Martinez and Allison Marston Danner.

Mary J. Moltenbrey was on the brief for amici curiae 305 United Kingdom and European Parliamentarians in support of appellee.

Gary S. Thompson was on the brief for amici curiae Eleven Legal Scholars in support of appellee.

Philip Sundel, Attorney, Office of Chief Defense Counsel, was on the brief for amicus curiae Military Attorneys Detailed to Represent Ali Hamza Ahmad Sulayman Al Bahlul in support of appellee.

Kurt J. Hamrock and Phillip E. Carter were on the brief for amici curiae Military Law Practitioners and Academicians Kevin J. Barry, et al. in support of appellee.

Blair G. Brown was on the brief for amicus curiae National Association of Criminal Defense Lawyers, Inc. in support of appellee.

Elisa C. Massimino was on the brief for amici curiae Human Rights First, et al. in support of appellee.

David H. Remes was on the brief for amici curiae **[*3]** General Merrill A. McPeak, et al. in support of appellee.

Jonathan M. Freiman was on the brief for amici curiae People for the American Way Foundation, et al. in support of appellee.

Morton Sklar was on the brief for amicus curiae The World Organization for Human Rights USA in support of appellee.

Jonathan L. Hafetz was on the brief for amicus curiae Louis Fisher in support of appellee.

Alan I. Horowitz was on the brief for amicus curiae Noah Feldman in support of appellee.

Christopher J. Wright and Timothy J. Simeone were on the brief for amicus curiae Urban Morgan Institute for Human Rights in support of appellee.

James J. Benjamin, Jr., Nancy Chung, Amit Kurlekar, Steven M. Pesner, and Laura K. Soong were on the brief for amicus curiae The Association of the Bar of the City of New York in support of appellee.

JUDGES: Before: RANDOLPH and ROBERTS, Circuit Judges, and WILLIAMS, Senior Circuit Judge. Opinion for the Court filed by Circuit Judge RANDOLPH. Concurring opinion filed by Senior Circuit Judge WILLIAMS.

OPINIONBY: RANDOLPH

OPINION: RANDOLPH, *Circuit Judge*: Afghani militia forces captured Salim Ahmed Hamdan in Afghanistan in late November 2001. Hamdan's **[*4]** captors turned him over to the American military, which transported him to the Guantanamo Bay Naval Base in Cuba. The military initially kept him in the general detention facility, known as Camp Delta. On July 3, 2003, the President determined "that there is reason to believe that [Hamdan] was a member of al Qaeda or was otherwise involved in terrorism directed against the United States." This finding brought Hamdan within the compass of the President's November 13, 2001, Order concerning the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833. Accordingly, Hamdan was designated for trial before a military commission.

In December 2003, Hamdan was removed from the general population at Guantanamo and placed in solitary confinement in Camp Echo. That same month, he was appointed counsel, initially for the limited purpose of plea negotiation. In April 2004, Hamdan filed this petition for habeas corpus. While his petition was pending before the district court, the government formally charged Hamdan with conspiracy to commit attacks on civilians and civilian objects, murder and destruction of property by an unprivileged **[*5]** belligerent, and terrorism. The charges alleged that Hamdan was Osama bin Laden's personal driver in Afghanistan between 1996 and November 2001, an allegation Hamdan admitted in an affidavit. The charges further alleged that Hamdan served as bin Laden's personal bodyguard, delivered weapons to al Qaeda members, drove bin Laden to al Qaeda training camps and safe havens in Afghanistan, and trained at the al Qaeda-sponsored al Farouq camp. Hamdan's trial was to be before a military commission, which the government tells us now consists of three officers of the rank of colonel. Brief for Appellants at 7.

In response to the Supreme Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004), Hamdan received a formal hearing before a Combatant Status Review Tribunal. The Tribunal affirmed his status as an enemy combatant, "either a member of or affiliated with Al Qaeda," for whom

continued detention was required.

On November 8, 2004, the district court granted in part

Hamdan's petition. Among other things, the court held that Hamdan could not be tried by a military commission unless a competent tribunal determined that he was not a **[*6]** prisoner of war under the 1949 Geneva Convention governing the treatment of prisoners. The court therefore enjoined the Secretary of Defense from conducting any further military commission proceedings against Hamdan. This appeal followed.

I.

The government's initial argument is that the district court should have abstained from exercising jurisdiction over Hamdan's habeas corpus petition. *Ex parte Quirin v. Cox*, 317 U.S. 1, 87 L. Ed. 3, 63 S. Ct. 2 (1942), in which captured German saboteurs challenged the lawfulness of the military commission before which they were to be tried, provides a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions. The Supreme Court ruled against the petitioners in *Quirin*, but only after considering their arguments on the merits. In an effort to minimize the precedential effect of *Quirin*, the government points out that the decision predates the comity-based abstention doctrine recognized in *Schlesinger v. Councilman*, 420 U.S. 738, 43 L. Ed. 2d 591, 95 S. Ct. 1300 (1975), and applied by this court in *New v. Cohen*, 327 U.S. App. D.C. 147, 129 F.3d 639 (D.C. Cir. 1997). **[*7]** *Councilman* and *New* hold only that civilian courts should not interfere with ongoing court-martial proceedings against citizen servicemen. The cases have little to tell us about the proceedings of military commissions against alien prisoners. The serviceman in *Councilman* wanted to block his court-martial for using and selling marijuana; the serviceman in *New* wanted to stop his court-martial for refusing to obey orders. The rationale of both cases was that a battle-ready military must be able to enforce "a respect for duty and discipline without counterpart in civilian life," *Councilman*, 420 U.S. at 757, and that "comity aids the military judiciary in its task of maintaining order and discipline in the armed services," *New*, 129 F.3d at 643. These concerns do not exist in Hamdan's case and we are thus left with nothing to detract from *Quirin*'s precedential value.

Even within the framework of *Councilman* and *New*, there is an exception to abstention: HN1 "a person need not exhaust remedies in a military tribunal if the military court has no jurisdiction over him." *New*, 129 F.3d at 644. The theory is that setting **[*8]** aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction. *See Abney v. United States*, 431 U.S. 651, 662, 52 L. Ed. 2d 651, 97 S. Ct. 2034 (1977). The courts in *Councilman* and *New* did not apply this exception because the servicemen had not "raised *substantial* arguments denying the right of the military to try them at all." *New*, 129 F.3d at 644 (citing *Councilman*, 420 U.S. at 759). Hamdan's jurisdictional challenge, by contrast, is not insubstantial, as our later discussion should demonstrate. While he does not deny the military's authority to try him, he does contend that a military commission has no jurisdiction over him and that any trial must be by court-martial. His claim, therefore, falls within the exception to *Councilman* and, in any event, is firmly supported by the Supreme Court's disposition of *Quirin*.

II.

In an argument distinct from his claims about the Geneva Convention, which we will discuss next, Hamdan maintains that the President violated the separation of powers inherent in the Constitution when he established military commissions. **[*9]** The argument is that HN2 Article I, § 8, of the Constitution gives Congress the power "to constitute Tribunals inferior to the supreme Court," that Congress has not established military commissions, and that the President has no inherent authority to do so under Article II. *See* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1284-85 (2002).

There is doubt that this separation-of-powers claim properly may serve as a basis for a court order halting a trial before a military commission, *see* *United States v. Cisneros*, 335 U.S. App. D.C. 135, 169 F.3d 763, 768-69 (D.C. Cir. 1999), and there is doubt that someone in Hamdan's position is entitled to assert such a constitutional claim, *see* *People's Mojahedin Org. v. Dep't of State*, 337 U.S. App. D.C. 106, 182 F.3d 17, 22 (D.C. Cir. 1999); *32 County Sovereignty Comm. v. Dep't of State*, 352 U.S. App. D.C. 93, 292 F.3d 797, 799 (D.C. Cir. 2002). In any event, on the merits there is little to Hamdan's argument.

HN3 The President's Military Order of November 13, 2001, stated that any person subject to the order, **[*10]** including members of al Qaeda, "shall, when tried, be tried by a military commission for any and all offenses triable by [a] military commission that such individual is alleged to have committed . . .." 66 Fed. Reg. at 57,834. The President relied on four sources of authority: his authority as Commander in Chief of the Armed Forces, U.S. CONST., art. II, § 2; Congress's joint resolution authorizing the use of force; 10 U.S.C. § 821; and 10 U.S.C. § 836. The last three are, of course, actions of Congress.

HN4 In the joint resolution, passed in response to the attacks of September 11, 2001, Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" the attacks and recognized the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001). *In re Yamashita*, 327 U.S. 1, 90 L. Ed. 499, 66 S. Ct. 340 (1946), which dealt with the validity of **[*11]** a military commission, held that HN5 an "important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war." *Id.* at 11. "The trial and punishment of enemy combatants," the Court further held, is thus part of the "conduct of war." *Id.* We think it no answer to say, as Hamdan does, that this case is different because Congress did not formally declare war. It has been suggested that only wars between sovereign nations would qualify for such a declaration. *See* John M. Bickers, *Military Commissions are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 TEX. TECH. L. REV. 899, 918 (2003). Even so, the joint resolution "went as far toward a declaration of war as it might, and as far or further than Congress went in the Civil War, the Philippine Insurrection, the Boxer Rebellion, the Punitive Expedition against Pancho Villa, the Korean War, the Vietnam War, the invasion of Panama, the Gulf War, and numerous other **[*12]** conflicts." *Id.* at 917. The plurality in *Hamdi v. Rumsfeld*, in suggesting that a military commission could determine whether an American citizen was an enemy combatant

in the current conflict, drew no distinction of the sort Hamdan urges upon us. 124 S. Ct. at 2640-42.

Ex parte Quirin also stands solidly against Hamdan's argument. The Court held that Congress had authorized military commissions through Article 15 of the Articles of War. *Ex parte Quirin v. Cox*, 317 U.S. 1 at 28-29, 87 L. Ed. 3; *accord In re Yamashita*, 327 U.S. at 19-20. The modern version of Article 15 is 10 U.S.C. § 821, which the President invoked when he issued his military order. HN6 Section 821 states that court-martial jurisdiction does 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." Congress also authorized the President, in another provision the military order cited, to establish procedures for military commissions. 10 U.S.C. § 836(a). Given these provisions and **[*13]** *Quirin* and *Yamashita*, it is impossible to see any basis for Hamdan's claim that Congress has not authorized military commissions. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2129-31 (2005). He attempts to distinguish *Quirin* and *Yamashita* on the ground that the military commissions there were in "war zones" while Guantanamo is far removed from the battlefield. We are left to wonder why this should matter and, in any event, the distinction does not hold: the military commission in *Quirin* sat in Washington, D.C., in the Department of Justice building; the military commission in *Yamashita* sat in the Phillipines after Japan had surrendered.

We therefore hold that through the joint resolution and the two statutes just mentioned, Congress authorized the military commission that will try Hamdan.

III.

This brings us to Hamdan's argument, accepted by the district court, that the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 ("1949 Geneva Convention"), ratified in 1955, may be enforced in federal court.

HN7 "Treaties **[*14]** made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST., art. VI, cl. 2. Even so, HN8 this country has traditionally negotiated treaties with the understanding that they do not create judicially enforceable individual rights. *See Holmes v. Laird*, 148 U.S. App. D.C. 187, 459 F.2d 1211, 1220, 1222 (D.C. Cir. 1972); *Canadian Transport Co. v. United States*, 214 U.S. App. D.C. 138, 663 F.2d 1081, 1092 (D.C. Cir. 1980). HN9 As a general matter, a "treaty is primarily a compact between independent nations," and "depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it." *Head Money Cases, Edye and Another v. Robertson*, 112 U.S. 580, 598, 28 L. Ed. 798, 5 S. Ct. 247, Treas. Dec. 6714 (1884). HN10 If a treaty is violated, this "becomes the subject of international negotiations and reclamation," not the subject of a lawsuit. *Id.*; *see Charlton v. Kelly*, 229 U.S. 447, 474, 57 L. Ed. 1274, 33 S. Ct. 945(1913); *Whitney v. Robertson*, 124 U.S. 190, 194-95, 31 L. Ed. 386, 8 S. Ct. 456 (1888); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 306, 314, 7 L. Ed. 415 (1829), **[*15]** *overruled on other grounds, United States v. Percheman*, 32 U.S. (7 Pet.) 51, 8 L. Ed. 604 (1883).

Thus, HN11 "international agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of

action in domestic courts." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a, at 395 (1987). The district court nevertheless concluded that the 1949 Geneva Convention conferred individual rights enforceable in federal court. We believe the court's conclusion disregards the principles just mentioned and is contrary to the Convention itself. To explain why, we must consider the Supreme Court's treatment of the Third Geneva Convention of 1929 in *Johnson v. Eisentrager*, 339 U.S. 763, 94 L. Ed. 1255, 70 S. Ct. 936 (1950), and this court's decision in *Holmes v. Laird*, neither of which the district court mentioned.

In *Eisentrager*, German nationals, convicted by a military commission in China of violating the laws of war and imprisoned in Germany, sought writs of habeas corpus in federal district court on the ground that the military commission **[*16]** violated their rights under the Constitution and their rights under the 1929 Geneva Convention. 339 U.S. at 767. The Supreme Court, speaking through Justice Jackson, wrote in an alternative holding that the Convention was not judicially enforceable: the Convention specifies rights of prisoners of war, but "responsibility for observance and enforcement of these rights is upon political and military authorities." *Id.* at 789 n.14. We relied on this holding in *Holmes v. Laird*, 459 F.2d at 1222, to deny enforcement of the individual rights provisions contained in the NATO Status of Forces Agreement, an international treaty.

This aspect of *Eisentrager* is still good law and demands our adherence. *Rasul v. Bush*, 542 U.S. 466, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (2004), decided a different and "narrow" question: whether federal courts had jurisdiction under 28 U.S.C. § 2241 "to consider challenges to the legality of the detention of foreign nationals" at Guantanamo Bay. *Id.* at 2690. The Court's decision in *Rasul* had nothing to say about enforcing any Geneva Convention. Its holding that federal courts had **[*17]** habeas corpus jurisdiction had no effect on *Eisentrager*'s interpretation of the 1929 Geneva Convention. That interpretation, we believe, leads to the conclusion that HN12 the 1949 Geneva Convention cannot be judicially enforced.

Although the government relied heavily on *Eisentrager* in making its argument to this effect, Hamdan chose to ignore the decision in his brief. Nevertheless, we have compared the 1949 Convention to the 1929 Convention. There are differences, but none of them renders *Eisentrager*'s conclusion about the 1929 Convention inapplicable to the 1949 Convention. HN13 Common Article 1 of the 1949 Convention states that parties to the Convention "undertake to respect and to ensure respect for the present Convention in all circumstances." The comparable provision in the 1929 version stated that the "Convention shall be respected . . . in all circumstances." Geneva Convention of 1929, art. 82. The revision imposed upon signatory nations the duty not only of complying themselves but also of making sure other signatories complied. Nothing in the revision altered the method by which a nation would enforce compliance. HN14 Article 8 of the 1949 Convention states that its provisions **[*18]** are to be "applied with the cooperation and under the scrutiny of the Protecting Powers . . .." This too was a feature of the 1929 Convention. *See* Geneva Convention of 1929, art. 86. But Article 11 of the 1949 Convention increased the role of the protecting power, typically the International Red Cross, when disputes arose: "In cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement." Here again there is no suggestion of judicial enforcement. The same is true with respect to the other method set forth in the 1949 Convention for settling

disagreements. HN15 Article 132 provides that "at the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention." If no agreement is reached about the procedure for the "enquiry," Article 132 further provides that "the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed."

Hamdan points out that the 1949 Geneva Convention **[*19]** protects individual rights. But so did the 1929 Geneva Convention, as the Court recognized in *Eisentrager*, 339 U.S. at 789-90. The NATO Status of Forces Agreement, at issue in *Holmes v. Laird*, also protected individual rights, but we held that the treaty was not judicially enforceable. 459 F.2d at 1222.

Eisentrager also answers Hamdan's argument that the habeas corpus statute, 28 U.S.C § 2241, permits courts to enforce the "treaty-based individual rights" set forth in the Geneva Convention. The 1929 Convention specified individual rights but as we have discussed, the Supreme Court ruled that these rights were to be enforced by means other than the writ of habeas corpus. The Supreme Court's *Rasul* decision did give district courts jurisdiction over habeas corpus petitions filed on behalf of Guantanamo detainees such as Hamdan. But *Rasul* did not render the Geneva Convention judicially enforceable. HN16 That a court has jurisdiction over a claim does not mean the claim is valid. *See* *Bell v. Hood*, 327 U.S. 678, 682-83, 90 L. Ed. 939, 66 S. Ct. 773 (1946). HN17 The availability of habeas may obviate a petitioner's need to rely **[*20]** on a private right of action, *see* *Wang v. Ashcroft*, 320 F.3d 130, 140-41 & n.16 (2d Cir. 2003), but it does not render a treaty judicially enforceable.

We therefore hold that the 1949 Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court. *See* *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978).

IV.

Even if the 1949 Geneva Convention could be enforced in court, this would not assist Hamdan. He contends that a military commission trial would violate his rights under HN18 Article 102, which provides that a "prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power." One problem for Hamdan is that he does not fit the Article 4 definition of a "prisoner of war" entitled to the protection of the Convention. He does not purport to be a member of a group who displayed "a fixed distinctive sign recognizable at a distance" and who conducted "their operations in accordance with the laws and customs of war." *See* 1949 Convention, arts. 4A(2)(b), (c) & (d). If Hamdan were to claim **[*21]** prisoner of war status under Article 4A(4) as a person who accompanied "the armed forces without actually being [a] member[] thereof," he might raise that claim before the military commission under Army Regulation 190-8. *See* Section VII of this opinion, *infra*. (We note that Hamdan has not specifically made such a claim before this court.)

Another problem for Hamdan is that HN19 the 1949 Convention does not apply to al Qaeda and its members. HN20 The Convention appears to contemplate only two types of armed conflicts. The first is an international conflict. Under Common Article 2, the provisions of the Convention 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,

even if the state of war is not recognized by one of them." Needless to say, al Qaeda is not a state and it was not a "High Contracting Party." There is an exception, set forth in the last paragraph of Common Article 2, when one of the "Powers" in a conflict is not a signatory but the other is. Then the signatory nation is bound to adhere to the Convention so long as the opposing Power "accepts and applies the provisions thereof." Even if **[*22]** al Qaeda could be considered a Power, which we doubt, no one claims that al Qaeda has accepted and applied the provisions of the Convention.

HN21 The second type of conflict, covered by Common Article 3, is a civil war --that is, an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . .." In that situation, 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 a civilized people." Hamdan assumes that if Common Article 3 applies, a military commission could not try him. We will make the same assumption *arguendo*, which leaves the question whether Common Article 3 applies. Afghanistan is a "High Contracting Party." Hamdan was captured during hostilities there. But is the war against terrorism in general and the war against al Qaeda in particular, an "armed conflict not of an international character"? *See* INT'L COMM. RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 37 (1960) (Common Article 3 applies **[*23]** only to armed conflicts confined to "a single country"). President Bush determined, in a memorandum to the Vice President and others on February 7, 2002, that it did not fit that description because the conflict was "international in scope." The district court disagreed with the President's view of Common Article 3, apparently because the court thought we were not engaged in a separate conflict with al Qaeda, distinct from the conflict with the Taliban. We have difficulty understanding the court's rationale. Hamdan was captured in Afghanistan in November 2001, but the conflict with al Qaeda arose before then, in other regions, including this country on September 11, 2001. HN22 Under the Constitution, the President "has a degree of independent authority to act" in foreign affairs, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414, 156 L. Ed. 2d 376, 123 S. Ct. 2374 (2003), and, for this reason and others, his construction and application of treaty provisions is entitled to "great weight." *United States v. Stuart*, 489 U.S. 353, 369, 103 L. Ed. 2d 388, 109 S. Ct. 1183 (1989); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185, 72 L. Ed. 2d 765, 102 S. Ct. 2374 (1982); *Kolovrat v. Oregon*, 366 U.S. 187, 194, 6 L. Ed. 2d 218, 81 S. Ct. 922 (1961). **[*24]** While the district court determined that the actions in Afghanistan constituted a single conflict, the President's decision to treat our conflict with the Taliban separately from our conflict with al Qaeda is the sort of political-military decision constitutionally committed to him. *See Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230, 92 L. Ed. 2d 166, 106 S. Ct. 2860 (1986). To the extent there is ambiguity about the meaning of Common Article 3 as applied to al Qaeda and its members, the President's reasonable view of the provision must therefore prevail.

V.

Suppose we are mistaken about Common Article 3. Suppose it does cover Hamdan. Even then we would abstain from testing the military commission against HN23 the requirement in Common Article 3(1)(d) that sentences must be pronounced "by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *See Councilman*, 420 U.S. at 759; *New*, 129

F.3d at 644; *supra* Part I. Unlike his arguments that the military commission lacked jurisdiction, his argument here is that the commission's procedures particularly its alleged failure **[*25]** to require his presence at all stages of the proceedings -- fall short of what Common Article 3 requires. The issue thus raised is not *whether* the commission may try him, but rather *how* the commission may try him. That is by no stretch a jurisdictional argument. No one would say that a criminal defendant's contention that a district court will not allow him to confront the witnesses against him raises a jurisdictional objection. Hamdan's claim therefore falls outside the recognized exception to the *Councilman* doctrine. Accordingly, comity would dictate that we defer to the ongoing military proceedings. If Hamdan were convicted, and if Common Article 3 covered him, he could contest his conviction in federal court after he exhausted his military remedies.

VI.

After determining that the 1949 Geneva Convention provided Hamdan a basis for judicial relief, the district court went on to consider the legitimacy of a military commission in the event Hamdan should eventually appear before one. In the district court's view, the principal constraint on the President's power to utilize such commissions is found in Article 36 of the Uniform Code of Military Justice, 10 U.S.C. § 836, **[*26]** which provides:

HN24 Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, *but which may not be contrary to or inconsistent with this chapter*.

(Emphasis added.) The district court interpreted the final qualifying clause to mean that military commissions must comply in all respects with the requirements of the Uniform Code of Military Justice (UCMJ). This was an error.

Throughout its Articles, the UCMJ takes care to distinguish between "courts-martial" and "military commissions." *See, e.g.*, 10 U.S.C. § 821 (noting that "provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions . . . of concurrent jurisdiction"). The terms are not used interchangeably, and the majority of the UCMJ's procedural requirements refer only to courts-martial. **[*27]** The district court's approach would obliterate this distinction. A far more sensible reading is that HN25 in establishing military commissions, the President may not adopt procedures that are "contrary to or inconsistent with" the UCMJ's provisions governing military commissions. In particular, Article 39 requires that sessions of a "trial by *court-martial*. . . shall be conducted in the presence of the accused." Hamdan's trial before a *military commission* does not violate Article 36 if it omits this procedural guarantee.

The Supreme Court's opinion in *Madsen v. Kinsella*, 343 U.S. 341, 96 L. Ed. 988, 72 S. Ct. 699 (1952), provides further support for this reading of the UCMJ. There, the Court spoke of the place of military commissions in our history, referring to them as "our commonlaw war courts. . . . Neither their procedure nor their jurisdiction has been prescribed by statute." *Id.* at 346-48. The Court issued its opinion two years after enactment of the UCMJ, and it is difficult, if not impossible, to square the Court's language in *Madsen* with the sweeping effect with which the district court

would invest Article 36. HN26 The UCMJ thus imposes only minimal **[*28]** restrictions upon the form and function of military commissions, *see, e.g.*, 10 U.S.C. §§ 828, 847(a)(1), 849(d), and Hamdan does not allege that the regulations establishing the present commission violate any of the pertinent provisions.

VII.

Although we have considered all of Hamdan's remaining contentions, the only one requiring further discussion is his claim that even if the Geneva Convention is not judicially enforceable, Army Regulation 190-8 provides a basis for relief. HN27 This regulation, which contains many subsections, "implements international law, both customary and codified, relating to [enemy prisoners of war], [retained personnel], [civilian internees], and [other detainees] which includes those persons held during military operations other than war." AR 190-8 § 1-1(b). The regulation lists the Geneva Convention among the "principal treaties relevant to this regulation." § 1-1(b)(3); *see Hamdi*, 124 S. Ct. at 2658 (Souter, J., concurring) (describing AR 190-8 as "implementing the Geneva Convention"). One subsection, § 1-5(a)(2), requires that prisoners receive the protections of the Convention "until some other legal **[*29]** status is determined by competent *authority*." (Emphasis added.) The President found that Hamdan was not a prisoner of war under the Convention. Nothing in the regulations, and nothing Hamdan argues, suggests that the President is not a "competent authority" for these purposes.

Hamdan claims that AR 190-8 entitles him to have a "competent tribunal" determine his status. But we believe the military commission is such a tribunal. HN28 The regulations specify that such a "competent tribunal" shall be composed of three commissioned officers, one of whom must be field-grade. AR 190-8 § 1.6(c). A field-grade officer is an officer above the rank of captain and below the rank of brigadier general -- a major, a lieutenant colonel, or a colonel. HN29 The President's order requires military commissions to be composed of between three and seven commissioned officers. 32 C.F.R. § 9.4(a)(2), (3). The commission before which Hamdan is to be tried consists of three colonels. Brief for Appellants at 7. We therefore see no reason why Hamdan could not assert his claim to prisoner of war status before the military commission at the time of his trial and thereby receive the judgment of **[*30]** a "competent tribunal" within the meaning of Army Regulation 190-8.

* * *

For the reasons stated above, the judgment of the district court is reversed.

So ordered.

CONCURBY: WILLIAMS

CONCUR: WILLIAMS, *Senior Circuit Judge*, concurring: I concur in all aspects of the court's opinion except for the conclusion that Common Article 3 does not apply to the United States's conduct toward al Qaeda personnel captured in the conflict in Afghanistan. Maj. Op. 15-16. Because I agree that the Geneva Convention is not enforceable in courts of the United States, and that that any claims under Common Article 3 should be deferred until proceedings against Hamdan are finished, I fully agree with the court's judgment.

* * *

There is, I believe, a fundamental logic to the Convention's provisions on its application. Article 2 (P1) covers armed conflicts between two or more contracting parties. Article 2 (P3) makes clear that in a multi-party conflict, where any two or more signatories are on opposite sides, those parties "are bound by [the Convention] in their mutual relations"--but not (by implication) vis-a-vis any non-signatory. And as the court points out, Maj. Op. at 14, under Article 2 (P3) **[*31]** even a non-signatory "Power" is entitled to the benefits of the Convention, as against a signatory adversary, if it "accepts and applies" its provisions.

Non-state actors cannot sign an international treaty. Nor is such an actor even a "Power" that would be eligible under Article 2 (P3) to secure protection by complying with the Convention's requirements. Common Article 3 fills the gap, providing some minimal protection for such non-eligibles in an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." The gap being filled is the non-eligible party's failure to be a nation. Thus the words "not of an international character" are sensibly understood to refer to a conflict between a signatory nation and a non-state actor. The most obvious form of such a conflict is a civil war. But given the Convention's structure, the logical reading of "international character" is one that matches the basic derivation of the word "international," i.e., *between nations*. Thus, I think the context compels the view that a conflict between a signatory and a non-state actor is a conflict "not of an international character." In such a conflict, **[*32]** the signatory is bound to Common Article 3's modest requirements of "humane[]" treatment and "the judicial guarantees which are recognized as indispensable by civilized peoples."

I assume that our conflicts with the Taliban and al Qaeda are distinct, and I agree with the court that in reading the Convention we owe the President's construction "great weight." Maj. Op. at 15. But I believe the Convention's language and structure compel the view that Common Article 3 covers the conflict with al Qaeda.

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[ORAL ARGUMENT SCHEDULED FOR MARCH 8, 2005]

No. 04-5393

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SALIM AHMED HAMDAN,
Petitioner-Appellee,

v.

DONALD H. RUMSFELD, U.S. SECRETARY OF DEFENSE, ET AL.,
Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS

PAUL D. CLEMENT
Acting Solicitor General

CHRISTOPHER A. WRAY
Assistant Attorney General

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
Acting United States Attorney

GREGORY G. KATSAS
Deputy Assistant Attorney General

JONATHAN L. MARCUS
Assistant to the Solicitor General

DOUGLAS N. LETTER
(202) 514-3602
ROBERT M. LOEB
(202) 514-4332
SHARON SWINGLE
ERIC MILLER
Attorneys, Appellate Staff
Civil Division, Room 7268
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

STEPHAN E. OESTREICHER, JR.
Criminal Division, Appellate Section

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Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS

SUMMARY OF ARGUMENT

The order under review in this case represents an unprecedented interference with the President's exercise of his constitutional authority as Commander in Chief to defend the United States. The district court erred by declining to abstain until the military commission's proceedings could be concluded, rejecting the President's reasonable interpretation of a treaty, overruling the President's determination concerning the application of a treaty to

al Qaeda, misreading provisions of the Uniform Code of Military Justice (UCMJ), and disregarding the President's inherent authority to establish military commissions to punish enemy combatants who violate the laws of war.

Hamdan fails to address the many flaws in the district court's reasoning. He provides no sound explanation why proceedings before a military commission — unlike all other military proceedings — should be immune from abstention rules. On the merits, he fails to overcome the extensive historical record demonstrating the President's authority to use military commissions to punish enemies who violate the laws of war. His claim that the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention) and the UCMJ have substantially diminished that authority lacks merit. The Geneva Convention is not judicially enforceable (in the sense of being privately enforceable by captured fighters), and, even if it were, neither it nor the UCMJ would call into doubt the jurisdiction or procedures of the commission established by the President.

ARGUMENT

I. THE DISTRICT COURT ERRED IN REFUSING TO ABSTAIN.

A. Hamdan's primary argument (Br. 25-30) — that abstention is unwarranted where the defendant challenges the "jurisdiction" of the tribunal — has been decisively rejected. "In *Councilman*, the Supreme Court made clear

that military courts are capable of, and indeed may have superior expertise in, considering challenges to their jurisdiction over disciplinary proceedings." *New v. Cohen*, 129 F.3d 639, 645 (D.C. Cir. 1997) (citing *Schlesinger v. Councilman*, 420 U.S. 738, 760 (1975)).

Hamdan claims (Br. 26-27) that he is similarly situated to the spouses of servicemen in *Reid v. Covert*, 354 U.S. 1 (1957), and the ex-serviceman in *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955). In those cases, however, *as this Court has held*, it was "undisputed that the persons subject to the court-martials either never had been, or no longer were, in the military," and thus were outside the authority of the military altogether. *New*, 129 F.3d at 644. That is self-evidently not the situation here. Hamdan is an enemy combatant, subject to continued military detention, who is to be tried for a war crime based on the charge that he is an al Qaeda conspirator who served as bin Laden's trusted bodyguard and personal driver, received weapons training, and delivered weapons. JA 191-193. As the Supreme Court explained in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), "the power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others *charged* with violating the laws of war" is "well-established." *Id.* at 786 (emphasis added) (internal quotation marks omitted). *See*

32 C.F.R. 9.3 (predicating commission's jurisdiction on President's determination of eligibility for commission trial and Charge).

The civilians in *Toth* and *Reid* were different from Hamdan in another crucial respect: they asserted a constitutional liberty interest enjoyed by citizens, but not aliens abroad. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1990) ("Since respondent is not a United States citizen, he can derive no comfort from the *Reid* holding."); *Eisentrager*, 339 U.S. at 785 ("the Constitution does not confer [constitutional rights] upon an alien enemy engaged in the hostile service of a government at war with the United States"); *see also 32 County Sovereignty Comm. v. Dep't of State,* 292 F.3d 797, 799 (D.C. Cir. 2002); *People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999). These holdings stand unaffected by *Rasul v. Bush*, 124 S. Ct. 2686 (2004), where the Court held as a *statutory* matter that Congress granted federal district courts authority to entertain habeas petitions filed by non-resident aliens detained at Guantanamo Bay, but did not address whether those aliens were entitled to substantive *constitutional* protections. *Id.* at 2692-2699. *Rasul*'s cryptic footnote 15 cannot be read, as Hamdan claims, to overrule *Eisentrager* or *Verdugo* on that issue, which was not before the Court. In light of the Court's repeated and recent invocation of *Eisentrager*'s constitutional holding, *see Verdugo*, 494 U.S. at 273-

274; *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), it is inconceivable that the Court would jettison that understanding in a single oblique footnote.

If these differences were not enough, the jurisdictional challenge that the *Reid* and *Toth* defendants pressed was entirely independent of the veracity of the charges leveled against them. Here, by contrast, Hamdan's basic "jurisdictional" challenge is dependent on a showing that the allegations in the Charge are untrue, namely, that he did not knowingly participate in al Qaeda's war against the United States. *See* JA 52. That claim is clearly an issue for the military commission in the first instance. *See Yamashita v. Styer*, 327 U.S. 1, 17 (1946). Likewise, his procedural claims under the UCMJ, the Geneva Convention, and/or customary international law, JA 56-60, to which he ascribes jurisdictional status, can be raised before the commission and, if the commission rejects his arguments and he is not acquitted, can be raised on review in the military system, and are thus properly subject to abstention.

B. Hamdan also argues (Br. 9-16) that military commission proceedings are not entitled to abstention because they are not authorized by Congress. But the military commission was established by the President pursuant to the same authority the Court found sufficient in *Ex parte Quirin*, 317 U.S. 1, 27-29 (1942) (holding military commissions validly established pursuant to a provision now

codified at 10 U.S.C. § 821), and would in any event merit deference as an arm of the Executive Branch. *See McCarthy v. Madigan*, 503 U.S. 140, 144-145 (1992) (discussing the rule of administrative exhaustion).

Although Hamdan asserts (Br. 20) that abstention is unwarranted because his case implicates no military exigencies, the trial of combatants for war crimes is a central part of waging war — the basic rationale for *Councilman* abstention, 420 U.S. at 757 — whether or not the trial is removed in place or time from active hostilities. *See Yamashita*, 327 U.S. at 11; *Hirota v. MacArthur*, 338 U.S. 197, 208 (1949) (Douglas, J., concurring). Abstention pending the conclusion of commission proceedings is thus appropriate, regardless of whether the Executive could have declined to urge abstention — as it did in *Quirin*, on which Hamdan relies (Br. 19-20). *Cf. Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 626 (1986) (distinguishing prior abstention cases in which the State had "expressly urged [the court] to proceed to an adjudication of the constitutional merits").

Finally, the need for abstention is underscored by the rule that a litigant may not invoke the habeas corpus jurisdiction of a federal court until he has employed all available procedures to correct the alleged error. *See, e.g.*, *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 490 (1973); *Gusik v. Schilder*, 340 U.S. 128,

131-132 (1950).

C. The additional equitable grounds relied on by Hamdan to evade abstention are insubstantial and would in many cases apply equally to courts-martial or garden-variety administrative proceedings. Hamdan contends (Br. 12 n.2), for example, that commission proceedings are inherently unfair because its members are selected by the President and their decisions are not directly reviewable in federal court. The same is true not only of numerous administrative agencies, but also of courts-martial, which are indisputably subject to abstention. *See* 10 U.S.C. §§ 822(a)(1), 825(d)(2); *compare Toth*, 350 U.S. at 17 (noting that procedures for courts-martial, such as appointment and removal of members by military commanders, do not meet "qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts"), *with Gusik*, 340 U.S. at 131-132 (mandating abstention pending exhaustion of military appeal rights following court-martial).

In the same vein, Hamdan claims (Br. 16-18) that he will not have an adequate opportunity to raise his claims before a military commission because that tribunal is "not competent to address the complex questions of constitutional law, international law, and jurisdiction present here." The questions before the commission regarding the applicability and meaning of the Geneva Convention

and the UCMJ, however, are precisely the types of questions that military officials are well-suited to consider. Moreover, Hamdan's position cannot be reconciled with the Supreme Court's holdings that abstention in favor of military proceedings is equally applicable where the defendant claims a constitutional error such as a Sixth Amendment violation or attacks the tribunal's jurisdiction. *See, e.g.*, *Gusik*, 340 U.S. at 129-132; *cf. Watson v. Buck*, 313 U.S. 387, 401 (1941) ("[E]quity will not interfere to prevent the enforcement of a criminal statute [in state court] even though unconstitutional.") (quotation omitted); *Nat'l Lawyers Guild v. Brownell*, 225 F.2d 552, 557 (D.C. Cir. 1955) ("[A] claim of constitutional invalidity does not negative the requirement for exhaustion of [administrative] remedies.").

Although Hamdan attacks the independence and constitutional fidelity of the commission review panel (Br. 14), the panel comprises a federal-court judge, one current and one former state-court judge, and a senior member of the Warren Commission and recipient of the presidential Medal of Freedom. *See* Secretary Rumsfeld Swearing-In, Sept. 21, 2004, http://www.defenselink.mil/transcripts/2004/tr20040921-secdef1323.html. As this Court has recognized, it would be improper to "assume in advance of a hearing that a responsible executive official of the Government will fail to carry out his manifest duty," and a litigant casting speculative claims of prejudgment must "await the

event" and exhaust administrative remedies before seeking judicial relief. *Brownell*, 225 F.2d at 555-556.

Hamdan also claims (br. 18) that the military commission will not give full and fair consideration to his arguments, but he offers no evidence to back that assertion. In fact, before the district court enjoined the commission proceedings, the Appointing Authority for Military Commissions, *see* 32 C.F.R. 9.2, issued a decision granting in part Hamdan's motion to remove several commission members because there was reason to doubt their impartiality. The Appointing Authority's opinion, *see* www.defenselink.mil/news/Oct2004/d20041021panel.pdf — which determined that the UCMJ rules providing protection against command influence, *see* 10 U.S.C. § 837(a), apply to Hamdan's commission — refutes Hamdan's speculative assertion that the process established by the President cannot be trusted to give fair consideration to his claims.

Moreover, Hamdan fails to show that the commission is *barred* from considering those arguments, and that is the showing necessary to defeat abstention in the analogous context of pending state proceedings. *See, e.g.*, *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 435-436 (1982); *Ohio Civil Rights Comm'n*, 477 U.S. at 629. The Supreme Court has also made clear that a defendant cannot avoid *Councilman* abstention by

making the convenient assertion that exhaustion will be "futile" or that his defenses will not be given the consideration they deserve. *See, e.g., Councilman*, 420 U.S. at 754; *Gusik*, 340 U.S. at 133; *cf. Huffman v. Pursue, Ltd.*, 420 U.S. 592, 610-611 (1975).

Hamdan speculates (br. 10-13) that commission proceedings could be indefinitely delayed or otherwise manipulated to prevent him from obtaining meaningful judicial review. But the only thing delaying the commission proceedings at this point is the injunction Hamdan procured. Moreover, to justify an exception to abstention, Hamdan must make a concrete "showing of bad faith, harassment, or some other extraordinary circumstance." *Middlesex County*, 457 U.S. at 435. Hamdan has made no such showing, and the district court did not find otherwise. Pretrial hearings on Hamdan's motions were underway and the trial was scheduled to begin soon when the district court enjoined the proceedings.[1]

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[1] Despite Hamdan's claim to the contrary (Br. 23), in determining whether abstention is appropriate, the Court looks to the current circumstances, not those prevailing at the time he filed suit. *See Middlesex County*, 457 U.S. at 436-437; *Hicks v. Miranda*, 422 U.S. 332, 348-350 (1975).

II. NEITHER THE GENEVA CONVENTION NOR OTHER FACTORS DEPRIVE THE MILITARY COMMISSION OF JURISDICTION.

A. Neither Congress Nor The Executive Has Made The Geneva Convention Judicially Enforceable.

Hamdan argues (Br. 31-37) that he is able to sue to enforce the Convention's provisions because the Convention "has been implemented" (*id.* at 31) in a variety of provisions of U.S. law. This argument is mistaken.

1. Hamdan first argues (Br. 31-32) that the Geneva restraints he posits are enforceable through 10 U.S.C. § 821. It is difficult to see, as a matter of chronology and common sense, how this statutory provision (first included in the Articles of War in 1916) recognizing the President's traditional authority to try offenses against the law of war could "implement" or "execute" the Geneva Convention ratified in 1956. Moreover, as we explained in our opening brief, pp. 32-38, that provision was not intended to *circumscribe* the President's military commission authority, but rather to *preserve* his historic authority to place before military commissions persons who, like Hamdan, are charged with offenses against the laws of war, *see Quirin*, 317 U.S. at 27-29, *or* persons otherwise subject to trial by military commission "by the law of war." Thus, even assuming the Geneva Convention could be read to contain procedural hurdles, Section 821 does not impose them as a limitation on the military commission jurisdiction that it

recognizes over offenses against the laws of war. In any event, a statutory reference to the "law of war," without more, cannot justify enforcing a treaty that does not create judicially enforceable rights. *See Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2763, 2767 (2004). Accordingly, Hamdan (and the district court) cannot sidestep the question whether the treaty creates judicially enforceable rights by reliance on Section 821.

2. Next, Hamdan turns (Br. 32) to a "policy" statement by Congress in the 2004 National Defense Authorization Act, Pub. L. No. 108-375, § 1091(b)(4), 118 Stat. 1811 (2004). Such "sense of Congress" statements create "no enforceable federal rights." *Monahan v. Dorchester Counseling Ctr., Inc.*, 961 F.2d 987, 994-995 (1st Cir. 1992); *see generally Yang v. California Dep't of Soc. Servs.*, 183 F.3d 953 (9th Cir. 1999). Moreover, this policy statement simply reaffirms the acknowledged obligations of the United States under the Geneva Convention, and states that it is the policy of this Country to comply with the treaty. It says nothing about judicially enforceable rights.

3. Hamdan argues (Br. 33-35) that Army regulations instructing Army personnel in regard to implementation of the Geneva Convention have the effect of permitting enemy forces to enforce the treaty through suits in U.S. courts. By their own terms, however, those regulations do not extend any substantive rights;

to the contrary, they state expressly that they establish internal policies and are for planning and guidance only. Army Reg. 190-8 § 1-1(a).

B. The Convention Itself Does Not Provide Judicially Enforceable Rights.

Hamdan argues in the alternative (Br. 37-43) that the Geneva Convention itself provides judicially enforceable rights, principally because it protects the rights of individuals. This argument is a non-sequitur.

While treaties are regarded as the law of the land, *see* U.S. Const. art. VI, cl. 2, they "are not presumed to create rights that are privately enforceable." *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992); *see also United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000); *United States v. Bent-Santana*, 774 F.2d 1545, 1550 (11th Cir. 1985). Hamdan disregards both that presumption and Supreme Court precedent holding that the prior version of the Geneva Convention, which also protected individual rights, did *not* create judicially enforceable rights. *See Eisentrager*, 339 U.S. at 789. Hamdan does suggest that the earlier Geneva Convention did not provide individual rights. In *Eisentrager*, however, the Supreme Court expressly recognized that the earlier Convention afforded such rights, *Eisentrager*, 339 U.S. at 789 n.14, but nonetheless held that it was the "obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities." *Ibid.*

Accordingly, Hamdan must point to some clear indication that the President and the Senate meant to override both the general presumption against creating judicially enforceable rights and this aspect of *Eisentrager* when they ratified the current version of the Geneva Convention. There is no evidence suggesting such a radical transformation of U.S. law was intended, such that captured forces would now be granted judicially enforceable rights.

Instead, Hamdan simply claims (Br. 39) that, because the Geneva Convention speaks in terms of protections for the captured party, those "rights" must be judicially enforceable. This Court rejected just such an argument in *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972). There, U.S. soldiers cited the fact that the NATO Status of Forces Agreement granted individual members of the armed forces specific rights (*e.g.*, speedy trial, confrontation, and legal representation), and argued that a federal court could adjudicate a claim based upon those treaty rights. *See id.* at 1213. This Court rejected that argument as unconvincing "when the corrective machinery specified in the treaty itself is nonjudicial." *Id.* at 1222. The 1949 Geneva Convention, like the 1929 version, specifies nonjudicial corrective machinery. *See* Gov't Op. Br. 27-30 (discussing Articles 1, 8, 11, and 132 of the 1949 Convention); *see also* Article 78 (recognizing the "right" of POWs "to apply to the representatives of the Protecting

Powers" regarding complaints about their conditions of captivity).

Hamdan's reliance (Br. 42) on the International Red Cross commentary to support the recognition of new judicially enforceable rights in the 1949 revision of the Geneva Convention is also mistaken. In fact, the full text of that commentary states that the concept of prisoner rights was already "more clearly defined" in the 1929 treaty, and that the concept was then "affirmed" by the 1949 revision. ICRC, *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* 91 (1960). Moreover, the commentary goes on to explain that the rights are "secured" under the Convention through the right of the prisoner to enlist the aid of the "protecting power," *id.* at 91-92, and through state criminal prosecutions of those who commit grave breaches of the Convention. There is no suggestion of enforcement of the Convention's terms in court by captured enemy forces.

Finally, Hamdan argues (Br. 39-40) that the Geneva Convention is enforceable through habeas. Neither 28 U.S.C. § 1331 nor the habeas statute transforms a treaty that does not grant judicially enforceable rights into one subject to judicial enforcement at the behest of captured enemy forces. *See Wesson v. Penitentiary Beaumont*, 305 F.3d 343, 348 (5th Cir. 2002) (per curiam); *Wang v. Ashcroft*, 320 F.3d 130, 140 (2d Cir. 2003); *Bannerman v. Snyder*, 325 F.3d 722, 724 (6th Cir. 2003); *see also Al-Odah v. United States*, 321 F.3d 1134, 1146-1147

(D.C. Cir. 2003) (Randolph, J., concurring), *reversed and remanded on other grounds sub nom.*, *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *cf. Sosa*, *supra*. The decisions Hamdan cites (Br. 36-37) simply hold that aliens may assert rights under the Convention Against Torture because Congress has implemented that treaty through other legislation. *See, e.g.*, *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 218 n.22 (3d Cir. 2003); *Wang*, 320 F.3d at 142.

C. Hamdan Does Not Qualify For POW Status Under The Plain Terms Of the Convention.

Even if the Geneva Convention were judicially enforceable in this context, it would not assist Hamdan because the President correctly determined that it does not apply to al Qaeda, and Hamdan does not qualify for POW protection in any event.

1. Hamdan claims (Br. 46) that the district court properly rejected the President's finding because the United States was in an armed conflict with a High Contracting Party, Afghanistan, occupied its territory, and captured Hamdan as part of that conflict. First, the United States is not, and has never been, an occupying power in Afghanistan. It has never administered or purported to administer the powers of government over any portion of the country. *See* Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention (IV), Oct. 18, 1907, art. 42(1), 36 Stat. 2277, 1 Bevans 631;

Department of Defense News Briefing, Tuesday, Oct. 9, 2001 (statement of Secretary of Defense Rumsfeld) ("The United States of America, and certainly the United States military, has no aspiration to occupy or maintain any real estate in [Afghanistan]."). Second, whether to treat the ongoing fight against al Qaeda and the military conflict against the Taliban regime as one or two conflicts is a political and military matter "constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986); *see Orloff v. Willoughby*, 345 U.S. 83, 93 (1953) ("[J]udges are not given the task of running the [military]."); *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988) ("[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military * * * affairs.").

2. Hamdan does *not* dispute that al Qaeda has consistently acted in flagrant defiance of the law of armed conflict. Article 4 of the Geneva Convention makes clear that POW status does not apply to such a group. Geneva Convention Art. 4(A)(2)(b)-(d). Article 4's requirements serve an important humanitarian purpose by maintaining a clear distinction between civilians and combatants, which is why the United States has rejected an additional protocol to the Geneva Convention that would have relaxed the requirements for lawful combatancy. *See* Protocol

Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, Article 45 (adopted June 8, 1977) (Additional Protocol I); *see also* Message from the President Transmitting Protocol II to the U.S. Senate, *reprinted in* S. Treaty Doc. 100-2, at IV (1987) (explaining President Reagan's decision not to submit Protocol I for ratification because it "would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war"). Hamdan does not claim, nor could he, that al Qaeda meets *any* of the requirements of the unrelaxed Article 4. Thus, there is no basis for a court to upset the President's finding that al Qaeda operatives are not encompassed by Article 4. *Cf. United States v. Lindh*, 212 F. Supp. 2d 541, 558 n.39 (E.D. Va. 2002).

3. Hamdan and his *amici* assert that, under Article 5, all persons *claiming* POW status must be deemed POWs until a competent tribunal determines otherwise. Article 5 of the Convention applies, however, only if "doubt arise[s] as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy," meet Article 4's definition of POWs. Hamdan's contention thus ignores the Convention's plain terms, which do not extend POW protection to those who do not meet the Article 4 standards, and which require that there be

some "doubt" about whether the person qualifies for protection under Article 4 before mandating interim POW status. As we noted in our opening brief (p. 50), the more expansive position urged by Hamdan was adopted in a subsequent international protocol, which the United States specifically declined to adopt. *See* Additional Protocol I. The fact that a new agreement was required to expand the scope of POW coverage to anyone claiming such status is strong evidence that the Convention itself did not mandate such treatment. Indeed, in declining to submit Additional Protocol I to the Senate for ratification, President Reagan expressly considered the specific problem of extending Geneva Convention protections to members of terrorist organizations: "[W]e must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law." S. Treaty Doc. 100-2, at IV.

No "doubt" has ever arisen as to whether Hamdan, "having committed a belligerent act," is nevertheless entitled to POW protection. As previously explained, Hamdan's claim all along has been that he has never committed a belligerent act on behalf of al Qaeda and thus is an innocent civilian, not that he is a lawful belligerent. Even if Hamdan's factual innocence claim itself raised a relevant "doubt" under Article 5, any such "doubt" was eliminated by the Combatant Status Review Tribunal, which is patterned after the type of

"competent tribunal" referred to in Article 5 and which found that he is an enemy combatant who is a member of or affiliated with al Qaeda.[2] The proper place for Hamdan to raise his factual innocence claim is before the military commission, not an Article 5 tribunal.

Indeed, the district court's holding that al Qaeda detainees such as Hamdan are entitled to an Article 5 hearing is clearly wrong. That article does not require individual determinations for each detainee. In past conflicts, the United States has made group status determinations of captured enemy combatants. *See, e.g.*, Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 Int'l L. Stud. 1, 61 (1977) (Second World War); Adam Roberts, *Counter-terrorism, Armed Force, and the Laws of War*, 44 Survival no. 1, 23-24 (Spring 2002) (Vietnam). And "the accepted view" of Article 4 is that "if the *group* does not meet the first three criteria . . . the individual member cannot qualify for privileged status as a POW." W. Thomas Mallison and Sally V. Mallison, *The Juridical Status of Irregular Combatants Under the International Humanitarian Law of*

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[2] Hamdan contends (Br. 45) that the CSRT finding is "not part of the Record in this case" and that his counsel has not been provided it. The CSRT's finding that Hamdan is an enemy combatant is part of the record, *see* JA 249; indeed, the district court treated it as part of the record, but concluded that the finding was irrelevant to Hamdan's supposed right to an Article 5 hearing, JA 388-391. Moreover, the government repeatedly offered to supplement the record with the underlying materials, JA 250, 274, but neither the district court nor Hamdan's counsel asked for them in this action.

Armed Conflict, 9 Case W. Res. J. Int'l L. 39, 62 (1977) (emphasis added).

D. Article 3 Does Not Provide A Basis For Relief.

Hamdan argues (Br. 48-49) that he is entitled to the protections of Article 3 of the Geneva Convention. That provision, however, applies only "[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." Because the conflict between the United States and al Qaeda has taken place in several countries, the conflict *is* "of an international character," and Article 3 thus is inapplicable.

The ICRC commentary for the Third Geneva Convention confirms that Article 3 means what it says. The commentary explains that the article "applies to non-international conflicts only." ICRC Commentary 34. "Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, . . . which are in many respects similar to an international war, but take place *within the confines of a single country*." *Id.* at 37 (emphasis added).

To the extent that international tribunals have held that the standards set out in Article 3 apply in all conflicts as customary international law, *see, e.g.*, *Prosecutor v. Tadic*, No. 94-1, ¶ 102 (I.C.T.Y. Appeals Chamber, Oct. 2, 1995), that law cannot override a controlling executive act, such as the President's Military Order in this case. *See The Paquete Habana*, 175 U.S. 677, 700 (1900).

In any case, Article 3 would not bar Hamdan's trial by military commission. The article 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." Hamdan's military commission, governed by the procedural guarantees set out in 32 C.F.R. Part 9, meets this standard.

E. Hamdan's Other Challenges To The Commission's Jurisdiction Lack Merit.

Hamdan makes a variety of other challenges to the jurisdiction of the military commission, none of which has merit.

Hamdan argues (Br. 67) that the history of military commissions suggests that their use has been restricted to "occupied territory or zones of war." That is plainly incorrect. The commission in *Quirin* was held at Department of Justice headquarters in *Washington, D.C.*, far removed from the place of the saboteurs' apprehension or any zone of active combat. 317 U.S. 1 (1942). Hamdan asserts (Br. 67) that the east coast of the United States was "under the control of the Army" during the Second World War. It is unclear exactly what this claim means, but if it is meant to suggest that civilian government in the District of Columbia was suspended, it is clearly false. Certainly the location of Hamdan's military commission — Guantanamo Bay, Cuba, a naval base with no civilian government

— is more exclusively under military control than was Washington, D.C., in 1942.[3]

Nor does the absence of a formal declaration of war (Br. 66) affect the commission's congressionally sanctioned jurisdiction. Recognizing that the September 11 attacks amounted to an act of war, Congress authorized the President to use all necessary force against al Qaeda and its supporters. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001). The plurality in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), held that that authorization triggered the exercise of the President's traditional war powers and relied on *Quirin* for the proposition that "the capture, detention, *and trial of unlawful combatants*, by 'universal agreement and practice,' are 'important incident[s] of war.'" *Id.* at 2640 (quoting *Quirin*, 317 U.S. at 28) (emphasis added). Moreover, contrary to Hamdan's suggestion, none of the UCMJ provisions that recognize the President's authority to convene military commissions requires a formal declaration of war, and it is settled that the UCMJ applies to armed conflicts that the United States has prosecuted without a formal

[3] Other historical examples likewise refute Hamdan's claim. The commission in *Yamashita*, was held in the Philippines, not in enemy territory, and occurred *after* Japan had surrendered and the Second World War was effectively over. 327 U.S. at 5. Similarly, the commission in *Eisentrager* was held in China, a friendly country, after the conclusion of active military operations. 339 U.S. at 765.

declaration of war. *See, e.g.*, *United States v. Anderson*, 38 C.M.R. 386, 386 (C.M.A. 1968); *United States v. Bancroft*, 11 C.M.R. 3, 5 (C.M.A. 1953).[4]

Finally, Hamdan mistakenly contends (Br. 70) that the conspiracy offense is not an offense triable under the laws of war. Conspiracy to commit a war crime has been prosecuted before military commissions throughout this Nation's history. *See Quirin* (petitioners charged with conspiracy), *supra*; *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956) (upholding trial by military commission of Nazi saboteur who was convicted, *inter alia*, of conspiracy); Charles Howland, *Digest of Opinions of the Judge Advocate General of the Army* 1071 (1912) (identifying conspiracy "to violate the laws of war by destroying life or property in aid of the enemy" as an offense against the laws of war that was "punished by military commissions" during the Civil War). Moreover, conspiracy liability was recognized as part of the post-WWII Nuremberg tribunals. *See* Charter of the International Military Tribunal at Nuremberg, Art. VI; Nuremberg International Military Tribunal Control Council Order No. 10, Art II (1)(a). Conspiracy is also an offense under the charters of modern international criminal tribunals. *See, e.g.*, Statute of the International Criminal Tribunal for the Former Yugoslavia (1993,

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[4] The *Averette* case on which Hamdan relies held only that a formal declaration is necessary before the UCMJ is applied to *civilians*. *See* 41 C.M.R. 363, 365 (C.M.A. 1970).

updated 2004), art. 4(3)(b); Statute of the International Criminal Tribunal for Rwanda (1994), art. 2(3)(a).[5]

III. HAMDAN'S CHALLENGES TO THE COMMISSION'S PROCEDURES LACK MERIT.

A. Article 36 Does Not Mandate That Military Commissions Conform To All UCMJ Procedures.

Hamdan contends (Br. 51-53) that Article 36 of the UCMJ strips a military commission of jurisdiction unless it complies with the court-martial procedures such as those set out in Article 39, which addresses the presence of the accused at a court-martial. First, Hamdan errs by couching an Article 39 defect as a jurisdictional problem. Neither the federal courts nor the military courts consider a defendant's temporary absence from trial proceedings to be a structural error depriving the court of jurisdiction; rather, they treat it as a type of trial error subject to review for harmlessness. *See United States v. Diggs*, 522 F.2d 1310, 1319 (D.C. Cir. 1975); *United States v. Daulton,* 45 M.J. 212, 218-219 (C.A.A.F. 1996); *United States v. Cordell*, 37 M.J. 592, 595 (A.F.C.M.R. 1993); *see also,*

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[5] Hamdan further contends that the definition of conspiracy does not include an agreement or specific intent. The regulations, however, provide that the prosecution must demonstrate that the accused entered an unlawful agreement or otherwise "joined an enterprise of persons who shared a common criminal purpose" to commit one or more of the listed offenses. 32 C.F.R. 11.6(c)(6)(i)(A). The prosecution must also prove that the accused "knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise" and "joined in it willfully." *Id.* § 6(c)(6)(i)(B).

e.g., *United States v. Harris*, 9 F.3d 493, 499 (6th Cir. 1993).

Second, the procedures governing the military commission are *not* "contrary to or inconsistent with" Article 39, which by its plain terms applies only to courts-martial. In this respect, Article 39 is no different from the vast majority of provisions in the UCMJ. *See* Hearings before Subcommittee of Committee on Armed Services on H.R. 2498 (Uniform Code of Military Justice), 81st Cong., 1st Sess. 1017 (1949) (statement of Robert Smart, Professional Staff Member of Subcommittee) ("We are not prescribing rules of procedure for military commissions here. This only pertains to courts martial."). If Article 36 is read to require military commission rules to comply with the UCMJ rules, like Article 39, which apply to courts-martial only, then the language in other UCMJ provisions extending a particular rule to military commissions would be superfluous.

Contrary to Hamdan's suggestion, there is nothing anomalous about a *statute* that comprehensively regulates the procedures for courts-martial while providing only limited restrictions on military commissions. That result is fully in keeping with historic reality that the President, rather than Congress, convened military commissions, and that one of their primary benefits was their flexibility.

It is settled that military commissions "will not be rendered illegal by the omission of details required upon trials by courts-martial," and that the rules for

commissions may be altered by regulation or at the direction of the President. William Winthrop, *Military Law and Precedents* 841 (2d ed. 1920). Thus, although Major William Birkhimer wrote in *Military Government and Martial Law* (3d ed. 1914), that military tribunals "should observe, *as nearly as may be consistently with their purpose,* the rules of procedure of courts-martial," he recognized that this "is not obligatory" and that military commissions were "not bound by the Articles of War." *Id.* at 533-535 (emphasis added).

The *Quirin* precedent illustrates these points. On the day before the military trial began, the commission established by President Roosevelt "adopted a three-and-a-half page, double-spaced statement of rules," which provided for closed hearings, no peremptory challenges, only one challenge for cause, and concluding language to the effect that "[t]he commission could * * * discard procedures from the Articles of War or the Manual for Courts-Martial whenever it wanted to." Louis Fisher, CRS Report for Congress, *Military Tribunals: The Quirin Precedent* 8 (Mar. 26, 2002), *available at* <http://www.fas.org/irp/crs/RL31340.pdf>. *See also Madsen v. Kinsella*, 343 U.S. 341, 346-349 (1952) (a military commission is not bound by the rules applicable to courts-martial).

B. Hamdan's Other Attacks On The Commission's Procedures Are Without Merit.

Hamdan challenges the constitutionality of the rule permitting his exclusion

from proceedings in order to protect classified and other national security information, *see* 32 C.F.R. 9.6(b), (e), but, as an alien abroad, he has no constitutional rights to invoke. *See* p. 4, *supra*. Hamdan also attacks the rule as a violation of customary international law, but that law cannot override a controlling executive act. *See The Paquete Habana*, 175 U.S. at 700.[6]

Finally, Hamdan asserts (Br. 61) that the rule violates "common law," but he cites no support for his assertion that military commissions are governed by common law standards for civil courts, or that any common law right would supersede the President's Military Order. Notably, other "common law" rights, such as a trial by jury, do not apply to military tribunals. *See Quirin*, 317 U.S. at 40-45. Moreover, Article 36(a) itself provides that the rules applicable to criminal trials in civilian courts shall apply to military commissions only "so far as [the President] considers practicable," 10 U.S.C. § 836(a), and the President specifically found that "it is not practicable" to apply those rules in military commissions "[g]iven the danger to the safety of the United States and the nature of international terrorism." Detention, Treatment, and Trial of Certain Non-

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[6] In addition to citing customary international law, a number of the *amici* incorrectly rely upon the International Covenant on Civil and Political Rights (ICCPR), which creates no judicially enforceable rights. S. Exec. Rep. No. 102-23 at 9, 19, 23 (1992); *Sosa*, 124 S. Ct. at 2767. In any event, because Hamdan himself does not invoke the ICCPR or the other treaties that *amici* cite, this Court is not in a position to consider them. *See Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001).

Citizens in the War Against Terrorism § 1(f), 66 Fed. Reg. 57833 (Nov. 13, 2001).

IV. THE PRESIDENT HAS INHERENT AUTHORITY TO ESTABLISH MILITARY COMMISSIONS.

Even if there were any doubt surrounding the correct interpretation of Articles 21 and 36, the President's inherent authority to establish military commissions would call for reading them in a manner not to obstruct the exercise of his war powers. That Congress also has powers that may be relevant to the prosecution of terrorists, such as the power to establish inferior Article III courts and the power to define and punish offenses against the law of nations (Br. 63; U.S. Const. art. I, § 8), in no way undermines the President's authority, as Commander in Chief, to exercise the traditional functions of a military commander by using military commissions to punish enemies who violate the laws of war.

There is a well-established historical practice of military commissions created by the Executive alone, acting on the basis of the Commander-in-Chief power. Hamdan's attempt to overcome the clear historical record falls short. For example, he points out that on one occasion during the Revolutionary War, George Washington chose not to try an individual by a military commission. Br. 64. But he does not dispute that, on another occasion, Washington did convene a military commission to try a captured British spy. Likewise, Hamdan acknowledges that General Andrew Jackson set up military commissions in 1818, during a conflict

with the Creek Indians, without statutory authority. Hamdan attempts to overcome the force of this example by quoting (Br. 64) William Winthrop's *Military Law and Precedents* for the proposition that Jackson's action was "wholly arbitrary and illegal." But Hamdan takes this statement out of context; what Winthrop described as illegal was Jackson's disregard of the commission's judgment when he ordered that the defendant be shot even though the commission had imposed a lesser sentence. *See id.* at 465.

With respect to the Mexican War, Hamdan correctly notes (Br. 65) that the military commissions set up during that conflict had a rather limited jurisdiction. But he fails to mention the "councils of war" — essentially commissions by another name — that were established to try offenses against the law of war, such as crimes committed by guerillas. *See* Winthrop, *Military Law* at 832-33.

Finally, Hamdan notes (Br. 65) that military commissions during the Civil War were "explicitly authorized" by Congress. But the statute to which he refers was not enacted until 1863, by which time commissions had been in use for almost two years. *See* Act of March 3, 1863, 12 Stat. 731; Winthrop, *Military Law* at 833 (noting "military commissions convened as early as in 1861"). In addition, the statute did not "authorize" or create military commissions. Rather, in defining certain offenses, it provided that those offenses could be tried by either court-

martial or military commission. *See* Act of March 3, 1863, §§ 30, 38. Thus, Congress contemplated that commissions could exist independently of any explicit statutory authorization.

And while Hamdan claims that *Ex parte Milligan*, 71 U.S. 2 (1866), disapproved the use of military commissions during the Civil War, the Court in *Milligan* did not consider the legality of commissions generally. It simply held that "a citizen in civil life, in nowise connected with the military service," may not be tried by military commission in a State where "the courts are open and their process unobstructed." *Id.* at 121-122. This holding is inapplicable to Hamdan, an alien enemy combatant. *Cf. Hamdi*, 124 S. Ct. at 2642 (plurality opinion) (recognizing military authority to detain citizen enemy combatants). *Milligan* is entirely consistent with the proposition that the President, as Commander in Chief, has inherent authority to convene a military commission to try an enemy combatant charged with an offense against the laws of war. Because the President's inherent power is well established, the district court's ruling nullifying it cannot stand.

CONCLUSION

For the foregoing reasons, and the reasons set forth in our opening brief, the district court's ruling should be reversed.

Respectfully submitted,

PAUL D. CLEMENT
Acting Solicitor General

CHRISTOPHER A. WRAY
Assistant Attorney General

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
Acting United States Attorney

GREGORY G. KATSAS
Deputy Assistant Attorney General

JONATHAN L. MARCUS
Assistant to the Solicitor General

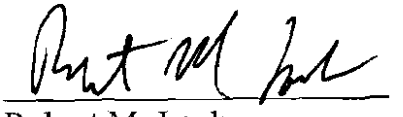
DOUGLAS N. LETTER
(202) 514-3602
ROBERT M. LOEB
(202) 514-4332
SHARON SWINGLE
ERIC MILLER
Attorneys, Appellate Staff
Civil Division, Room 7268
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

STEPHAN E. OESTREICHER, JR.
Criminal Division, Appellate Section

JANUARY 10, 2005

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 6,978 words (which does not exceed the applicable 7,000 word limit).



Robert M. Loeb

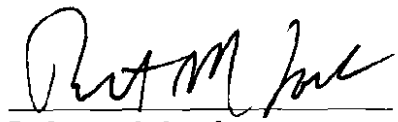
CERTIFICATE OF SERVICE

I hereby certify that on this January 10, 2005, I caused copies of the foregoing brief to be sent by hand delivery to the Court and the following counsel of record:

Kelly A. Cameron
PERKINS COIE, LLP
607 Fourteenth Street, NW
Suite 800
Washington, DC 20005
(202) 434-1652

Neal Katyal
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue
Washington, DC 20001
(202) 662-9000

Charles Swift
OFFICE OF CHIEF DEFENSE COUNSEL FOR MILITARY COMMISSIONS
1851 South Bell Street
Suite 103
Arlington, VA 22202
(703) 607-1521 Ext. 191



Robert M. Loeb

[ORAL ARGUMENT SCHEDULED FOR MARCH 8, 2005]
No. 04-5393

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SALIM AHMED HAMDAN,

Petitioner-Appellee,

v.

DONALD H. RUMSFELD, U.S. SECRETARY OF DEFENSE, ET AL.,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

NEAL K. KATYAL
Georgetown University Law Ctr.
600 New Jersey Ave.
Washington, DC 20001
(202) 662-9000

CHARLES DAVIDSON SWIFT
Lieutenant Commander
Office of the Chief Defense Counsel for
Military Commissions
1851 S Bell St., Ste. 103
Arlington, VA 22202
(703) 607-1521, Ext. 191

BENJAMIN S. SHARP
KELLY A. CAMERON
Perkins Coie LLP
607 Fourteenth St., NW, Ste. 800
Washington, DC 20005
(202) 628-6600

HARRY H. SCHNEIDER, JR.
JOSEPH M. MCMILLAN
DAVID R. EAST
CHARLES C. SIPOS
Perkins Coie LLP
1201 3rd Avenue, Ste. 4800
Seattle, WA 98101-3099
(206) 359-8000

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties and Amici*

1. The Petitioner-Appellee is Salim Ahmed Hamdan. The habeas petition was originally brought in the name of Hamdan's appointed counsel, Charles Swift, in his capacity as Hamdan's "next friend." The petition has since been amended to be in Hamdan's name only.

2. The named Respondents-Appellants are: Donald H. Rumsfeld, United States Secretary of Defense; John D. Altenburg, Jr., Appointing Authority for Military Commissions, Department of Defense; Brigadier General Thomas L. Hemingway, Legal Advisor to the Appointing Authority for Military Commissions; Brigadier General Jay Hood, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; George W. Bush, President of the United States.

3. *Amici* appearing in the District Court were: Washington Legal Foundation and Allied Educational Foundation; 271 United Kingdom and European Parliamentarians; International Law Professors in Support of Petitioner (William J. Aceves; Jeffrey F. Addicott, Donna E. Arzt, M. Cherif Bassiouni, Robert W. Benson, Arthur L. Berney, Christopher Lee Blakesley,

Carolyn Patty Blum, Bartram S. Brown, Daniel H. Derby, Sherri Burr, Laura Dickinson, Father Robert F. Drinan, Steven D. Jamar, Walter J. Kendall, III, Saul Mendlovitz, Jennifer Moore, Makau Mutua, Paula Rhodes, Leila Nadya, Nadine Strossen, A. Dan Tarlock, Mark E. Wojcik); Sixteen Law Professors (Bruce Ackerman, Rosa Ehrenreich Brooks, Sarah H. Cleveland, William S. Dodge, Martin S. Dodge, Martin S. Flaherty, Ryan Goodman, Oona Hathaway, Derek Jinks, Kevin R. Johnson, Jennifer S. Martinez, Judith Resnik, David Scheffer, Anne-Marie Slaughter, David Sloss, Carlos M. Vazquez, David C. Vladeck); General David M. Brahms, Admiral Lee F. Gunn, Admiral John D. Hutson and General Richard O'Meara in Support of Petitioner; and The Center for International Human Rights of Northwestern University School of Law (Louise Doswald-Beck, Guy S. Goodwin-Gill, Frits Kalshoven, and Marco Sassoli).

4. *Amici* appearing thus far in the Court of Appeals are Washington Legal Foundation and Allied Educational Foundation; and the American Center for Law and Justice.

B. Rulings Under Review

The present appeal is from the District Court's order in *Hamdan v. Rumsfeld, et al.*, No. 04-CV-1519, 2004 WL 2504508 (D.D.C. Nov. 8, 2004)

(Robertson, J.). Respondents-Appellants filed the notice of appeal on November 12, 2004.

C. Related Cases

The following cases that have been brought by other detainees at the Guantanamo Naval Base are pending in the District Court in this Circuit:

1. *Hicks (Rasul) v. Bush*, S.Ct.; D.C. Cir. No. 02-5284; No. 02-CV-0299 (D.D.C.) (J. Kollar-Kotelly)

2. *Al-Odah v. United States*, No. 02-CV-0828 (D.D.C.) (J. Kollar-Kotelly)

3. *Habib v. Bush*, No. 02-CV-1130 (D.D.C.) (J. Kollar-Kotelly)

4. *Kurnaz v. Bush*, No. 04-CV-1135 (D.D.C.) (J. Huvelle)

5. *O.K. v. Bush*, No. 04-CV-1136 (D.D.C.) (J. Bates)

6. *Begg v. Bush*, No. 04-CV-1137 (D.D.C.) (J. Collyer)

7. *Khalid (Benchellali) v. Bush*, No. 04-CV-1142 (D.D.C.) (J. Leon)

8. *El-Banna v. Bush*, No. 04-CV-1144 (D.D.C.) (J. Roberts)

9. *Gherebi v. Bush*, No. 04-CV-1164 (J. Walton)

10. *Boumediene v. Bush*, No. 04-CV-1166 (D.D.C.) (J. Leon)

11. *Anam v. Bush*, No. 04-CV-1194 (D.D.C.) (J. Kennedy)

12. *Almurbati v. Bush*, No. 04-CV-1227 (J. Walton)

13. *Abdah v. Bush*, No. 04-CV-1245 (D.D.C.) (J. Kennedy)

14. *Belmar v. Bush*, No. 04-CV-1997 (D.D.C.) (J. Collyer)

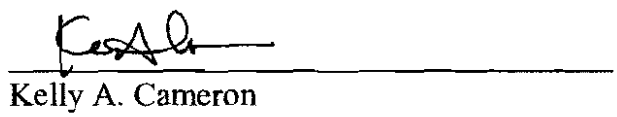
15. *Al-Qosi v. Bush*, No. 04-CV-1937 (D.D.C.) (J. Friedman)

16. *Al-Marri v. Bush*, No. 04-CV-2035 (J. Kessler)

17. *Paracha v. Bush*, No. 04-CV-2022 (J. Friedman)

18. *Zemiri v. Bush*, No. 04-CV-2046 (J. Kollar-Kotelly)

Counsel certifies that he is not aware at this time of any other related cases within the meaning of D.C. Cir. Rule 28(a)(1)(C).



Kelly A. Cameron
Counsel for Petitioner-Appellee Hamdan

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GLOSSARY

Addendum ..... Appellee's Addendum filed herewith

App. Br. .....Appellants' Brief to this Court

CSRT ....Combatant Status Review Tribunal

GPW ..... Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949

Hamdan Reply Br. .... Respondent-Appellee Hamdan's Reply Brief in the District Court in this Circuit

JA ..... Joint Appendix

JAG ..... Judge Advocate General

Military Order ..... Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 13, 2001)

POW ..... Prisoner of War

UCMJ ..... Uniform Code of Military Justice

[ORAL ARGUMENT SCHEDULED FOR MARCH 8, 2005]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5393

SALIM AHMED HAMDAN,

Petitioner-Appellee,

v.

DONALD H. RUMSFELD, U.S. SECRETARY OF DEFENSE, ET AL.,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

STATEMENT OF THE ISSUES

1. Whether the District Court erred in determining not to abstain from exercising jurisdiction over Petitioner-Appellee Hamdan's petition by construing the laws, treaties, and Constitution of the United States.

2. Whether the District Court erred in determining that the 1949 Geneva Conventions, as ratified treaties of the United States, constitute the law of the land applicable in this case.

3. Whether the District Court erred in holding that, until a competent tribunal determines that Hamdan is not entitled to POW status under the Geneva Conventions, he may be tried only by court-martial for the offense with which he is charged.

4. Whether the District Court erred in holding that Hamdan's Military Commission lacks jurisdiction because it violates rights of confrontation and presence guaranteed by the UCMJ, military law, international law, common law, and the Constitution.

5. Whether the President has unilateral power to create military commissions, including those that contravene military law and the laws of war.

RELEVANT STATUTES AND REGULATIONS

Relevant statutes and regulations are set forth, in pertinent part, in the Addendum filed herewith.

STATEMENT OF THE CASE

This case involves a petition for a writ of mandamus and habeas corpus filed by Salim Ahmed Hamdan. The petition challenges Hamdan's pretrial detention at Guantanamo Bay Naval Base, and, among other things, the validity of the military commission that was to try him. The District Court found that the commission was inconsistent with the laws and treaties of the United States, specifically, the UCMJ and the Geneva Conventions.

STATEMENT OF THE FACTS

On November 13, 2001, the President issued a Military Order to create military commissions.

The rules that govern these commissions do not provide the fundamental protections mandated for an accused in the UCMJ. Commission rules permit the exclusion of the accused from portions of his trial, 32 C.F.R. §9.6(b)(3); deny him the ability to represent himself, and permit the admission of unsworn statements in lieu of testimony, §9.6(d)(3). The rules further provide that the limited protections

available to defendants, such as the presumption of innocence and the right to not testify, are not "enforceable" in any way and can be stripped at any time. 32 C.F.R. §9.10-11.

In late November 2001, Hamdan was captured by Afghani militia forces while attempting to flee Afghanistan and return his family to his native country of Yemen. After being turned over to American forces, Hamdan was taken to Guantanamo Bay, where he was placed with the general detainee population at Camp Delta. On July 3, 2003, the President announced that there was "reason to believe" that Hamdan was subject to trial by commission. Hamdan was then placed in solitary confinement in Camp Echo, where he remained from December 2003 until late October 2004 (approximately four days before this case was argued in the District Court). JA 374-75. While in solitary, Hamdan exhibited symptoms consistent with acute mental injury including suicidal inclinations. JA 168-72.

In December 2003, Lieutenant Commander Swift was detailed, at the prosecution's request, to serve as Hamdan's counsel for the limited purpose of negotiating a plea. JA 154-55. On February 12, 2004, Hamdan filed a demand with the Appointing Authority for charges and a speedy trial under the UCMJ. The Appointing Authority rejected Hamdan's demand, concluding that the UCMJ does not apply. Hamdan filed this Petition in April 2004. In July 2004, approximately

thirty-two months after Hamdan was detained and eight months after the beginning of his solitary confinement, Appellants charged Hamdan with conspiracy.

SUMMARY OF ARGUMENT

Correctly characterized, the decision below is not "extraordinary," "unprecedented" or "counterintuitive." The District Court construed the laws and treaties of the United States. It did not "overrule" the President, other than in the sense that any federal court might do so in determining that Executive action did not comply with the laws and treaties of the United States. The District Court did not limit the Commander-in-Chief powers in the absence of Congressional authority; rather, it found that Congress in the UCMJ and the Geneva Conventions set forth rules governing the treatment of Hamdan.

Although this case undoubtedly raises issues of national and international importance, the court below did not unduly restrict the powers of the Executive as historically recognized by the courts; it simply did not acquiesce to claims for the substantial broadening of those powers at the expense of traditional functions reposed in the Judicial Branch and Congress.

Whenever a federal court construes the Constitution, statutes or treaties, the court, to a degree, impinges upon Executive and Legislative prerogatives. That it does so is inherent in the nature of our tripartite form of government. Only in the

most rare and extreme cases does the exercise of the judicial function cause serious tensions between the branches of government. The decision of the court below is not one of those cases. It would have been such a case only if the District Court had concluded that the Executive's interpretation of the UCMJ and the Geneva Conventions urged by Appellants was superior to and could not be reviewed by the judiciary.

The District Court correctly determined that the commission lacks jurisdiction to try Hamdan because it violates his right to be present and the right to confront witnesses. The right to be present at all stages in criminal proceedings is fundamental, guaranteed by military law, common law, constitutional law, and international law. Even without the UCMJ, a commission that denied these rights would be dismissed for want of jurisdiction. The UCMJ codifies this longstanding tradition of justice.

Hamdan's rights have already been abridged, as he has been excluded from portions of the *voir dire*. The commission rules permit Hamdan to be excluded from portions of the trial as well, and the Prosecutor has announced his intention to exclude Hamdan for two days of testimony. These actions violate the longstanding guarantee of confrontation, one "founded on natural justice." *Crawford v.*

Washington, 124 S.Ct. 1354, 1363 (2004) (quoting *State v. Webb*, 2 N.C. 104 (1794)).

The court below correctly concluded that abstention was not appropriate under *Schlesinger v. Councilman*, 420 U.S. 738 (1975) and *New v. Cohen*, 129 F.3d 639 (CADC 1997). It did so because the courts in *Councilman* and *New* were asked to defer to courts-martial, the very process that the Government rejects for Hamdan. Unlike a court-martial, the commission Hamdan faces was not created by Congress. It is not equipped to construe the Constitution, laws and treaties at issue; nor is it an established or mature system designed to protect the rights of the accused. The commission, an *ad hoc* body tainted by command influence, is not due comity.

The District Court also observed that *Councilman* and *New* repeated the determination in *Noyd v. Bond*, 395 U.S. 683, 696 n.8 (1969), that it would be "especially unfair to require exhaustion . . . when the complainants raised substantial question whether the military may try them at all." Having determined that Hamdan raised that substantial question, the District Court held that abstention was neither required nor appropriate.

In reaching this conclusion, the District Court reviewed the policy factors favoring abstention set forth in *Parisi v. Davidson*, 405 U.S. 34 (1972), and recited

in *New*. Deferring to the commission would not "aid[] the military judiciary in its task of maintaining order and discipline in the armed services," would not "eliminate[] needless friction between the federal civilian and military judicial systems," and would not deny "due respect to the autonomous military judicial system created by Congress." JA 379.

STANDARD OF REVIEW

A district court's abstention decision is reviewed for abuse of discretion. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984); *Handy v. Shaw*, 325 F.3d 346, 349 (CADC 2003).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY REACHED THE MERITS

Abstention "is the exception, not the rule" "because of 'the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.'" *Bridges v. Kelly*, 84 F.3d 470, 475 (CADC 1996) (citation omitted); *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) (abstention "rarely should be invoked").

Abstention is *required* only when Congress states "in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision." *Avocados Plus v. Veneman*, 370 F.3d 1243, 1248

(CADC 2004) (quotation omitted). Congress has said nothing about abstention in this case, let alone in the requisite "[s]weeping and direct statutory language." *Id.*

A. *Councilman* Does Not Support Abstention Here

The government's reliance on *Councilman* is misplaced and ironic. *Councilman* emphasized that in creating the modern court-martial, Congress carefully balanced military necessities against procedural fairness. It is precisely this system that Appellants reject. This rejection has significant consequences for abstention and its underlying elements of comity, competence, exigency, and equity.

1. Comity

The commission lacks the factual predicate of abstention, a system "established by Congress and carefully designed to protect not only military interests but [the defendant's] legitimate interests as well." *Councilman*, 420 U.S. at 760; *see also New*, 129 F.3d at 643; JA 379.

Councilman and *New* did not challenge the process's fairness and legality; Hamdan does. As this Court has held, without "proceedings that would have afforded appellants a full and fair opportunity to litigate their [federal] claims, the predicate for *Younger* abstention [i]s simply absent." *Bridges*, 84 F.3d at 478 (citation omitted).

Appellants have acknowledged they are "plowing new ground" in conducting the first military commissions since 1948. *Plowing New Ground in Military Commissions,* http://www.defenselink.mil/news/Aug2004/n08232004_2004082301.html. Notions of comity are simply inapposite when the tribunal's legitimacy is itself at issue.

Appellants cannot harvest the comity benefits of court-martial cases like *Councilman* and simultaneously claim they are not bound by court-martial rules. As noted above, *supra* pages 3-4, the supposed "rights" Appellants highlight are not "rights" at all and can be taken away at any time. Only Presidential fiat constrains this commission.

Abstention to courts-martial is built on the rock of a fair system established by Congress. This commission, a purely Executive creation, cannot make similar appeals to comity. Consider two examples.

a. Delay

Unlike courts-martial, commissions have no time limits. Appellants insist that Hamdan lacks court-martial speedy-trial rights. Under the current commission rules, Hamdan's trial may not take place for years, if ever.

If a trial eventually took place and the commissioners found Hamdan not guilty, the Appointing Authority and Review Board can send his case back to the

commission.[1] If Hamdan were found guilty, review by the Secretary of Defense and the President would occur. That review has absolutely no timetable or fixed guidelines. (It took nearly three years to simply charge Hamdan.)

Abstention principles are inapplicable when there is "an unreasonable or indefinite timeframe for administrative action." *McCarthy v. Madigan*, 503 U.S. 140, 147 (1992); *see Gibson v. Berryhill,* 411 U.S. 564, 575 n.14 (1973) (administrative remedy inadequate "[m]ost often . . . because of delay by the agency"); *Coit v. FSLIC,* 489 U.S. 561, 587 (1989) (because "regulations do not place a reasonable time limit on FSLIC's consideration of claims, Coit cannot be required to exhaust those procedures"); *Walker v. Southern Ry.*, 385 U.S. 196, 198 (1966); *Smith v. Ill. Bell Tel.*, 270 U.S. 587 (1926).

Commissions do not meet *Younger*'s premise of being the "most appropriate forum for the resolution of constitutional contentions." *Huffman v. Pursue*, 420 U.S. 592, 609 (1975). Permitting the military's process to run its course is only appropriate where there *is* process in the first place and where that process

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[1] While the Review Panel cannot directly turn a finding of not guilty into a finding of guilty, the rules unjustly permit them to return the case for further proceedings simply because they are unhappy with the results. *Compare* 32 C.F.R. §9.5(p) *with* 10 U.S.C. §§844(a), 862(a)(1) (UCMJ provisions preventing double jeopardy).

comports with basic fairness. Neither is evident here. Even the mere CSRT finalization procedure was so opaque that Appellants' own counsel was unsure of it. JA 249. Appellants make procedures up as they go along, dragging out deliberations or finalizing them in whatever way prevents them from having to defend their actions. This suspect process is not entitled to presumptive legitimacy.

Even if the commission or the President acquitted Hamdan, *that* would not end the matter. Commission rules permit Hamdan to be charged with another offense (such as conspiring to commit some other offense, or even aiding and abetting the *same* object offenses for which he is currently charged). As long as the Military Order stands, Appellants can bring new charges—and subject Hamdan to new trials—until conviction. Therefore, Appellants' argument that Hamdan's conviction may not be affirmed is irrelevant; he will always be subject to yet another proceeding under the Military Order. Review of that Order is essential now. [2]

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[2] While *amicus* WLF "do not doubt" that that the federal courts would possess habeas jurisdiction after a conviction, Appellants offer no such assurance. The Military Order tries to preclude civilian review. When this Court abstained in *New*, it noted the variety of remedies available after the court-martial ended. 129 F.3d at 647-48. If the President keeps post-verdict review to a minimum, then federal courts must rule on the commission's legality and jurisdiction at the outset.

Unlike *Councilman*, this is not a case where the defendant is subjected to the period of uncertainty and anxiety attendant upon a typical prosecution. Hamdan is subjected to unending uncertainty. His case presents serious allegations of ongoing psychological damage, harm that is irreparable, "great and immediate." *Younger v. Harris*, 401 U.S. 37, 46 (1971); Lewis, *FBI Memos Criticized Practices at Guantanamo*, N.Y. Times, Dec. 7, 2004. Abstention could mean Hamdan is placed in solitary confinement again indefinitely to await further proceedings, creating irreparable psychological harm and eviscerating Hamdan's ability to defend himself at trial. Hamdan Reply Br. 15-16.

b. Command Influence

Councilman was premised on structural safeguards in the court-martial system and judges "completely removed from all military influence or persuasion." 420 U.S. at 758. The commissioners here (all hand-picked by Appellants) entirely lack this insulation. Even worse, the Prosecution has recognized that some have close personal connections with senior Pentagon officials who oversee the proceedings. Lewis, *Guantanamo Tribunal Process in Turmoil*, N.Y. Times, Sept. 26, 2004, A29. Command influence in a process that mixes adjudication of law and fact represents a "half-century leap backward in military legal norms."

Glazier, Note, *Kangaroo Court or Competent Tribunal?*, 89 Va. L.Rev. 2005, 2019 (2003).

Judicial insulation, another predicate of comity, is missing. "When after the Second World War, Congress became convinced of the need to assure direct civilian review over military justice, it deliberately chose to confide this power to a specialized Court of Military Appeals, so that *disinterested* civilian judges could gain *over time* a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces." *Noyd*, 395 U.S. at 694 (emphasis added).

Unlike that system, the Commission's *ad hoc* Review Board took oaths that excluded obeying the Constitution and laws. *See* Secretary Rumsfeld Swearing-In, Sept. 21, 2004, http://www.defenselink.mil/transcripts/2004/tr20040921-secdef1323.html; *JMM Corp. v. District of Columbia*, 378 F.3d 1117, 1123 (CADC 2004) (applying *Younger* because "there is no reason to presume that the courts of the District cannot be trusted to adequately protect federal constitutional rights"). "[T]he duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty," *Ex parte Quirin*, 317 U.S. 1, 19 (1942), should not be delegated to officials who claim the Constitution does not apply and take an oath to implement only the rules that they themselves have created.

The lack of safeguards against command influence is also evident in Appellants' defiance of 10 U.S.C. §3037(c), which provides:

> The Judge Advocate General . . . shall receive, revise, and have recorded the proceedings of courts of inquiry and military commissions.

The JAG by statute is Presidentially appointed and Senate confirmed for this task. The commission therefore not only lacks the sanction of Congress present in *Councilman*, it actively flouts congressional rules.

"The Judge Advocate General adds integrity to the system of military justice by serving as a reviewing authority". Louis Fisher, *Military Tribunals and Presidential Power* 124 (2005). In the Civil War, JAG review led to invalidation of commission convictions, including for denying the right to be present:

> [Judge Advocate General Holt] repeatedly overturned the decisions of trials by military commission...Holt reviewed the sentence of Mary Clemmens . . . [stating]: "Further, it is stated that the Commission was duly sworn—but does not add 'in the presence of the accused.' Nor does the Record show that the accused had any opportunity of challenge afforded her. These are particulars, in which it has always been held that the proceedings of a Military Commission should be assimilated to those of a Court-martial. And as these defects would be fatal in the latter case, they must be held to be so in the present instance."

Neely, *The Fate of Liberty* 162-63 (1991) (quoting Holt's opinion). The denial of this right to be present *has already happened to Hamdan.* JA 411.

Appellants are asking this Court to abstain to a process that denies basic rights and eliminates the advisory review required by Congress. These procedural failings counsel against application of comity and abstention.

2. Competence and Futility

Younger "presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Gibson*, 411 U.S. at 577. Hamdan's commission is not competent to address the complex questions of constitutional law, international law, and jurisdiction present here. The commission's presumed knowledge of military operations is simply irrelevant.[3] The legal questions demand the competence and careful consideration of an Article III court. *McCarthy*, 503 U.S. at 148 (exhaustion not "required where the

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[3] The issue is how military officers will be used: in a commission whose rules are made up on the fly, or a court-martial whose procedures have been carefully crafted over two centuries by Congress. *See* William E. Birkhimer, *Military Government and Martial Law* 533-34 (1914) ("The customs of courts-martial are the teaching of ages. They have been transmitted from one generation of soldiers to another . . . besides, experience has demonstrated that changes, unless carefully made, are more apt to embarrass than to facilitate and render certain the administration of justice through military tribunals").

challenge is to the adequacy of the agency procedure itself"); *Allen v. Grand Central Aircraft*, 347 U.S. 535, 540 (1954).

In contrast to courts-martial, Hamdan's commission is conducted largely by non-lawyers and reviewed by executive-branch officials. Its legal rulings are unlikely to provide guidance to the federal courts. While the Court of Military Appeals may provide insights into the meaning of the Geneva Conventions, the commission proceedings will not.

Even with professional military judges, *Councilman* pointedly rejected the argument that "the expertise of military courts extended to the consideration of constitutional claims." 420 U.S. at 759 (quoting *Noyd, supra*). *See also McKart v. United States*, 395 U.S. 185, 197-98 (1969).

Moreover, because it is doubtful that commissions can declare their own existence unconstitutional, they "lack authority to grant the type of relief requested." *McCarthy*, 503 U.S. at 148. "[A]n agency . . . may be unable to consider whether to grant relief because it lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute." *Id.* at 147-48; *Johnson v. Robison*, 415 U.S. 361, 368 (1974); *McNeese v. Board of Educ.*, 373 U.S. 668, 675 (1963).

In addition, abstention is not appropriate when the administrative body has "predetermined the issue." *McCarthy*, 503 U.S. at 148; *Gibson*, 411 U.S. at 577. Appellants have predetermined the issues in this case, namely, the legality and constitutionality of commissions, by promulgating the Military Order and accompanying regulations. Moreover, Appellants evidently rely on an Office of Legal Counsel opinion, which binds the entire federal government, stating that commissions are legal. Memorandum for Alberto Gonzales from Patrick Philbin, Office of Legal Counsel, *Legality of the Use of Military Commissions to Try Terrorists* (2001). Appellants also claim that a Presidential Order resolves the issue of whether the Geneva Conventions apply. App. Br. 40-46.

The President's recent statements underscore the futility of abstention:

> [T]o the extent that people say, well, America is no longer a nation of laws -- that does hurt our reputation . . . [O]ur courts have made a ruling, they looked at the jurisdiction, the right of people in Guantanamo to have habeas review. . . . We want to fully vet the court decision, because I believe I have the right to set up military tribunals. And so the law is working to determine what Presidential powers are available and what's not available.

Press Conference, Dec. 20, 2004, at http://www.whitehouse.gov/news/releases /2004/12/20041220-3.html; *see also* http://www.whitehouse.gov/news/releases/

2004/12/20041210-9.html; Remarks by Secretary of Defense, Feb. 13, 2004, http://www.defenselink.mil/transcripts/2004/tr20040213-0445.html.

The Military Order, OLC opinion, and other documents make clear that exhaustion is futile. *Houghton v. Shafer,* 392 U.S. 639, 640 (1968); *Hammond v. Lenfest*, 398 F.2d 705, 713 (CA2 1968) ("a court-martial would consider itself bound by the determination of the Chief of Naval Personnel"). Commissions have long been subject to this problem. *E.g.*, Birkhimer, *supra*, at 357 (a soldier "who assumes to question the order of his commander does so at his peril. This rule . . . leads to unquestioned obedience" so that officers feel bound to obey orders convening commissions).

In *Quirin*, Attorney General Biddle explained why exhaustion was futile. Responding to the defense's claim that "this court is invalid and unconstitutional," Biddle opened the first day of proceedings:

> I cannot conceive that a military commission composed of high officers of the Army, under a commission signed by the Commander-in-Chief, would listen to argument on the question of its power under that authority to try these defendants . . . [T]he question of the law involved is a question, of course, to be determined by the civil courts . . . I cannot think it conceivable that any commission would listen to an argument that [enemy] armed forces . . . have any civil rights that you can listen to in this proceeding.

Proceedings ("Saboteur Tr.") at 5-6, http://www.soc.umn.edu/~samaha/nazi_saboteurs/nazi01.htm. Consistent with Biddle's logic, the commission was halted so that the federal case could be filed and decided.[4] The same result is required here.

3. No Exigency Requires Abstention

Appellants also renew the military-exigency claim that failed in *Reid v. Covert*, 354 U.S. 1 (1957). Deference to the President goes to the merits, not abstention. And no exigency exists. Hamdan has been in military custody for over three years and the government has stated it may detain Hamdan independently and indefinitely as an enemy combatant. Hamdan is also subject to court-martial and civilian trial. The needs of the military are protected.

Councilman, moreover, had nothing to do with deference to the exigencies of war, it was concerned exclusively with *internal* military discipline. 420 U.S. at 757. As *Toth v. Quarles*, 350 U.S. 11, 22 (1955), stated: "Army discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier

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[4] *See* William Rehnquist, *All The Laws But One* 137 (1998); Saboteur Tr. at 2765 (adjourning commission so defendants could proceed in Supreme Court); *id.* at 2935 (JAG stating that Supreme Court "probably will straighten out the question as to whether this is a theater of operation").

who has been wholly separated from the service . . . [D]iscipline provide[s] no excuse for new expansion of court-martial jurisdiction." When the fighting function is not implicated, neither is abstention. *See Doe v. Rumsfeld*, 297 F. Supp.2d 119, 128 (D.D.C. 2003). Whether Hamdan is tried by commission or court-martial has no effect on discipline.

Appellants' delay also belies their claim that commissions are essential for security. Unlike past commissions, which dispensed quick justice, this commission took over two years to charge Hamdan, and almost three years to begin proceedings. Whatever benefits this commission may have for Appellants, speedy efficiency is not among them.

4. As in *Quirin*, the Public Interest Requires Immediate Review

Appellants' conduct at Guantanamo is the subject of intense interest and concern. As President Bush recently suggested, *see supra* Page 18, a good portion of the nation, indeed the world, is watching these proceedings.

This is the first commission since the World War II era. In the decades since, the Geneva Conventions were ratified and the UCMJ enacted. A clear, efficient, and just resolution of the questions presented is essential now. If commissions are worth doing, they are worth doing right the first time.

In *Quirin*, the Supreme Court reached the conclusion that equity required reaching the merits without delay:

> In view of the public importance of the questions...and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay, we directed . . . a special term of this Court . . .

317 U.S. at 19. Even in the midst of World War, the Court understood that the cloud of legal uncertainty must be cleared before a commission's verdict. Antecedent civilian review avoided the far greater comity threat of courts setting aside commission verdicts. That is why a Nixon Administration DOD Report concluded that pre-trial habeas review would benefit the Government. *See Amici* International Law Scholars' Brief App. 9. The years since *Quirin* have seen dramatic changes in both domestic law and laws of war. "By definition, the law of war must be a concept which changes with the practice of war and the customs of nations." *United States v. Schultz*, 4 C.M.R. 104, 114 (C.M.A. 1952). As in *Quirin*, Article III courts must address the legality of commissions in light of these changes.

Appellants, not pleased with this aspect of *Quirin*, contend it was overruled by *Younger* and *Councilman*. But this is flatly wrong. Abstention law in 1942 did not look significantly different. *See Councilman*, 420 U.S. at 754-56; *Younger*, 401 U.S. at 45-46; *Reaves v. Ainsworth*, 28 App. D.C. 157 (CADC 1906). And again, *Councilman* dealt with the carefully designed Congressional system of military justice, which is precisely what Appellants reject.

5. Private Equities Counsel Against Abstention

When Hamdan filed suit, he had been languishing in solitary confinement for five months and detention for over two-and-one-half years with no commission and no charges. Before filing suit, he did everything possible to exhaust his claims, including requesting charges and a speedy trial.[5] His request was denied in a legal opinion that essentially rejected Hamdan's statutory and constitutional claims. JA 104.[6]

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[5] Appellants' July 27 filing stated that "'the jurisdiction of the Court depends upon the state of things at the time of the action brought.'" *Grupo Dataflux v. Atlas Global Group*, 124 S.Ct. 1920, 1924 (2004). Events after the April 2004 petition do not concern jurisdiction.

[6] The opinion necessarily rejected the Nixon Pentagon Report conclusion that the UCMJ and Constitution apply to commissions, which found:

After refusing to apply the UCMJ, Appellants tried to derail this litigation. First, they asked the Court to hold the proceedings in abeyance pending *Padilla* and *Rasul* and then brought *post-hoc* charges to take advantage of *Councilman*. Second, although Hamdan has continuously warned of the irreparable psychological harm accruing each day of solitary confinement, Appellants waited until the eve of oral argument to move him and then highlighted that change at argument. JA 246-47, 261, 357. Third, well after filing their Return, Appellants launched a CSRT and concluded it a few days before oral argument but not soon enough to introduce any findings into the record or provide them to opposing counsel.

The procedural history of this case makes clear that it was the Government's own manipulations and not Judge Robertson's decision that created "needless friction" between the civilian and military systems. *Parisi,* 405 U.S. at 40. It is

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> [T]he specific protections of the Bill of Rights, unless made inapplicable to military trials by the Constitution itself, have been held applicable to courts-martial. Both logic and precedent indicate that a lesser standard for military commissions would not be constitutionally permissible. In this regard, Winthrop stated: "Military commissions . . . are commonly conducted according to the rule and forms governing courts-martial."

Appellants that violated comity by trying to derail Hamdan's pre-existing federal case.

Reversal of the judgment below, moreover, may eviscerate *Rasul* by enabling Appellants to evade habeas review of *all* Guantanamo detainee cases for years by designating detainees eligible for commissions. *See* Golden, *After Terror, A Secret Rewriting of Military Law*, N.Y. Times, Oct. 24, 2004, at 1 (stating that Counsel to the Vice President "urged" the White House Counsel to "seek a blanket designation of all the detainees being sent to Guantanamo as eligible for trial under the president's order" and that White House Counsel "agreed").

B. *COUNCILMAN* DOES NOT APPLY TO JURISDICTIONAL CHALLENGES

1. The System Cannot Determine Its Own Jurisdiction

Councilman recognized that a military-court system needs an external determination of jurisdiction and power. It is "especially unfair to require exhaustion . . . when the complainants raise[] substantial arguments denying the right of the military to try them at all." 420 U.S. at 759 (citation omitted). This language from *Councilman* was quoted by this Circuit in *New*, 129 F.3d at 644,

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Quoted in Paust, *Antiterrorism Military Commissions*, 23 Mich. J. Int'l L. 1, 3-4

and tracks the longstanding rule. *See Guagliardo v. McElroy*, 259 F.2d 927, 929 (CADC 1958) (previous exhaustion cases are "inapposite, for there court-martial jurisdiction over the accused unquestionably existed" and here "the question is whether appellant is subject to court-martial jurisdiction at all"), *aff'd*, 361 U.S. 281 (1960); *Kinsella v. Singleton*, 361 U.S. 234, 240-41 (1960) (rejecting Government's argument to consider a civilian's impact on discipline because "[t]he test for jurisdiction . . . is one of *status*"); *Hammond*, 398 F.2d at 714 (abstention inappropriate because government "fails to explain wherein lies [its] power to convene the court-martial"); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

Councilman upheld the denial of abstention in *Toth* and *Reid*, *supra*, because "[t]he constitutional question presented *turned on the status of the persons* as to whom the military asserted its power." 420 U.S. at 759 (emphasis added). The challenge in *Councilman*, by contrast, was brought under the fact-specific "ad hoc" 12-factor test of *Relford v. Commandant*, 401 U.S. 355, 366 (1971). Such factual determinations are irrelevant here, as in *Toth, Reid*, and *Guagliardo*.

The expansion of military jurisdiction is disfavored because it is harsh even at its best. Accordingly, federal courts always police the boundary at the outset.

(2001).

Appellants try to flip the burden through manufacturing a new test: civilian status must be "undisputed." App. Br. 20. But *Councilman* and *New* both require only "substantial arguments." *Councilman*, 420 U.S. at 759; *New*, 129 F.3d at 646; *Andrews v. Heupel*, 29 M.J. 743, 747 (A.F.C.M.R. 1989). Abstention has been rejected when the Petitioner "colorably claim[ed]" that he was a civilian. *Machado v. Commanding Officer,* 860 F.2d 542, 546 (CA2 1988). New's claim of civilian status, in contrast, was so insubstantial that he abandoned it. 129 F.3d at 646.

Moreover, Appellants' portrayal of uncontested civilian status in *Toth* and *Reid* is revisionist history. The Solicitor General argued in *Toth* that "ninety years" of precedent explain why Toth was "not a civilian." Petr. Br., *Toth v. Quarles*, No. 3 (1955), at 12. The Solicitor General argued that Mrs. Reid was "part of the American military contingent abroad" and Congress made her "subject to discipline under American military law." App. Br., *Reid*, No. 701, at 31-32.

Appellants also assert, after failing to provide any evidence to the Court below, that Hamdan "clearly falls within the jurisdiction and authority of the military." App. Br. 20-21. The Solicitor General in *Toth* and *Reid* advanced that argument to no avail. Moreover, the question is not whether Hamdan is under the military's jurisdiction writ large, but whether the commission has jurisdiction. Under Appellants' reasoning, because Councilman and New were under "the

jurisdiction and authority of the military" they could be subjected to any "commission" the President created.

In fact, any difference between Hamdan and Toth cuts *against* Appellants. No civilian court had jurisdiction to prosecute Toth. Petr. Brief, *supra*, at 7. Hamdan does not ask for Toth's windfall. Judge Robertson did not grant Hamdan immunity; he required prosecution under procedures that comply with law.

Appellants also repeat their irrelevant assertions that Hamdan is not entitled to constitutional protection. *Councilman* focused not on constitutional rights, but fairness to a defendant's "interests." 420 U.S. at 757. Moreover, *Rasul v. Bush*, 124 S.Ct. 2686, 2698 (2004), made clear that "nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the privilege of litigation." The Government must "make their response to the merits of petitioners' claims." *Id.* at 2699. Finally, footnote 15 of *Rasul* shows that the Constitution protects Hamdan. Hamdan Reply Br. 39-43.

2. The Rights at Stake Are Jurisdictional

Hamdan "is contesting the very authority of the Government to hale him into court to face trial on the charge against him." *Abney v. United States*, 431 U.S. 651, 659 (1977). Abstention is inappropriate when a defendant asserts a right such

as Double Jeopardy, which protects against the unconstitutional trial process itself. *Gilliam v. Foster*, 75 F.3d 881, 904 (CA4 1996) (en banc); *Mannes v. Gillespie*, 967 F.2d 1310 (CA9 1992); *Showery v. Samaniego*, 814 F.2d 200 (CA5 1987).

In addition to his status-based claim, Hamdan raises several other jurisdictional challenges. In military courts, a defendant's presence at every stage of the trial is a jurisdictional requirement:

> "[H]e has *the right* to be present, and must be present, during *the whole* of the trial, and until the final judgment. If he be absent . . . there is a want of jurisdiction over the person, and the court can not proceed with the trial, or receive the verdict, or pronounce the final judgment."

Weirman v. United States, 36 Ct. Cl. 236 (1901) (emphasis in original) (quoting Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 319 (1868)). In military courts, a defendant's presence continues to be jurisdictional. *United States v. Day*, 48 C.M.R. 627 (1974); *United States v. Norsian*, 47 C.M.R. 209 (1973).

Likewise, the failure to follow statutory authorization is jurisdictional: "A court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute or else it is without jurisdiction." *McClaughry v. Deming*, 186 U.S. 49, 62 (1902).

See also Dudley, *Military Law* 13 (1910) ("The military commission . . . [has] jurisdiction only within the limits prescribed by law. Being courts of special jurisdiction, the fact that they have jurisdiction must appear in every case, because without it their acts are wholly void."); *Wilcox v. Jackson*, 38 U.S. 498, 510-11 (1839); *Williamson v. Berry*, 49 U.S. 495, 540-41 (1850).

United States v. MacDonald, 435 U.S. 850, 861 n.7 (1978) suggested that Sixth Amendment speedy-trial guarantees could be vindicated after trial, but the Court cautioned that its holding "is not to be confused with the quite distinct proposition that certain claims (because of the substance of the rights entailed, rather than the advantage to a litigant in winning his claim sooner) should be resolved before trial." *See Flanigan v. United States*, 465 U.S. 259, 266 (1984). Hamdan asserts a "right not to be tried." *MacDonald*, 435 U.S. at 861. Furthermore, *MacDonald*'s Sixth Amendment analysis does not control UCMJ and the Geneva Conventions speedy-trial rights, which are far more extensive.

Finally, even rights that can be vindicated post-trial may be properly adjudicated without abstention when a patently severe violation occurs. *Younger*, 401 U.S. at 53-54.

II. HAMDAN'S COMMISSION VIOLATES THE GPW

The District Court's GPW ruling should be affirmed. In challenging this ruling, Appellants disparage the Court's power under the Judiciary and Supremacy Clauses, mischaracterize the ruling below, and disregard the Suspension Clause.

A. Domestic Law Implements The GPW

The GPW has been implemented, as no less than four separate provisions confirm.

1. 10 U.S.C. §821

The District Court correctly noted that "Hamdan has not asserted a 'private right of action' under the Third Geneva Convention." JA 394. It held that the GPW is implicated by a federal statute, 10 U.S.C. §821. The statute limits commissions to "offenders or offenses that . . . by the law of war may be tried by military commissions." *Quirin* held that the predecessor of §821 incorporated the law of war. 317 U.S. at 38. Appellants acknowledge that the law of war includes the GPW. JA 292; Addendum 29a.

Under GPW Article 5, when any doubt arises, a person "shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." Addendum 3a. Under Article 102, a POW

can be tried only "by the same courts according to the same procedures as in the case of members of the armed forces of the Detaining Power." Addendum 4a.

Appellants claim that §821, by referring to "offenders *or* offenses," permits trial by commission because "Conspiracy" violates the law of war. This is false, *see infra* Part IV.D.1, as well as far too expansive. Furthermore, under the "last in time" rule, any such reading of §821 was overruled by subsequent GPW ratification. *Cook v. United States*, 288 U.S. 102, 120 (1933).

2. The National Defense Authorization Act

Implementation of the GPW is also evident in the National Defense Authorization Act, which provides:

> It is the policy of the United States to . . . ensure that, in a case in which there is doubt as to whether a detainee is entitled to prisoner of war status under the Geneva Conventions, such detainee receives the protections accorded to prisoners of war until the detainee's status is determined by a competent tribunal.

Pub. L. No. §108-375, §1091(b)(4), 118 Stat. 1811, 2068-69 (2004), Addendum 57a. Congress further directed in §1092(b)(3) that "all detainees [be provided] with information, in their own language, of the applicable protections afforded under the Geneva Conventions." *Id.* §1092(b)(3), 2069-70.

3. AR 190-8

Army Regulation 190-8 provides:

> All persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is determined by competent authority.

190-8 §1-5(a)(2), Addendum 55a. Section 1-1(b) explicitly states that it implements international law and the GPW. AR 190-8 was "adopted to implement the Geneva Convention." *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2658 (2004) (Souter, J., concurring).

GPW Articles 5 and 102—the provisions the District Court relied on—are specifically implemented:

> *a.* In accordance with Article 5, GPW, if *any doubt* arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to *any* of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention *until* such time as their status has been determined by a competent tribunal.
>
> *b.* A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who . . . *asserts* that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

AR 190-8 §1-6 (emphasis added). Thus, the mere assertion of protected status is sufficient.

Section 3-7(b) implements Article 102, providing that "judicial proceedings . . . will be by courts-martial or by civil courts," that the UCMJ applies to courts-martial, and that POWs are to be treated like American soldiers in judicial proceedings.

These regulations and their predecessors have long been included in military-training manuals. U.S. Army Field Manual 27-10, *The Law of Land Warfare*, ch. 3 ¶71 (1956) ("[Article 5] applies to any person not appearing to be entitled to prisoner-of-war status . . . who asserts that he is entitled to treatment as a prisoner of war or concerning whom any other doubt of a like nature exists"); Judge Advocate General's School, *Operational Law Handbook* 22 (2003).

"It has been repeatedly held that authorized military regulations have the force of law." *United States v. Mead*, 16 M.J. 270, 273 (C.M.A. 1983). Courts enforce them, even against the military. *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959) ("Having chosen to proceed against petitioner on security grounds, the Secretary . . . was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged petitioner summarily"); *Service v. Dulles*, 354 U.S. 363, 388-89 (1957);

Standard Oil Co. v. Johnson, 316 U.S. 481, 484 (1942); *Nixon v. Sec'y of Navy*, 422 F.2d 934, 937 (CA2 1970) ("the Navy is bound by its own validly promulgated regulations, and the district courts are free to entertain suits by servicemen requesting compliance with such rules"); *United States v. Heffner*, 420 F.2d 809, 811 (CA4 1969); *Hammond*, 398 F.2d at 715 ("we agree with the District of Columbia Circuit that 'the District Court may review actions by military authorities which violate their own established regulations.'" (citation omitted)).

4. M.C.M.

The M.C.M., promulgated by President Bush's Executive Order, limits military tribunals under the Geneva Conventions:

> When a general court-martial exercises jurisdiction under the law of war, it may adjudge any punishment permitted by the law of war.
>
> Discussion
> Certain limitations on the discretion of military tribunals to adjudge punishment under the law of war are prescribed in international conventions. See, for example, Geneva Convention Relative to the Protection of Civilian Persons. . . .

M.C.M. 201(f)(1)(B)(ii).

B. Hamdan May Challenge Appellants' Violation of Statutes and Regulations

Given Appellants' violation of statutes and regulations, mandamus relief is appropriate. *Nixon*, 422 F.2d at 937 (mandamus available when Navy violated regulations). The same is true of habeas: "unless Congress acts to suspend it . . . the Great Writ . . . serv[es] as an important judicial check on the Executive's discretion in the realm of detentions." *Hamdi*, 124 S.Ct. at 2650 (plurality) (citing *INS v. St. Cyr*, 533 U.S. 289 (2001)).

In *Wang v. Ashcroft*, 320 F.3d 130 (CA2 2003), an alien sought habeas relief claiming that his deportation violated the Convention Against Torture (CAT). The Government claimed, and the petitioner did not dispute, that CAT was neither self-executing nor judicially enforceable. Nevertheless, the Court held that the violation of the implementing statute and regulations could be challenged in a habeas action, despite this statutory language: "[n]otwithstanding any other provision of law, . . . nothing in this section shall be construed as providing any court jurisdiction to consider or review claims under the [CAT] or this section." *Id.* at 140. Such language "does not speak with sufficient clarity to exclude CAT claims from §2241 jurisdiction," and that to conclude otherwise would create serious Suspension Clause issues. *Id.* at 142. *Accord Ogbudimkpa v. Ashcroft*,

342 F.3d 207, 221 (CA3 2003); *Saint Fort v. Ashcroft*, 329 F.3d 191, 202 (CA1 2003); *Singh v. Ashcroft*, 351 F.3d 435, 442 (CA9 2003). The court relied on *St. Cyr*, where "[T]he [Supreme] Court explained that at an absolute minimum, the Suspension Clause protects the writ as it existed in 1789, and at that time the use of the writ encompassed detentions based on errors of law, including the erroneous application or interpretation of statutes." *Wang*, 320 F.3d at 143.

Hamdan's claims are similar, indeed stronger, arising from his detention due to Appellants' erroneous interpretation of §821, the National Defense Authorization Act, and AR 190-8.

C. Hamdan's GPW Rights Are Also Enforceable Under the Supremacy Clause

Even absent the implementing statutes and regulations, Hamdan has rights under the GPW that are judicially enforceable by virtue of the Supremacy Clause. This is because the GPW is self-executing and protects individual rights in a manner capable of judicial enforcement.

"In determining whether a treaty is self-executing courts look to the intent of the signatory parties as manifested by the language of the instrument, and, if the instrument is uncertain, recourse must be had to the circumstances surrounding its execution." *Diggs v. Richardson*, 555 F.2d 848, 851 (CADC 1976). Non-self-

executing treaty provisions typically "call upon governments to take certain action." *Id.* at 851. Treaties that "by their terms confer rights upon individual citizens" and can be given effect by courts without legislation are generally self-executing. *Id.* The GPW clearly speaks in terms of individual rights, as Appellants admit. JA 270.

Some provisions of a treaty may be self-executing and others non-self-executing. *Lidas v. United States*, 238 F.3d 1076, 1080 (CA9 2001); *United States v. Postal*, 589 F.2d 862, 884 (CA5 1979). Nothing in Articles 5 and 102 calls for future government action. "[I]t appears that very little in the way of new legislative enactments will be required to give effect to the provisions contained in the four [Geneva] conventions." S. Exec. Rep. No. 84-9 (1955) ("Ratifying Report") at 30. The Senate Foreign Relations Committee identified only four areas where additional legislation would be necessary to implement the GPW, none relevant here. *Id.*

Appellants no longer contend that the GPW is not self-executing. They acknowledge that it is in effect in domestic law. App. Br. 27, 31. However, they assert that the GPW does not contemplate judicial enforcement. That claim depends primarily on whether the treaty purports to protect individual rights or, by contrast, addresses itself only to governments. For example, the instrument in

Diggs—a UN resolution calling on states to embargo South Africa—was "not addressed to the judicial branch" and did not confer rights upon individuals. 555 F.2d at 851. However, the Court has made clear that certain treaty provisions are judicially enforceable:

> A treaty, then, is a law of the land as an act of Congress is, whenever its provisions *prescribe a rule by which the rights of the private citizen or subject may be determined.* And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

Head Money Cases, 112 U.S. 580, 598-99 (1884) (emphasis added).

Thus, if the GPW provides a rule to determine an individual's rights, courts will enforce it. *E.g.*, *Kolovrat v. Oregon*, 366 U.S. 187 (1961); *Jordan v. Tashiro*, 278 U.S. 123, 130 (1928); *Asakura v. Seattle*, 265 U.S. 332, 341 (1924); *United States v. Percheman*, 32 U.S. 51, 89 (1833). None of these cases ask whether a "private right of action" exists.

Moreover, the Court has repeatedly held that the habeas statute permits enforcement of treaty-based individual rights. *Factor v. Laubenheimer*, 290 U.S. 276, 286 (1933); *Mali v. Keeper of Common Jail*, 120 U.S. 1 (1887) ("we see no reason why [petitioner] may not enforce his rights under the treaty by writ of habeas corpus in any proper court of the United States"); *United States v.*

Rauscher, 119 U.S. 407 (1886); *Chew Heong v. United States*, 112 U.S. 536 (1884); *Ogbudimkpa*, 342 F.3d at 218 n.22.

Indeed, the Executive Branch has itself acknowledged that the GPW provides rules of decision that can be invoked by enemy detainees in a habeas action. *United States v. Noriega*, 808 F. Supp. 791, 797 (S.D. Fla. 1992) ("The government has maintained that if General Noriega feels that the conditions in any facility in which the BOP imprisons him do not meet the Geneva III requirements, he can file a *habeas corpus* action under 28 U.S.C. 2255"); U.S. Army, *Law of War Workshop Deskbook* 85 (2000) (prisoners of war "have standing to file a Habeas Corpus action . . . to seek enforcement of their GPW rights").[7]

D. The 1949 GPW Does Not Rely Only on Diplomacy

Appellants mistakenly assume that diplomacy is the exclusive means of enforcement. The fact that the GPW does not expressly mandate judicial domestic enforcement is not unusual given the variety of legal regimes in place among signatories. Carlos Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89

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[7] Available at https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/fc6fd99c6c0745e185256a1d00467742/$FILE/LOW%20Deskbook%202000.pdf.

Am.J. Int'l L. 695, n.36, n.63 (1995). The GPW contemplates the most scrupulous enforcement by whatever means are constitutionally appropriate. Its very first Article requires the Parties "to respect and to ensure respect for the present Convention in all circumstances."

> By undertaking this obligation at the very outset, the Contracting Parties drew attention to the fact that it is not merely an engagement concluded on a basis of reciprocity. . . . It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations vis-à-vis itself and at the same time vis-à-vis the others.
>
> The Contracting Parties do not undertake merely to respect the Convention, but also to ensure respect for it. It is self-evident that it would not be enough for a Government to give orders or directions and leave the military authorities to arrange as they pleased for their detailed execution. It is for the Government to supervise the execution of the orders it gives.

Int'l Comm. Red Cross, *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* 17-18 (1960). Its framers intended signatories to employ all necessary internal mechanisms for domestic compliance, and to use diplomacy to promote compliance abroad. In our country, the Constitution's structural reliance on courts entails their participation to "ensure respect for the [GPW] in all circumstances."

Appellants also fail to recognize that the 1949 Conventions, unlike the 1929 treaty, protect *individual* rights:

> It was not until the Conventions of 1949 . . . that the existence of "rights" conferred on prisoners of war was affirmed.

Id. at 90-91. Nothing in the GPW suggests that it is enforceable only through diplomatic protest, which was a flaw in the 1929 treaty that the GPW sought to remedy. Best, *War and Law Since 1945*, at 80-114 (1994).

In ratifying the GPW, the Senate looked at the 1939-45 failures of the earlier Convention and sought to provide "greater and more effective protection for the persons whom they were intended to benefit." Ratifying Report at 1-2. "To tighten up the obligations of the parties," *id.* at 6, the GPW replaced ineffective diplomatic protest with legally binding injunctions. The Senate Committee hailed the GPW as a "landmark" in the protection of human rights, cautioning "[w]e should not be dissuaded by the possibility that at some later date a contracting party may invoke specious reasons to evade compliance." *Id.* at 32.

The task of interpreting the GPW rests ultimately with the Courts. While an interpretation urged by the Executive is "of weight," it is well settled that "the construction of a treaty by the political department of the government [is] not conclusive upon courts called upon to construe it." *Factor*, 290 U.S. at 295.

Appellants' interpretation ignores the GPW's spirit and purpose, disregards canons of interpretation, and offends the Suspension and Supremacy Clauses.

"According to the accepted canon, we should construe the treaty liberally to give effect to the purpose which animates it. Even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred." *Bacardi v. Domenech*, 311 U.S. 150, 163 (1940); *accord United States v. Stuart*, 489 U.S. 353, 368 (1989); *Chew Heong*, 112 U.S. at 540. "After all, the ultimate goal of Geneva III is to ensure humane treatment of POWs–not to create some amorphous, unenforceable code of honor among the signatory nations." *Noriega*, 808 F. Supp. at 799; *United States v. Lindh*, 212 F. Supp. 2d 541, 554 (E.D.Va. 2002).[8]

Finally, even had the GPW denied the right to judicial review (which it does not), domestic statutes and regulations create one. *Ogbudimkpa*, 342 F.3d at 228; *Saint Fort*, 329 F.3d at 201; *Wang*, 320 F.3d at 141.

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[8] Judge Bork's concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (CADC 1984), concerned a claim for damages and did not comment on the provisions at issue in this case. Its conclusions regarding the GPW are not controlling. Nor are those of *Hamdi v. Rumsfeld*, 316 F.3d 450, 468-68 (CA4 2003), which was vacated, 124 S.Ct. 2633.

E. The District Court Correctly Interpreted GPW Article 2

The District Court's ruling was not based on "determinations" that only the Executive may make. Rather, it was based on three facts that were *not disputed* by Appellants below: (1) Hamdan was captured in Afghanistan during hostilities after 9/11, (2) he has asserted a right to protection under the GPW, and (3) Appellants have not convened a competent tribunal.

Appellants now challenge facts (2) and (3), but those challenges are not part of the record and can easily be disposed of. First, Hamdan has clearly claimed protected GPW status. JA 57-59, 65. It is true that he denies he was a combatant, but the GPW by its terms protects persons not directly involved in hostilities. GPW Articles 3, 4, 5.

Second, with respect to Article 5, Appellants admitted that the CSRT had no bearing on POW status and had "zero effect" on their motion to dismiss. JA 250-51. Appellants now contend that the CSRT was the functional equivalent of an Article 5 hearing. Yet the CSRT determines enemy combatancy, not POW status. Memorandum from Secretary of the Navy, http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf. Appellants have stated that CRSTs are not Article 5 tribunals. Defense Dep't. Background Briefing on CSRTs, http://defenselink.mil/transcripts/2004/tr20040707-0981.html. In any

event, Hamdan's CSRT findings are not part of the Record in this case and have not been given to Hamdan's lawyers (who hold security clearances). JA 294-95.

The cases cited by Appellants do not remotely stand for the proposition that a federal court cannot interpret a treaty to determine whether it applies to undisputed facts. For example, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), did not even involve a treaty. It dealt with an Executive Order implementing a joint resolution of Congress. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), rejected the Executive's argument that Cuba should be refused access to U.S. courts, establishing that the judiciary will not be marginalized by Executive claims about foreign-policy prerogatives. Likewise, *Doe v. Braden*, 57 U.S. 635 (1853), merely held that the Executive determines whether a foreign government ratified a treaty:

> [T]he Constitution declares that all treaties made under the authority of the United States should be the supreme law of the land.
>
> The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms.

Id. at 657 (emphasis added).

Furthermore, the District Court's Article 2 determination is correct. Afghanistan and the United States are GPW High-Contracting Parties. U.S. Armed Forces invaded Afghanistan "to wage a military campaign against al Qaeda and the Taliban regime that had supported it." *Rasul*, 124 S.Ct. at 2690. The Taliban controlled the Afghan state. Thus, the U.S. was in armed conflict with a High Contracting Party and occupied its territory.

Appellants' contention that the Afghani conflict was actually two separate conflicts is strained, reminiscent of the "specious reasons to evade compliance" decried in the Ratifying Report. These alleged "separate conflicts" were fought against forces working in concert, on the same territory, at the same time, arrayed against the same American and allied forces. Appellant Rumsfeld stated: "With respect to the Taliban . . . they were tied tightly at the waist to al Qaeda. They behaved like them, they worked with them, they functioned with them, they cooperated with respect to communications, they cooperated with respect to supplies and ammunition. . . ." Rumsfeld Statement, www.defenselink.mil/news/Jan2002/t01282002_t0127sd2.html. Application of the GPW in these circumstances is consistent American military practice in every major conflict. Jennifer Elsea, Congressional Research Service, *Treatment of "Battlefield*

Detainees" in the War on Terrorism 29 (2002), http://fpc.state.gov/documents/organization/9655.pdf.

Appellants concede that the Geneva Conventions apply in the conflict against the Taliban. *See* White House Fact Sheet, http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html. Because Hamdan was captured in that conflict, the GPW applies.

As the District Court found, "doubt" of Hamdan's POW status arises from multiple circumstances, including his denial that he is al Qaeda, his assertion of protected status, the civil war in Afghanistan, and the fact, undisputed by Appellants, that he was seized by an Afghan militia and exchanged for a bounty. JA 153.

Moreover, AR 190-8 makes clear that the mere *assertion* of POW status requires a tribunal. "The United States has in the past interpreted [Article 5] as requiring an individual assessment of status before privileges can be denied. Any individual who claims POW status is entitled to an adjudication of that status." Elsea, *supra*, at 29.

Furthermore, it is arguable that even al Qaeda members can receive GPW protections, and need not meet Article 4(a)(2)'s criteria if they are "members of militias or volunteer corps forming part of [a Party's] armed forces." GPW 4(a)(1);

D. Jinks and D. Sloss, *Is the President Bound by the Geneva Conventions?*, 90 Cornell L.Rev. 97, n.79 (2004). The District Court did not need to reach this question because Hamdan did not receive an Article 5 hearing.

Finally, Appellants' argument about GPW Article 2, ¶ 3's reference to "mutual relations" is irrelevant. Appellants cannot rely on their allegation that Hamdan is "affiliated" with al Qaeda to deny him GPW protections. The GPW, a federal statute, and Army regulations each require an Article 5 hearing first.

F. Appellants Have Violated Common Article 3

The District Court's holding that Article 3 applies should be affirmed. JA 388, 391. The court cited authorities establishing that Article 3 sets forth the "most fundamental requirements of the law of war." *Kadic v. Karadzic*, 70 F.3d 232, 243 (CA2 1995). While invoking the law of war as authorizing Hamdan's commission, Appellants disregard other aspects of that law constraining their conduct. One such constraint is Article 3's requirement of "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

Appellants argue that Article 3 does not apply because the conflict against al Qaeda is international. This argument "is plainly incorrect as a matter of law." Jinks and Sloss, *supra*, at n.87. In fact, as *Kadic* and the other authorities cited by

the District Court establish, Article 3 is binding in all conflicts, on all parties, as a minimum standard. Indeed, American courts have found individuals liable for "violations of Common Article 3 and the customary international humanitarian norms embodied in those provisions." *Mehinovic v. Vuckovic*, 198 F. Supp.2d 1322, 1351 (N.D.Ga. 2002).

Hamdan's *ad hoc* commission is not regularly constituted because it is established in violation of statutes, the GPW, the Constitution, and the laws of war; compromised by command influence; and not competent to address the complex issues presented. It fails to afford adequate judicial guarantees, denying confrontation and other basic rights while not providing independent and impartial review.

While the District Court correctly recognized that Article 3 applies, it abstained from ruling further. JA 398-99. However, this Court can and should affirm the court below because of Appellants' Article 3 violation. *Freeman v. B&B Assocs.*, 790 F.2d 145, 151 (CADC 1986) (appellate court "will freely consider any argument by an appellee that supports the judgment of the district court including arguments rejected by the district court"); *In re Swine Flu Immunization Prods. Liability Litig.*, 880 F.2d 1439, 1444 (CADC 1989).

III. HAMDAN'S COMMISSION, WHICH HAS ALREADY DENIED THE RIGHT TO BE PRESENT, LACKS JURISDICTION

Appellants contend that the President can shape the proceedings as he chooses, unconstrained by the UCMJ and fundamental principles of law. They have already abridged Hamdan's right to be present by barring him from portions of his *voir dire*. JA 131-32. In addition, the prosecution has stated that it will put on two days of testimony without Hamdan present. *Id.*

The involuntary exclusion of the accused from trial proceedings is universally rejected and unprecedented in military justice. As noted above, the failure to guarantee the right to presence is jurisdictional; indeed the judgment of a military commission during the Civil War was dismissed for violating presence rights. *See supra* pages 15-16, 29. In World War II, the United States even *prosecuted* Japanese officers who conducted a military commission that abridged the defendant's right to participate.

The right to be present is foundational in the UCMJ, international law, military law, common law, and the Constitution. Each provides an independent basis to void the commission.

First, UCMJ provisions 821 and 836 require commissions to conform to the laws of war and the UCMJ, respectively.

Second, even before the UCMJ's enactment, commissions could not take actions contrary to the laws of war. *See infra* Part IV. The laws of war also establish a rule by which Sections 821 and 836 should be interpreted. "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Charming Betsy*, 6 U.S. 64, 118 (1804).

Third, Presidential rules for military tribunals must follow "well-recognized principle[s] of military law." *United States v. Rodriguez,* 37 M.J. 448, 454 (C.M.A. 1993). Appellants state that commissions are "commonlaw war courts." App. Br. 55. They are bound by that common law, too.

Fourth, the constitutional right to be present is fundamental and cannot be denied in Guantanamo. *See Rasul*, *supra*, at n.15.

A. The UCMJ constrains the President

10 U.S.C. §821 permits the President only to punish in conformity with the laws of war. *See supra* Part II.A.1. But denial of the right to be present not only removes the commission from established law-of-war principles, it creates a grave breach of them.

An independent UCMJ provision, 10 U.S.C. §836(a), limits Presidential power:

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

Based on this Congressional mandate that the UCMJ is a procedural baseline, the District Court properly held that the commission cannot try Hamdan. JA 414. The plain language of 10 U.S.C. §836, historical practice, and military-court interpretation all support that decision.

The fundamental principle of statutory interpretation is to follow the text. *Ardestanti v. I.N.S.*, 502 U.S. 129, 135 (1991). This Court need go no further than the UCMJ's text. Section 836 does not say "contrary to or inconsistent with" rules in the UCMJ that specify military commissions; it says "this chapter." The President expressly relied on §836 to establish this commission. Addendum 13a. He cannot invoke words in §836 that empower him and simultaneously ignore words that constrain him.

Even if the UCMJ did not exist, the President could not depart from fundamental court-martial rules. Prior to the UCMJ, commissions followed the same procedures as courts-martial with the exception of the number of members:

> [Commissions] while in general even less technical than a court-martial, will ordinarily and properly be governed, upon all important questions, by the established rules and principles of law and evidence. Where essential, indeed, to a full investigation or to the doing of justice, these rules and principles will be liberally construed and applied.

2 William Winthrop, *Military Law and Precedents*, 842 (2d ed. 1920). *Accord* Glenn, *Army and Law* 42 (1918) ("in all matters of procedure, [commissions] are governed by the practice obtaining in regular courts-martial"); Ives, *Treatise on Military Law* 284 (1879) ("The forms of procedure are the same as before courts-martial"); *id.*, at 281; George B. Davis, *A Treaty on the Military Law of the United States* 309 (1913) ("the rules which apply in these particulars to general courts-martial have almost uniformly been applied to military commissions"); Benet, *Treatise on Military Law* 15 (1862) (commissions must "be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise."); Instructions No. 5, Hunt, 4 American Mil. Govt. of Occupied Germany, 1918-1920, 50 (1920) (commission procedure in occupied Germany would "be in substance the same as in trial by General Court-Martial").

Appellants point to General Crowder's "authoritative" testimony, App. Br. 35, neglecting to mention that Crowder's next sentence is that commissions and courts-martial "*have the same procedure.*" S. Rep. 64-582 at 40 (1916).

Section 836 reflects this traditional equivalence. As the District Court noted, it permits procedures for courts-martial to differ from commissions in some respects, but subordinates both to fundamental UCMJ principles.

The District Court's reading is not a "death knell" for Presidential flexibility. Rules for commissions *can* differ from the rules for courts-martial when they are consistent with the UCMJ. JA 406.[9]

Appellants contend that §836 only prevents the President from prescribing procedural rules that are contrary to the nine UCMJ sections where "military commissions" are specifically mentioned. App. Br. 53-54. Yet only three of these nine sections specify procedural rights: 10 U.S.C. §828 (requiring court reporter and, where necessary, interpreters); §849(d) (permitting authenticated depositions); §850(a) (permitting prior sworn statements). Appellants' position is, quite simply, that the <u>only</u> procedural rules it must provide are the presence of a court reporter and interpreter, and the ability to read into evidence prior sworn statements or deposition testimony. This is an absurd statutory reading that not only defies the

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[9] For example, Commission Rule 32 C.F.R. §9.5(m) permits, in contrast to R.C.M. 1001(c), "the Accused to make a statement during sentencing proceedings." Although these rules differ, neither is contrary to 10 U.S.C. §856 or other UCMJ provisions. Commission Rule §13.3(c)(3) gives defense counsel

plain meaning of §836(a), but also ignores §836(b), which states: "All rules and regulations made under this Article shall be uniform insofar as practicable."

Appellants claim that the District Court made the nine commission mentions surplusage, neglecting that their reading renders §836 entirely superfluous. If the President has the inherent authority to set up commissions as he pleases, §836 is a nullity. Appellants' reading creates a second layer of superfluousness, too, since "contrary to" has a narrower meaning than "inconsistent with." The latter looks to the animating purpose and spirit. *Black's Law Dictionary* 322, 766 (1990). Appellants' surplusage argument fails for other reasons as well, Glazier, *supra*, at 2022; *Lamie v. United States Trustee*, 124 S.Ct. 1023, 1031 (2004).

Appellants' reliance on *Yamashita* and *Madsen* is misplaced. As the District Court noted, *Yamashita* was decided five years before extension of UCMJ jurisdiction over "persons within an area leased by or otherwise reserved or acquired for the use of the United States." §802(a)(12); JA 407-408. Indeed, when proposed, ¶12 was criticized for greatly expanding Article 2. General Green, the Army JAG, stated:

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primary responsibility for identifying conflicts-of-interest; R.C.M. 901(d)(4)(D) makes the military judge primarily responsible. Neither violates §838.

> Article 2(12) is not limited to time of war or national emergency, nor does it exclude purely military offenses. Its effect would be to make subject to military law, without limitation or qualification, any person residing in or visiting a base area at any time. The enactment . . . will inevitably lead to international complications.

Statement, U.S. Senate, Armed Services Committee, 5/9/1949, at 266. Despite this criticism, ¶12 was adopted without the limitations in §1201. The UCMJ applies under ¶12, as well as ¶¶9,10.

Appellants' misleading quotation of four words from *Madsen*'s description of the *history* of commissions does not enlarge its holding, which was merely that commissions may try civilians under circumstances not present here. *See infra* Part IV.C. *Madsen* touched on procedure only in passing because procedure was not challenged, but that dicta undermines Appellants. *Id.* at 358-59 ("The rights of individuals were safeguarded by a code of criminal procedure dealing with warrants, summons, preliminary hearings, trials, evidence, witnesses, findings, sentences, contempt, review of cases and appeals."). Of most relevance, the Commission Rules in *Madsen explicitly* guaranteed "the rights . . . To be present" and to "cross-examine any witness." *Id.* at 360 n.24.

The District Court's holding is consistent with judicial enforcement of §836 in courts-martial. *United States v. Douglas*, 1 M.J. 354, 356 (C.M.A. 1976)

(M.C.M. provision contrary to 10 U.S.C. §854 "exceeds the President's authority under Article 36, UCMJ, and is inoperative."). "Under [Article 36] a variety of Manual provisions have been invalidated, although it has occasionally been difficult to perceive the exact textual conflict between the Code and Manual provisions." Eugene Fidell, *Judicial Review of Presidential Rulemaking Under Article 36: The Sleeping Giant Stirs*, 4 Mil. L.Reptr. 6049, 6051 (1976) (footnote/citations omitted).

B. The Denial of Presence and Confrontation Destroys the Commission's Jurisdiction

The District Court correctly concluded that commission rule 32 C.F.R. §9.6(b), which permits portions of Hamdan's trial to be conducted outside of his presence and robs him of the right to confront witnesses, destroys the commission's jurisdiction. JA 403-405.

Section 839(b) reflects a fundamental truth: A trial without the accused present is a sham. "In cases of felony our courts, with substantial accord, have regarded [the right to be present] as extending to every stage of the trial, inclusive of the empanelling of the jury and the reception of the verdict, *and as being scarcely less important to the accused than the right of trial itself.*" *Diaz v. United States*, 223 U.S. 442, 455 (1912) (emphasis added); *Lewis v. United States*, 146

U.S. 370, 372, 375 (1892) ("A leading principle *that pervades the entire law of criminal procedure* is that, after indictment found, nothing shall be done in the absence of the prisoner."); *id.* (right to be present is of "peculiar sacredness" and it would be "*contrary to the dictates of humanity*" to allow defendant to waive it) (emphasis added); *United States v. Washington*, 705 F.2d 489, 497 (CADC 1983) ("the defendant's presence is fundamental to the basic legitimacy of the criminal process.") (citations omitted).

While presence rights for disruptive defendants has been cut back, *e.g.*, *Illinois v. Allen*, 397 U.S. 337 (1970), no case questions the fundamental common law proposition that absent waiver, the accused must be present during *voir dire*. The presence of counsel is not enough. *Lewis*, 146 U.S. at 373-74 (specifically addressing exclusion from *voir dire* and stating that defendant's "life or liberty may depend upon the aid which, by his personal presence, he may give to counsel. . . . The necessities of the defense may not be met by the presence of his counsel only."); *Faretta v. California*, 422 U.S. 806, 819 (1975). This Court, for example, reversed a conviction when a defendant was not present during *voir dire*, finding the right to be present fundamental at both common law and in the Constitution:

> During *voir dire*, for example, "what may be irrelevant when heard or seen by [defendant's] lawyer may tap a memory or association of the defendant's which in turn may be of some use

> to his defense"....A defendant's presence at *voir dire* is essential not only because it is necessary to the appearance of impartiality but, "because the defendant has unique knowledge which is important at all stages of trial, including the *voir dire*. ....He may also have knowledge of facts about himself or the alleged crime which may not have seemed relevant to him in the tranquility of his lawyer's office, and thus may not have been disclosed, but which may become important as the individual prejudices or inclinations of the jurors are revealed."

United States v. Gordon, 829 F.2d 119, 124-25 (CADC 1987) (citations omitted).

Military courts require presence for a trial to comport with the UCMJ. *United States v. Dean*, 13 M.J. 676, 678 (A.F.C.M.R. 1982) ("The accused must be present at all stages of his trial. The integrity of the military justice system is jeopardized . . . without all parties to the trial being present."); *United States v. Daulton*, 45 M.J. 212, 219 (U.S.A.F. 1996) ("§839(b)[ ]requires that all proceedings, except deliberations and voting of members, be conducted in the accused's presence."). *See also* Army, Military Judges Benchbook for Trial of Enemy Prisoners of War, Oct. 2004, at 202 (pattern instruction for judge to defendant, "you have the right to be present at every stage of your trial").

Similarly, international law recognizes the right to be present as fundamental. This fact is confirmed by the rules for Iraqi tribunals, written by Appellants. They provided as "minimum guarantees" that the accused will be "tried without undue delay" and "*tried in his presence*."

Art. 20(d), http://www.cpa-iraq.org/regulations/20031210_CPAORD_48_IST_and _Appendix_A.pdf. As the Fourth Geneva Convention, Art. 67, specifies, an occupying power may only prescribe rules of trial that are *required* by international law, and presence is one such required rule.

Tribunals for war crimes in Rwanda and the former Yugoslavia also guarantee the right to be present. Yugoslavia Art. 21, http://www1.umn.edu/humanrts/icty/statute.html; Rwanda Art. 20, http://www.ictr.org/ENGLISH/basicdocs/statute.html. GPW Article 75, Protocol I of the GPW, recognized as binding,[10] similarly guarantees defendants:

> an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include . . . . the right to be tried in his presence . . . . [and] the right to examine, or have examined, the witnesses against him

During World War II, when Japanese Judge-Advocates tried our soldiers in a military commission that, *inter alia*, deprived American soldiers of the right to participate and violated Japanese rules for courts-martial, America responded by

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[10] Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am.U.J. Int'l L.&Pol'y 419 (1987).

prosecuting the Japanese. *United States v. Uchiyama* Tr., Case 35-36, War Crimes Branch, JAG Records, at 20 (Prosecution's opening statement: "[The accused] applied to them a special type of summary procedure which failed to afford them the minimal safeguards for the guarantee of their fundamental rights which were given them both by the written and customary laws of war."). The defense unsuccessfully made the same argument voiced by the Government in this case--that "there is no standard of procedures" for war criminals in commissions and that the Americans had no legal rights.

Everything from common law to modern international law, *Uchiyama* to the UCMJ, the Civil War to contemporary Iraq, is aligned in guaranteeing the right to be present. No authority relied on by Appellants suggests that the President can dictate rules that violate international law or military principles.

As with presence, the right to confront witnesses reflects a protection fundamental to the common law, military law, and international law. As Justice Scalia put it: "'It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross-examine.'" *Crawford v. Washington*, 124 S.Ct. 1354, 1363 (2004) (quoting *Webb*, *supra*); *Coy v. Iowa*, 487 U.S. 1012, 1017n.2 (1988) (referring to "both the antiquity and currency of the human feeling that a criminal trial is not just unless

one can confront his accusers"); *Pointer v. Texas*, 380 U.S. 400, 405 (1965) ("fundamental requirement for . . . fair trial"); *Mattox v. United States*, 156 U.S. 237, 243 (1895) ("general rule of law defended since the days of Magna Charta"). Unsurprisingly, given its bedrock nature, military courts interpret §839(b) to guarantee confrontation. *Daulton*, 45 M.J. at 219 (witness' testimony outside the presence of the accused violated Article 39). UCMJ §849(d) and §850(a) have been similarly interpreted.

Appellants offer no justification for their unprecedented denial of confrontation rights. Assuming it is based on the need to protect classified information, alternative procedures exist. *United States v. Rezaq*, 134 F.3d 1121, 1142 (CADC 1998) (applying Classified Information Procedures Act). Moreover, trials with a significant political dimension, such as Hamdan's, provide a stronger, not weaker, rationale for these confrontation rights. *Crawford*, 124 S.Ct. at 1373-74 (in securing confrontation rights, "the Framers had an eye toward politically charged cases like Raleigh's—great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear").

Appellants do not dispute that excluding Hamdan and denying his confrontation rights is "contrary to or inconsistent with" §839(b). Appellants' only argument is that §836 permits the President to ignore any UCMJ provision that

does not expressly mention commissions, even if that means denying Hamdan the right to attend his own trial or cross-examine his accusers. The District Court properly rejected this interpretation, and its ruling should be affirmed.

IV. THIS COMMISSION VIOLATES SEPARATION OF POWERS

The commissions blatantly violate statutory requirements such as UCMJ §3037(c), *supra* Part I.A.2.b, as well as the UCMJ. As the District Court found, these defects place them in the last, most restrictive, category of *Youngstown*. JA 384-85.

The animating assumption of the Government's appeal is a never-accepted notion of inherent Presidential power. *See Quirin*, 317 U.S. at 29. They believe that the President has the absolute discretion to determine international law, the jurisdiction of commissions, and common-law requirements. "Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers." *Reid*, 354 U.S. at 39 (plurality); *Toth*, 350 U.S. at 17.

A. Text

Article I, §8 grants Congress the power to "constitute Tribunals inferior to the supreme Court" and "define and punish . . . Offences against the Law of

Nations." It speaks with specificity; Article II does not. *See In re Yamashita*, 327 U.S. 1, 7 (1946) (referring to "define and punish" clause); *id.* at 8-10.

B. History

Appellants' examples undermine their point.

Washington. Even in the pre-founding and pre-separation-of-powers era, General Washington urged "the necessity of enforcing the articles of war in all its parts," because they preserve "the rights and liberties of the people against the arbitrary proceedings of the military officers." 1 *Writings of George Washington* 467 (Fitzpatrick ed. 1931). Washington also disapproved a court-martial for an offense similar to the one at issue here because "the Civil authority of that State has made provision for the punishment of persons taking Arms with the Enemy." 11 *id.* 262.

1818. The House Committee on Military Affairs stated that it could find "no law of the United States authorizing a trial before a military court" for the convicted offenses, including piracy. Annals, 15th Cong., 2d Sess. 515-27 (1819). Appellants' own authority states that Jackson's order "was wholly arbitrary and illegal. For such an order and its execution a military commander would now be indictable for murder." Winthrop, *supra*, at 465.

1847. During a declared war, General Scott convened battlefield commissions out of bare necessity "until Congress could be stimulated to legislate on the subject." 2 *Memoirs of Lieutenant-General Scott* 392-93 (1864). The Order specifically applied court-martial rules and procedures. *Id.* at 540-44. It stated that punishment must be "in conformity with known punishments" in State law. It further provided "no military commission shall try any case clearly cognizable by any court-martial." *Id.*

The Civil War. Congress explicitly authorized commissions. The "general rule" was to use commissions "only for cases which cannot be tried by a court-martial or by a proper civil tribunal." 1 *The War of the Rebellion* 242 (1894). General Order 1 required commissions to

> [B]e constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise.

Id. at 248 (emphasis added). Despite such limitations, *Milligan* found commissions impermissible. Appellants fail their own historical practice test.

C. Precedent

Today, no clear statement by Congress exists to supplant civilian courts or courts-martial. *See Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991); *Coleman v.*

Tennessee, 97 U.S. 509, 514 (1878) (applying rule to military justice); Katyal & Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259 (2002).[11] Congress has authorized "force," which has as its incident *prospective* detention, not *retrospective* punishment. Congress did not authorize commissions by implication, which had not been used in a half-century and even then in far more restrained circumstances.

While *Quirin* and *Yamashita* found the predecessor to 10 U.S.C. §821 permitted commissions, those commissions were in war zones, and the Court relied on 50 U.S.C. §38, which has been repealed. *Yamashita*, 327 U.S. at 7; *Quirin*, 317 U.S. at 27. The Court's interpretation of §821 was confined to declared wars, tracking the longstanding military-justice rule about jurisdiction. *E.g., United States v. Averette*, 19 U.S.C.M.A. 363, 366 (1970) (finding that the Vietnam conflict was not a time of war because general terminology "should not serve as a shortcut for a formal declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction"); *Cole v. Laird*, 468 F.2d 829, 831 n.2 (CA5 1972); *Robb v. United States*, 456 F.2d 768, 771 (Ct. Cl. 1972).

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[11] *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948), stated that federal courts could not review international tribunals. *Id.* at 208 (Douglas, J., concurring).

In *Quirin*, Biddle stressed that the Eastern seaboard "was declared to be under the control of the Army." Saboteur Tr. at 79. The Court agreed. 317 U.S. at 22 n.1. It cited Winthrop repeatedly, which states:

> Jurisdiction. . . The place must be the theatre of war or a place where military government or martial law may legally be exercised; otherwise a military commission (unless specially empowered by statute) will have no jurisdiction of offense committed there.

Winthrop, *supra*, at 836; Dudley, *supra,* 313 (same). No court has ever, to Appellee's knowledge, upheld commissions in places that are not occupied territory or zones of war. Accordingly, the commission is not properly constituted and must be struck down. Paust, *supra*, at 1363; *Ex Parte Milligan,* 71 U.S. 2, 127 (1866) ("confined to the locality of actual war").[12]

Madsen concerned occupation courts. Its holding was limited to "territory occupied by Armed Forces" "in time of war". 343 U.S. at 348, 355. Guantanamo does not qualify. Indeed, *Reid* held that dependents away from conquered territory could not be subject to military trial, in spite of Article 15 and treaties authorizing it: "*Madsen* [] is not controlling here. It concerned trials in enemy territory which

had been conquered and held by force of arms and which was being governed at the time by our military forces." 354 U.S. at 35 n.63.[13] The government claimed the "battlefront" was worldwide due to "present threats to peace" and "world tension." *Id.* at 33-35. The Court rejected this argument: "exigencies which have required military rule on the battlefront are not present in areas where no conflict exists." *Id.* at 35.

"Throughout history many transgressions by the military have been called 'slight' and have been justified as 'reasonable' in light of the 'uniqueness' of the times," but "[w]e should not break faith with this nation's tradition of keeping military power subservient to civilian authority, a tradition . . . firmly embodied in the Constitution." *Id.* at 40. *Accord Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Toth*, 350 U.S. at 23.

The *Hamdi* plurality's recent invocation of *Quirin* is descriptive and does not answer *what body* must try unlawful combatants. *See* 124 S.Ct. at 2660. It also strongly rejected a similar executive-deference argument, looked to the GPW to

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[12] Involving civilians in the commission, perhaps for the first time in history, creates separation-of-powers difficulties as well. Winthrop, *supra*, at 835.

outline Government powers, and weakened the Government's equal protection claim here. *Id.* at 2641, 2650, 2461.

The Government's putative fifth vote, Justice Thomas's dissent, dealt only with detention, mentioning it forty-six times. *See id.* at 2674, 2677-85. He found *punishment* stands on entirely different footing, isolating *Milligan*: "the punishment-nonpunishment distinction harmonizes all of the precedent." *Id.* at 2682 (citations omitted).

The President has neither the authority to defy Congressional restrictions on commissions nor the authority to establish *this* commission under present circumstances. This is the first commission insulated from a theater of war. War has not been declared, years have elapsed since Hamdan's capture, necessity is lacking, courts-martial and civilian courts are open, the offense is not authorized for commission trial, and the commission flouts court-martial rules and the laws of war themselves. While such a commission may be possible in some other country, it is most assuredly not in a regime under law, dedicated to dividing power instead of concentrating it in the Executive.

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[13] *Reid* commanded a plurality, three years later a majority affirmed and expanded it when "critical areas of occupation" were not involved. *Singleton*, 361 U.S. at 244.

D. The District Court Order Should Also Be Affirmed on Alternative Grounds

The District Court's decision should also be affirmed because the commission lacks subject-matter and personal jurisdiction. Both defects demonstrate an undue expansion of presidential power and distinguish *Quirin*.

1. Subject-Matter Jurisdiction

Quirin held that a court must examine whether "constitutional power" exists to try an offense. 317 U.S at 29. The first inquiry is "whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial." *Id.*

By statute, only two offenses are triable by commission, aiding the enemy and spying. *See* 10 U.S.C. §§904,906. Yet rather than employ these carefully crafted statutes, the Government invents an offense, conspiracy, unknown to the laws of war. *Quirin*'s offenders were charged, *inter alia*, under the predecessor versions of §§904,906.

Conspiracy is not triable by commission. It is not mentioned in the Geneva Conventions or the other treaties identified by Congress to define war crimes. Hamdan Reply Br. 64-66. Furthermore, Appellants' definition of conspiracy does not require its essential elements—agreement and specific intent. *Id.*

2. Personal Jurisdiction

Appellants have introduced no evidence in their Return or elsewhere to rebut Hamdan's claim that he is not an unlawful combatant. The petitioners in *Quirin*, by contrast, admitted they received sabotage training, were members of German armed forces, came ashore with explosives, and shed their German uniforms. 317 U.S. at 20-21. *Quirin* held the commission had jurisdiction "upon the conceded facts." *Id.* at 46. *See Hamdi,* 124 S.Ct. at 2670 (Scalia, J., dissenting).

Even if Appellants' allegations are taken at face value, Mr. Hamdan resembles Mr. Milligan, not Mr. Quirin. The Solicitor General argued that Milligan "conspired with and armed others," and "plotted to seize" arsenals. *Milligan*, 71 U.S. at 17. The Court struck down the commission nevertheless, *id.* at 130; *id.* at 132 (separate opinion). Appellants' attempt to downplay *Milligan* is undermined by what the Court said after *Quirin*:

> [T[he founders of this country are not likely to have contemplated complete military dominance within the limits of a Territory made part of this country and *not recently taken from an enemy*. They were *opposed* to governments that placed in the hands of one man the power to make, interpret and enforce the laws. . . . *Ex parte Milligan*. Legislatures and courts are not merely cherished American institutions; they are indispensable to our government.

Duncan, 327 U.S. at 322 (emphasis added); 354 U.S. at 30 (*Milligan* is "one of the great landmarks in this Court's history").

Appellants have had numerous opportunities to provide facts showing that Hamdan resembles the *Quirin* saboteurs. At every turn, they have failed. Their recitation of "facts," many of them for the first time before this Court, is too little, too late. To permit the President, on his say-so, to label anyone subject to a commission is to countenance an expansion of Presidential authority that this nation has never before seen.

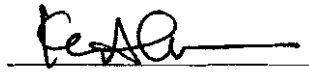
CONCLUSION

For the reasons stated above, the district court ruling should be affirmed.

Respectfully submitted,

NEAL K. KATYAL
Georgetown University Law Ctr.
600 New Jersey Ave.
Washington, DC 20001
(202) 662-9000

CHARLES DAVIDSON SWIFT
Lieutenant Commander
Office of the Chief Defense
Counsel Military Commissions
1851 S Bell St., Ste. 103
Arlington, VA 22202
(703) 607-1521, Ext. 191



KELLY A. CAMERON
BENJAMIN S. SHARP

Perkins Coie LLP
607 Fourteenth St., NW, Ste. 800
Washington, DC 20005
(202) 628-6600

HARRY H. SCHNEIDER, JR.
JOSEPH M. MCMILLAN
DAVID R. EAST
CHARLES C. SIPOS
Perkins Coie LLP
1201 3rd Avenue, Ste. 4800
Seattle, WA 98101-3099
(206) 359-8000

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a type face of 14 point and contains 13,991 words (which does not exceed the applicable 14,000 word limit).

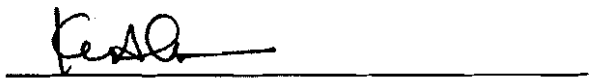
/s/
Neal Katyal
Counsel for Petitioner-Appellee Hamdan

CERTIFICATE OF SERVICE

I hereby certify that on this day, December 29, 2004, I caused copies of the foregoing brief to be sent by hand delivery to the Court and the following counsel of record:

Robert M. Loeb
Attorney, Appellate Staff
Civil Division, Room 7263
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530-0001

Sharon Swingle
Attorney, Appellate Staff
Civil Division, Room 7250
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530-0001



Kelly A. Cameron
Counsel for Petitioner-Appellee Hamdan

[ORAL ARGUMENT SCHEDULED FOR MARCH 8, 2005]

No. 04-5393

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SALIM AHMED HAMDAN,
Petitioner-Appellee,

v.

DONALD H. RUMSFELD, U.S. SECRETARY OF DEFENSE, ET AL.,
Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

PAUL D. CLEMENT
Acting Solicitor General

CHRISTOPHER A. WRAY
Assistant Attorney General

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
Acting United States Attorney

GREGORY G. KATSAS
Deputy Assistant Attorney General

JONATHAN L. MARCUS
Assistant to the Solicitor General

DOUGLAS N. LETTER
(202) 514-3602
ROBERT M. LOEB
(202) 514-4332
AUGUST FLENTJE
SHARON SWINGLE
ERIC MILLER
Attorneys, Appellate Staff
Civil Division, Room 7268
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

STEPHAN E. OESTREICHER, JR.
Criminal Division, Appellate Section

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici.

1. The named petitioner-appellee is Salim Ahmed Hamdan. The habeas petition was originally brought in the name of his lawyer, Charles Swift, as "next friend" to Hamdan. The petition has since been amended to be in Hamdan's name only.

2. Respondents-Appellants are: Donald H. Rumsfeld, United States Secretary of Defense; John D. Altenburg, Jr., Appointing Authority for Military Commissions, Department of Defense; Brigadier General Thomas L. Hemingway, Legal Advisor to the Appointing Authority for Military Commissions; Brigadier General Jay Hood, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; George W. Bush, President of the United States.

3. Amici appearing in the district court were: Allied Educational Foundation, Washington Legal Foundation; a group of 16 law professors (Bruce Ackerman, Rosa Ehrenreich Brooks, Sarah H. Cleveland, William S. Dodge, Martin S. Flaherty, Ryan Goodman, Oona Hathaway, Derek Jinks, Kevin R. Johnson, Jennifer S. Martinez, Judith Resnik, David Scheffer, Anne-Marie Slaughter, David Sloss, Carlos M. Vazquez, David C. Vladeck); a group of four retired Generals and Admirals (Richard O'Meara, John D. Hutson, Lee F. Gunn, David M. Brahms); Center for International Human Rights of Northwestern University School of Law, Louise Doswald-Beck,

Guy S. Goodwin-Gill, Frits Kalshoven, and Marco Sassoli; and "271 United Kingdom and European Parliamentarians."

B. Rulings Under Review.

This appeal is from the district court's order in *Hamdan* v. *Rumsfeld, et al.*, No. 04-CV-1519, 2004 WL 2504508 (D.D.C. Nov. 8,. 2004)(Robertson, J.). The notice of appeal was filed on November 12, 2004.

C. Related Cases.

There are several related cases brought by detainees at the Guantanamo Naval Base pending in the district court in this Circuit:

1. *Hicks (Rasul) v. Bush*, S. Ct.; D.C. Cir. No. 02-5284; No. 02-CV-0299 (D.D.C.) (J. Kollar-Kotelly)
2. *Al-Odah v. United States*, No. 02-CV-0828 (D.D.C.) (J. Kollar-Kotelly)
3. *Habib v. Bush*, No. 02-CV-1130 (D.D.C.) (J. Kollar-Kotelly)
4. *Kurnaz v. Bush*, No. 04-CV-1135 (D.D.C.) (J. Huvelle)
5. *O.K. v. Bush*, No. 04-CV-1136 (D.D.C.) (J. Bates)
6. *Begg v. Bush*, No. 04-CV-1137 (D.D.C.) (J. Collyer)
7. *Khalid (Benchellali) v. Bush*, No. 04-CV-1142 (D.D.C.) (J. Leon)
8. *El-Banna v. Bush*, No. 04-CV-1144 (D.D.C.) (J. Roberts)
9. *Gherebi v. Bush*, No. 04-CV-1164 (J. Walton)
10. *Boumediene v. Bush*, No. 04-CV-1166 (D.D.C.) (J. Leon)

11. *Anam v. Bush*, No. 04-CV-1194 (D.D.C.) (J. Kennedy)

12. *Almurbati v. Bush*, No. 04-CV-1227 (J. Walton)

13. *Abdah v. Bush*, No. 04-CV-1254 (D.D.C.) (J. Kennedy)

14. *Belmar v. Bush*, No. 04-CV-1997 (D.D.C.) (J. Collyer)

15. *Al-Qosi v. Bush*, 04-CV-1937 (D.D.C.) (J. Friedman).

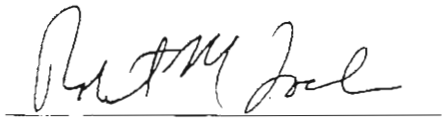
16. *Jarallah Al-Marri v. Bush* (we have been informed that this suit will be filed in the D.C. federal district court shortly, but it has not been docketed yet).

17. *Al-Marri v. Bush*, 04-CV-2035-GK (J. Kessler)

18. *Paracha v. Bush*, 04-CV-2022-PLF (J. Friedman)

19. *Zemiri v. Bush*, 04-CV-2046-CKK (J. Kollar-Kotelly)

Counsel is not aware at this time of any other related cases within the meaning of D.C. Cir. Rule 28(a)(1)(C).



Robert M. Loeb
Counsel for Appellants

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CSRT . . . . . Combatant Status Review Tribunal

Geneva Convention . . . . . Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949

JA. . . . . Joint Appendix

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POW . . . . . Prisoner of war

UCMJ . . . . . Uniform Code of Military Justice

[ORAL ARGUMENT SCHEDULED FOR MARCH 8, 2005]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5393

SALIM AHMED HAMDAN,
Petitioner-Appellee,

v.

DONALD H. RUMSFELD, U.S. SECRETARY OF DEFENSE, ET AL.,
Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

STATEMENT OF JURISDICTION

On November 8, 2004, the district court granted in part the habeas corpus petition of Salim Ahmed Hamdan, a trained al Qaeda operative and driver for international terrorist leader Osama bin Laden. Hamdan is currently detained by the U.S. military at Guantanamo Bay Naval Base in Cuba, and he has been charged in military proceedings with conspiring to commit murder and terrorism, among other offenses. The district court's jurisdiction was invoked by Hamdan under 28 U.S.C. §§ 1331, 1361, 1391, 1651, 2241, and 5 U.S.C. § 702.

In its November 8 ruling, the court enjoined the current military commission proceedings against Hamdan and ordered him released to the general detention population at Guantanamo. On November 12, 2004, the Government filed a notice of appeal from the district court's November 8 order. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the district court erred in refusing to abstain from interfering with ongoing military commission proceedings instead of awaiting their outcome.

2. Whether the district court erred in holding that Hamdan has judicially enforceable rights under the current Geneva Convention Relative to the Treatment of Prisoners of War (Aug. 12, 1949, T.I.A.S. No. 3364, 6 U.S.T. 3316) (Geneva Convention).

3. Whether the district court erred in overruling the President's determination as Commander in Chief that al Qaeda combatants are not covered by the Geneva Convention.

4. Whether the district court erred in holding that Hamdan has a colorable claim of prisoner-of-war status under the Geneva Convention.

5. Whether the district court erred in holding that the federal regulations governing military commissions must conform to the provisions in the Uniform

Code of Military Justice (UCMJ) that apply only to courts-martial.

6. Whether the President has inherent power to establish military commissions.

STATEMENT OF THE CASE

Hamdan was captured in Afghanistan in November 2001. Because of his close link to al Qaeda and Osama bin Laden, the U.S. military, at the direction of the President, is detaining him at Guantanamo as an enemy combatant and has charged him with conspiring to commit murder, terrorism, and other offenses against the laws of war. Military commission proceedings against Hamdan on this charge were underway when the district court took the unprecedented step of enjoining them. The court held that it had the authority to intervene before the proceedings were completed, that Hamdan has judicially enforceable rights under the Geneva Convention that precluded his trial before a military commission, that the Geneva Convention is applicable to an al Qaeda detainee, and that Congress has imposed limits on the President's authority to convene a military commission to try offenders against the laws of war. The court further ordered Hamdan released into the general detention population at Guantanamo. The Government immediately appealed, and this Court granted the motion to expedite this appeal.

TREATY, STATUTORY AND REGULATORY PROVISIONS AT ISSUE

The relevant texts of the Geneva Convention, the Uniform Code of Military Justice, the President's Order establishing military commissions, the federal regulations governing military commissions, the Authorization for Use of Military Force, the President's Memorandum regarding the applicability of the Geneva Conventions to al Qaeda and the Taliban, and Army regulation 190-8 are set forth in an addendum to this brief.

STATEMENT OF THE FACTS

A. On September 11, 2001, the United States endured a foreign enemy attack more savage, deadly, and destructive than any sustained by the Nation on any one day in its history. That morning, agents of the al Qaeda terrorist network hijacked four commercial airliners and crashed them into targets in the Nation's financial center and its seat of government. The attacks killed approximately 3,000 persons and caused injury to thousands more persons, destroyed billions of dollars in property, and exacted a heavy toll on the Nation's infrastructure and economy.

The President took immediate action to defend the country and prevent additional attacks. Congress swiftly enacted its support of the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist

attacks that occurred on September 11, 2001." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) (AUMF).

The President ordered the armed forces of the United States to subdue the al Qaeda terrorist network, as well as the Taliban regime in Afghanistan that supported it. In the course of those armed conflicts, the United States, consistent with the Nation's settled practice in times of war, has seized numerous persons fighting for the enemy and detained them as enemy combatants. Equally consistent with historical practice, the President ordered the establishment of military commissions to try members of al Qaeda and others involved in international terrorism against the United States for violations of the laws of war and other applicable laws. In doing so, the President expressly relied on "the authority vested in me * * * as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the [AUMF] * * * and sections 821 and 836 of title 10, United States Code." Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001) (Military Order).

In July 2003, the President, acting pursuant to the Military Order, designated Hamdan for trial before a military commission, finding "that there is reason to believe that [Hamdan] was a member of al Qaeda or was otherwise

involved in terrorism directed against the United States." JA 74. Hamdan was charged with a conspiracy to commit attacks on civilians and civilian objects, murder and destruction of property by an unprivileged belligerent, and terrorism. JA 192.

The charge against Hamdan arises out of his close connection to bin Laden and his participation in al Qaeda's campaign of international terrorism against the United States. JA 191-194. Hamdan served as bin Laden's bodyguard and personal driver. In that capacity, he delivered weapons and ammunition to al Qaeda members and associates; transported weapons from Taliban warehouses to the head of al Qaeda's security committee at Qandahar, Afghanistan; purchased or otherwise secured trucks for bin Laden's bodyguard detail; and drove bin Laden and other high-ranking al Qaeda operatives in convoys with armed bodyguards. JA 193.

The charge also alleges that Hamdan was aware during this period that bin Laden and his associates had participated in terrorist attacks against U.S. citizens and property, including the September 11 attacks. JA 193. Hamdan received terrorist training himself, learning to use machine guns, rifles, and handguns at an al Qaeda training camp in Afghanistan. *Ibid.*

In the military commission proceedings at Guantanamo, Hamdan has legal

counsel appointed to represent him. This commission consists of three military officers of the rank of colonel. Hamdan has the right to a copy of the charge in a language he understands, the presumption of innocence, and proof beyond a reasonable doubt. He may confront witnesses against him and subpoena his own witnesses, if reasonably available. Hamdan will have access to all evidence, except classified material, which must be provided to his counsel. If Hamdan is found guilty by the commission, that judgment will be reviewed by a review panel, the Secretary of Defense, and ultimately the President, if he does not designate the Secretary as the final decisionmaker. 32 C.F.R. Pt. 9.

While at Guantanamo, Hamdan has also been given a hearing before a Combatant Status Review Tribunal, which confirmed that he is an enemy combatant who is "either a member of or affiliated with Al Qaeda," subject to continued detention. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (plurality opinion); *id.* at 2678-2679 (Thomas, J. dissenting); *see* JA 243-244, 249-251

B. Hamdan's counsel instituted these proceedings by filing a petition for mandamus or habeas corpus in the United States District Court for the Western District of Washington, alleging in relevant part that trial before a military commission rather than a court-martial convened under the UCMJ would be unconstitutional and a violation of the Geneva Convention. JA 38-68. While

Hamdan acknowledged in his petition that he worked for bin Laden for many years prior to his capture, *see* Pet. ¶¶ 15-16, he asserted that he was unaware of bin Laden's terrorist activities, *id.* ¶ 19. The district court in Washington transferred the case to the District of Columbia.

The district court here granted the petition in part, holding that Hamdan could not be tried before a military commission. JA 371-372. The court first declined to abstain from interrupting the pending military commission proceedings; the court determined that it could stop them in their tracks[1] simply because Hamdan challenged the jurisdiction of the commission over him. JA 378-380.

Next, the court ruled that the military commission lacked jurisdiction over Hamdan because a "competent tribunal" had yet to determine whether Hamdan was entitled to prisoner-of-war (POW) status under the Geneva Convention, a status that the court believed would preclude his trial by military commission. In so holding, the district court determined that the Convention grants Hamdan rights enforceable in federal court and overruled the President's determination that al Qaeda combatants are not covered by it. JA 387, 394-397.

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[1] The Commission was in the midst of conducting a hearing on Hamdan's motions — which raise the very same challenges Hamdan raises in his federal petition — when it received word of the district court's order.

The court further held that, even if a "competent tribunal" determines that Hamdan is an unlawful enemy combatant rather than a POW, he can be tried by a military commission only if the commission rules are amended so that they are consistent with Article 39 of the UCMJ, which governs the presence of the accused at a court-martial.

Based on these legal rulings, the court took the extraordinary step of enjoining the ongoing military commission proceedings and ordered Hamdan released to the general detention population at Guantanamo Bay Naval Base. JA 371-372.

SUMMARY OF ARGUMENT

The district court's deeply flawed ruling constitutes an extraordinary intrusion into the Executive's power to conduct military operations to defend the United States. In a case where the district court should have simply abstained, it instead engaged in a wide-ranging analysis of enemy status and international treaties in which it gave greater weight to advice the President did not adopt than to the President's own determinations. The resulting opinion erroneously interprets United States and international law in ways that would give enemy combatants unprecedented access to the United States courts. Indeed, the court's ruling applies not to lawful combatants, but to terrorists such as bin Laden and

other al Qaeda leaders and operatives, despite the Executive's determination that, as a terrorist organization that is not a party to the Geneva Convention and openly flouts the laws of war, al Qaeda is not entitled to the protections that contracting parties agree will govern their mutual relations. And, by ruling that any combatant — including a known al Qaeda operative — is presumptively protected under the Geneva Convention based solely on his unsupported claim of entitlement, the district court has expanded the Convention's protections far beyond the scope agreed to by the Executive with the advice and consent by the Senate. Finally, the district court held invalid the President's authority, exercised since the Revolutionary War and inherent in his role as Commander in Chief, to establish military tribunals to punish enemy violations of the laws of war. Each of these unprecedented rulings would be a ground for reversal and should be repudiated; that they were made in a case in which the district court should not have exercised jurisdiction in the first instance merely underscores that the district court's analysis was wrong.

I. The district court erred in failing to abstain from interrupting Hamdan's trial by military commission. The Supreme Court has instructed that courts should not entertain an attack on ongoing military proceedings, even if the challenge is framed in jurisdictional terms. Although there is a limited exception

for challenges brought by U.S. civilians subjected to military proceedings, it does not apply to Hamdan, an alien enemy combatant charged with an offense against the laws of war. Judicial interference in Hamdan's trial would improperly intrude on the Executive's conduct of war, and require consideration of a host of legal questions that may be wholly unnecessary to resolve if the military proceedings are allowed to run their course. Thus, Hamdan's premature challenge should not have been considered until military proceedings are complete.

II. Having decided to consider Hamdan's claims, the district court ruled that the military commission lacks jurisdiction over Hamdan, because a "competent tribunal" has not determined whether Hamdan, notwithstanding his status as an al Qaeda operative, is a POW under Article 4 of the Geneva Convention. In the absence of a determination that Hamdan is not a POW, the court ruled that the Convention requires that Hamdan may only be tried by court-martial. In so ruling, the district court made several independent legal errors.

As an initial matter, the district court erred in holding that the Geneva Convention provides Hamdan with rights enforceable by individuals in the courts of the United States. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Supreme Court concluded that the 1929 Geneva Convention, the predecessor to the 1949 Convention, did not confer rights enforceable in our domestic, civilian

courts. The Court recognized that enforcement of the treaty is instead a matter of state-to-state relations. There is no indication in the 1949 Convention's text or drafting and ratification history to suggest that the President, the Senate, or the other ratifying nations meant to make a truly revolutionary change by creating judicially enforceable rights. To the contrary, the Convention sets out a detailed dispute-resolution procedure making no mention of litigation in the domestic courts of signatory nations.

By permitting captured enemies to continue their fight in our courts, the district court's holding threatens to undermine the President's power to subdue those enemies. Not surprisingly, there is no indication that either the President or the Senate countenanced such a result when the Convention was ratified.

The district court justified this extraordinary and counterintuitive result on the ground that it was compelled by Article 21 of the UCMJ. That provision merely preserves the historical jurisdiction of military commissions over offenses against the laws of war in the face of the extension of courts-martial jurisdiction effected by the UCMJ. Article 21 in no way limits the President's authority under the Constitution to subject alleged offenders against the laws of war to trial by military commission, let alone provides a backdoor mechanism for judicial enforcement of the Geneva Convention at the behest of enemy aliens. Rather, as

the Supreme Court has repeatedly held. Article 21 reflects Congressional recognition and preservation of the President's authority to establish military commissions as he deems necessary to try enemy belligerents for offenses against the laws of war.

Having erroneously concluded that the Geneva Convention is judicially enforceable at the behest of enemy fighters generally, the district court compounded that error by holding the Convention specifically enforceable by Hamdan, a confirmed al Qaeda operative. That latter holding required the district court to overrule the President's determination that the Geneva Convention does not extend to al Qaeda operatives. The President's decision that a foreign terrorist network is not a party to a treaty and does not enjoy protections under that treaty, however, is an exercise of his Commander-in-Chief and foreign-affairs powers not subject to countermand by the courts.

Even if the President's determination about the coverage of the Geneva Convention were judiciary reviewable, it is plainly correct. By its terms, the Convention applies to cases of "armed conflict which may arise between two or more of the High Contracting Parties." Al Qaeda is not a "High Contracting Party" to the Geneva Convention, which it is has not signed — nor could it do so, since it is obviously not a state. Because the President has authoritatively and

correctly determined that the Geneva Convention does not cover al Qaeda, the military commission's jurisdiction over Hamdan is not dependent on compliance with the Convention's provisions.

Even assuming that the Geneva Convention applied to al Qaeda and was judicially enforceable by captured enemy fighters, the district court further erred in holding that Hamdan had raised a colorable claim of POW status. Even if al Qaeda were a party to the Convention, Hamdan could not qualify as a POW because al Qaeda does not meet *any* of the requirements set out in Article 4 of the Convention, such as wearing a distinctive sign and conducting operations "in accordance with the laws and customs of war." Indeed, Hamdan has never even claimed that he is part of a group entitled to lawful belligerent status. Rather, his claim all along has been that, notwithstanding his close ties to bin Laden, he is an innocent civilian – a claim he is free to raise as a defense before the military commission. Moreover, to the extent that that claim ever raised a relevant "doubt" under Article 5 of the Geneva Convention, a competent tribunal – the Combatant Status Review Tribunal – put it to rest when it confirmed the military's prior determination, reflected in the Charge, that Hamdan is an al Qaeda operative. Because there is no doubt as to Hamdan's status, there is no need for yet another tribunal (other than the military commission itself) to consider Hamdan's claim

that he is a civilian, and he has made no claim to being a lawful belligerent that would call his status into question or require the convening of an Article 5 tribunal.

III. The district court also ruled that, even if another competent tribunal is convened and determines that Hamdan is not a POW such that he is eligible for trial by military commission, Hamdan still must be provided the functional equivalent of a court-martial. The district court predicated this ruling not on the Geneva Convention, but rather on its interpretation of the UCMJ. In particular, the district court ruled that, because Article 36 of the UCMJ provides that the rules the President prescribes for military commissions "may not be contrary to or inconsistent with" the UCMJ, the military commission rules cannot materially diverge from those rules in the UCMJ that are facially applicable only to courts-martial. The district court's conclusion that Article 36 imposes substantial restrictions on the President's authority to use military commissions is no less flawed than its parallel interpretation of Article 21.

Congress has never sought to regulate military commissions comprehensively; rather, it has recognized and approved the President's historic use of military commissions as he deems necessary to prosecute offenders against the laws of war. Article 21 itself reflects Congress's hands-off approach to

military commissions, as does the fact that only eight other articles of the UCMJ even mention them. If, as the district court would have it, the military commission must follow the UCMJ rules that apply to courts-martial only, then the UCMJ's provisions that expressly apply to military commissions would be superfluous. Moreover, if military commissions must follow the same procedures as courts-martial, there is no point in having a military commission, whose jurisdiction the UCMJ recognizes precisely because of the historic authority and flexibility the President has had to administer justice to enemy fighters who commit offenses against the laws of war. Finally, the district court's reading of Article 36 creates grave doubts about its constitutionality, because that reading frustrates the exercise of the President's war powers.

STANDARD OF REVIEW

The district court's ruling is based upon several errors of law subject to *de novo* review. *United States v. Bookhardt*, 277 F.3d 558, 564 (D.C. Cir. 2002).

ARGUMENT

I. THE DISTRICT ERRED IN REFUSING TO ABSTAIN FROM INTERRUPTING HAMDAN'S TRIAL BEFORE THE MILITARY COMMISSION.

The district court concluded that it had authority to intervene in the ongoing military proceedings upon finding that Hamdan had raised a "substantial" challenge to the commission's jurisdiction. JA 379-380. This finding is badly flawed and calls for reversal.

The Supreme Court has instructed that a civilian court should normally await the final outcome of ongoing military proceedings before entertaining an attack on those proceedings. In *Schlesinger v. Councilman*, 420 U.S. 738 (1975), the Supreme Court explained that the need for protection against judicial interference with the "primary business of armies and navies to fight or be ready to fight wars" "counsels strongly against the exercise of equity power" to intervene in an ongoing court-martial. 420 U.S. at 757 (quotation omitted). The Court held that even a case with relatively limited potential for interference with military action — *i.e.*, the prosecution of a serviceman for possession and sale of marijuana — implicated "unique military exigencies" of "powerful" and "contemporary vitality." *Ibid.* These exigencies, the Court held, should normally preclude a court from entertaining "habeas petitions by military prisoners unless all available

military remedies have been exhausted." *Id.* at 758.

In addition to underscoring the military factors supporting abstention, the *Councilman* Court emphasized that abstention would properly respect the judgment of a coordinate branch of government that military prosecution and review were the best way to balance "military necessities" with "ensuring fairness to servicemen charged with military offenses." *Id.* at 757. The military forum could also be expected to gain "familiarity with military problems" and corresponding expertise. *Id.* at 758.

Finally, the *Councilman* Court emphasized prudential considerations in support of abstention. Although the petitioner in *Councilman* had alleged that the military court-martial lacked jurisdiction to try him, "whether he would be convicted was a matter entirely of conjecture," and "there was no reason to believe that his possible conviction inevitably would be affirmed." *Id.* at 754. Awaiting the outcome of the military proceedings would permit any eventual judicial review to "be informed and narrowed," thus avoiding "duplicative proceedings" and judicial involvement that, in hindsight, turned out to be unnecessary. *Id.* at 756-757.

The factors the Court emphasized in *Councilman* apply *a fortiori* here, where the military seeks to adjudicate war crimes in the midst of an ongoing war,

as opposed to off-post marijuana dealings in Oklahoma. The potential for interfering with the military's primary mission, for disturbing the delicate national security balance struck by the President, and for reaching unnecessary holdings are all magnified here. Indeed, Hamdan's trial implicates military exigencies of the highest order — enforcing the laws of war against an enemy force that is targeting civilians for mass death — a task surely as exigent as maintaining discipline in the Nation's own troops. *See Yamashita v. Styer*, 327 U.S. 1, 11 (1946) ("trial and punishment of enemy combatants" for war crimes is "part of the conduct of war operating as a preventive measure against such violations").

The district court nevertheless refused to abstain because it viewed the petition as raising a substantial challenge to the military commission's jurisdiction over him. JA 379. The precedent of the Supreme Court and this Court make clear, however, that there is no general exception to *Councilman* for a "jurisdictional challenge." *See Councilman*, 420 U.S. at 741-742, 758-759; *New v. Cohen*, 129 F.3d 639, 644-646 (D.C. Cir. 1997). In fact, *Councilman* and *New* both involved jurisdictional challenges. Moreover, if abstention were held not to apply to military prisoners raising jurisdictional challenges, abstention would be a meaningless doctrine, since absent a statutory right of review, judicial scrutiny of military proceedings is limited to review for jurisdictional or other

fundamental defects. *See, e.g.*, *Councilman*, 420 U.S. at 746-747.

There is a narrow exception to the general rule against intervention in pending military proceedings, but it applies only in cases brought by *U.S. citizen civilians*, who assert a substantial claim that the military has no authority over them *at all*. *See New*, 129 F.3d at 152. In cases applying the exception, it was "undisputed that the persons subject to the court-martials either never had been, or no longer were, in the military," and thus appeared to be outside military jurisdiction altogether. *Ibid* (citing *McElroy v. U.S. ex rel. Guagliardo*, 361 U.S. 281 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11 (1955)). The issue raised in those cases was thus "whether under Art. I Congress could allow the military to interfere with the liberty of civilians *even for the limited purpose of forcing them to answer to the military justice system*." *Councilman*, 420 U.S. at 759 (emphasis added).

Here, in contrast, requiring Hamdan to complete the military commission proceedings before invoking the equity jurisdiction of a federal court does not raise unfairness or liberty concerns. Hamdan is being detained as an enemy combatant and will continue to be detained as such whether his trial goes forward before a military commission or other military tribunal. *See Hamdi*, 124 S. Ct. at 2639-2643. Given that Hamdan clearly falls within the jurisdiction and authority

of the military, as the district court itself recognized, JA 398, his circumstances are akin to those of the service member in *Councilman*, who likewise was unquestionably "subject to military authority." *Councilman*, 420 U.S. at 759; *see also New*, 129 F.3d at 644-645.

The *Reid* and *Toth* line of cases is patently inapplicable not only in light of Hamdan's confirmed status as an enemy combatant, but also because Hamdan is not a U.S. citizen. The premise for *Reid* and *Toth* was the constitutional liberty interest that a citizen, but not an alien abroad, enjoys. As an alien with no voluntary ties to the United States, Hamdan "can derive no comfort" from those cases. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 270 (1990); *see also 32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002); *Harbury v. Deutch*, 233 F.3d 596, 602-604 (D.C. Cir. 2000), *rev'd on other grounds sub nom.*, 536 U.S. 403 (2002).

The district court also cited *Parisi* v. *Davidson*, 405 U.S. 34 (1972), for the proposition that it was not required to abstain. In *Parisi*, the Court held that a habeas action challenging the rejection of an application for discharge from the armed forces could proceed despite ongoing court-martial proceedings related to the petitioner's refusal to board a plane to Vietnam. Like the petitioner in *New*, however, Hamdan "can find no solace in *Parisi*," where the "doctrine of comity

was seen to have no application * * * because the military tribunal could not award the service member the desired relief — conscientious objector discharge — in conjunction with the court-martial proceedings." 129 F.3d at 646; *see Parisi*, 405 U.S. at 41 (habeas petition relating to discharge "was independent of the military criminal proceedings"). Hamdan has raised the same legal claims that form the basis for his habeas corpus petition in the proceedings before the military commission, which is fully capable of addressing them and providing a remedy if appropriate. This case thus presents the "direct intervention" in pending military proceedings decried as improper in *Parisi*, 405 U.S. at 41; see also *New*, 129 F.3d at 644 (refusing to "extend the *Parisi* exception beyond the circumstances of that case").

Finally, in the district court, Hamdan relied on *Ex parte Quirin*, 317 U.S. 1 (1942). to support his assertion that abstention was unwarranted. His reliance is misplaced. First, the petitioners there, which included a presumed U.S. citizen, faced imminent execution, which is not the case here. Second, the government did not ask the *Quirin* Court to abstain. Third, the case was decided long before *Councilman*, which sets out the governing rule for abstention in challenges to military proceedings and before precedent definitively establishing the constitutionality of military commissions. Compare *Ex parte Milligan*, 71 U.S. (4

Wall.) 2 (1866) (the most apposite precedent when *Quirin* was decided), with *Quirin*, 317 U.S. 1 (upholding military commission proceedings); *Yamashita*, 327 U.S. 1 (same); *Johnson v. Eisentrager*, 339 U.S. 763, 785-790 (1950) (same in dicta); *Madsen v. Kinsella*, 343 U.S. 341 (1952) (same).

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE MILITARY COMMISSION LACKED JURISDICTION OVER HAMDAN.

The district court held that the military commission cannot assert jurisdiction over Hamdan, a confirmed al Qaeda combatant charged with an offense against the laws of war, until and unless a "'competent tribunal' referred to in Article 5 [of the Geneva Convention] concludes" that Hamdan is not entitled to the protections that the Geneva Convention affords prisoners of war. JA 398. That holding is premised on a series of deeply flawed and logically anterior legal rulings — that the Geneva Convention is judicially enforceable at the behest of a captured enemy fighter; that, contrary to the President's determination, the Geneva Convention applies to al Qaeda operatives; and that Article 5 of the Convention and a corresponding Army regulation compel the convening of yet another tribunal to consider Hamdan's claim that he is a civilian — all of which are necessary steps to the erroneous result the court reached.

A. The Geneva Convention Does Not Provide Hamdan Judicially Enforceable Rights.

The district court erred in holding that Hamdan has judicially enforceable rights under the Geneva Convention.[2] Enforcement of the Convention is a matter of State-to-State relations, not judicial resolution.

1. As this Court has explained, "[s]ince * * * 1796, the courts of this country have uniformly held that it is not for the judiciary to determine whether a treaty has been broken either by the legislature or the executive, and, accordingly, have consistently declined jurisdiction of such matters." *Z. & F. Assets Realization Corp. v. Hull*, 114 F.2d 464, 471 (D.C. Cir. 1940) (footnotes omitted), *aff'd on other grounds*, 311 U.S. 470 (1941); *see also Canadian Trans. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980). As a rule, "[a] treaty is primarily a compact between independent nations." *Head Money Cases*, 112 U.S. 580, 598 (1884).

Significantly for the case at bar, judicial enforcement of a treaty is not presumed. Rather, absent a clear intent to the contrary, a treaty "depends for the

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[2] The Third Geneva Convention of 1929 was adopted as an extension to the protections provided by the Hague Convention of 1907. It was revised in 1949, with the modified form adopted on August 12, 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, and entered into force on October 21, 1950. The Treaty was ratified by the Executive with advice and consent of Senate on February 2, 1956.

enforcement of its provision[s] on the interest and the honor of the governments which are parties to it." *Head Money Cases*, 112 U.S. at 598; *accord Charlton*, 229 U.S. at 474.

Thus, the Supreme Court has long held that, in regard to individuals seeking enforcement of a treaty, "judicial courts have nothing to do and can give no redress." *Head Money Cases*, 112 U.S. at 598; *accord Whitney v. Robertson*, 124 U.S. 190, 194-195 (1888); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988) (refusing to adjudicate the claim that U.S. policy and actions concerning Nicaragua violated the U.N. Charter); *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972) (rejecting claim based on alleged violations of the NATO Status of Forces Agreement). The treaty "addresses itself to the political, not the judicial department; and the legislature must execute the [treaty] before it can become a rule for the Court." *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.).

2. The district court's ruling that the Geneva Convention confers individual rights enforceable through suits in our domestic, civilian courts is not only contrary to the general rule, but it also disregards the text and history of the Convention, as well as the ramifications of such a conclusion.

As an initial matter, any examination of whether the Convention provides

individuals with judicially enforceable rights must begin with the fact that the Supreme Court held that the 1929 Geneva Convention did *not* provide such rights. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court expressly concluded that German prisoners of war challenging the jurisdiction of a military tribunal "could not" invoke the 1929 Third Geneva Convention because the protections afforded under it were not judicially enforceable by the captured party. *Id.* at 789. Rather, the Court held, those protections "are vindicated under it only through protests and intervention of protecting powers." *Id.* at 789 n.14.[3]

This Court, too, has recognized that the 1929 version of the Third Geneva Convention did not provide individuals with judicially enforceable rights. In *Holmes*, 459 F.2d at 1221-22, the Court explained that "the obvious scheme of the Agreement [is] that responsibility for observance and enforcement of these rights is upon political and military authorities, and that rights of alien enemies are vindicated under it only through protests and intervention of protecting powers * * *." *Id.* at 1222 (footnotes and quotations omitted).

When the President ratified and the Senate granted its advice and consent for the current version of the Convention, there was no indication that they

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[3] Although the Court in *Rasul v. Bush*, 124 S. Ct. 2686 (2004), concluded that *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484 (1973), overruled the statutory predicate for the statutory habeas ruling in *Eisentrager*, this aspect of *Eisentrager*, as well as its constitutional holding and other merits discussion, remains good law.

changed the essential character of the treaty to permit alleged treaty violations to be enforced by captured enemy forces through the captor's judicial system. There is nothing in the text or history of the revised version in effect today that would lead to the conclusion that it was intended to revolutionize the treaty and grant the captured parties rights enforceable in the domestic courts of the nation that captured them. To the contrary, the plain terms of the revised Convention show that, as with the 1929 version, vindication of the treaty is a matter of State-to-State diplomatic relations, not domestic court resolution.

Article 1 of the treaty explains that the parties to the Convention "undertake to respect and to ensure respect for the present Convention in all circumstances." Art. 1. This was an important revision of the 1929 Convention, which provided that the "Convention shall be respected * * * in all circumstances." 1929 Convention, Art. 82. The 1949 revision clarified that it was the duty of all parties not only to adhere to the Convention, but also to ensure compliance by every other party to the convention. *See* 59 INTERNATIONAL LAW STUDIES: PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT, 26-27 (Naval War College Press 1978). Establishing a peer-nation duty to ensure enforcement was deemed at the time to be a critical advancement in securing compliance with the treaty. *Ibid.*

Further to effectuate compliance, the 1949 Convention relied upon third-

party — "protecting powers"[4] — oversight. Article 8 provides that the treaty is to be "applied with the cooperation and under the scrutiny of the Protecting Powers * * *." Art. 8. Reliance upon "protecting powers" was also a prime feature of the 1929 Convention. *See* 1929 Convention Art. 86. Article 11 of the 1949 revision of the Convention, however, clarified and increased the role of the protecting powers in cases where there is a disagreement about the application or interpretation of the Treaty: "in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement." Art. 11. Thus, Article 11 sets out one of the primary "methods for resolving" disputes relating to application and interpretation of the Convention. *See* 59 INTERNATIONAL LAW STUDIES at 87.

The "second method for resolving disputes" described in the 1949 Convention is the "'enquiry' provided for in Article 132." 59 INTERNATIONAL LAW STUDIES at 88. Article 132 provides that at "the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.' Art. 132.

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[4] The role of the "protecting power," in modern time, has been performed by the International Committee of the Red Cross. In 1949, it was typically performed by a neutral state.

It further states that if "agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed." *Ibid.* This Article was deemed an improvement over the 1929 Convention, which did not provide for the use of an "umpire" to settle disputes. *See* 1929 Convention, Art. 30.

The Convention thus creates specific measures to ensure enforcement, none of which remotely contemplated a lawsuit brought by the captured party in the courts of the detaining nation to enforce the treaty. *See Hamdi v. Rumsfeld*, 316 F.3d 450, 468-469 (4th Cir. 2003), *overruled on other grounds*, 124 S. Ct. 2633 (2004). Moreover, where the contracting nations to the Convention wanted to require enforcement beyond the two prescribed methods and the peer enforcement mandated by Article 1, they said so directly. Article 129 requires the signatory nations to "undertake to enact any legislation necessary to provide effective *penal* sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in [Article 130]." (Emphasis added.) Then, under the Convention, it is the duty of the signatory nations to bring the offenders before their own courts. Art. 129. That is yet another enforcement mechanism that does not rely on judicially enforceable rights. Even under this Article, judicial enforcement occurs only at the behest of the Executive and

involves the implementing statute, not the treaty itself. As was the case with the 1929 Convention, the 1949 Convention itself does not provide judicially enforceable rights to individuals. *See also* S. Exec. Rep. 9, 84th Cong., 1st Sess. 6-7 (1955) (citing the enforcement provisions discussed above and the newly created obligation of contracting States to enact penal sanctions for "grave breaches of the Convention," with no suggestion of such a radical change as permitting enemy combatants to enforce in U.S. courts the provisions of the treaty).

Thus, it is no accident that over the last fifty years no court of appeals has ever construed the 1949 Convention as granting individuals judicially enforceable rights. *See Hamdi*, 316 F.3d at 468-469; *see also Al Odah v. United States*, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randoph, J., concurring), *overruled on other grounds*, 124 S. Ct. 2686 (2004); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-809 (D.C. Cir. 1984) (Bork, J., concurring).

3. The district court's primary rationale for finding that the Convention provides Hamdan with judicially enforceable rights is that the treaty protects individuals – *i.e.*, persons captured or otherwise detained during an armed conflict. But that was true of the 1929 version of the treaty, see, *e.g.*, 1929 Convention, Arts. 2, 3, 16, 42, which the Supreme Court held did not grant individuals

judicially enforceable rights.

Beyond the observation that the Convention protects individuals, the district court relied upon the fact that "the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation." JA 397. But that fact is consistent with the reality that the Executive Branch viewed the Convention as largely enforceable at the State-to-State level, with the absence of implementing legislation fully explained by the absence of any need to enact such legislation. There is certainly no evidence that the President, the Senate, and the other contracting nations intended to revolutionize the treatment of detained enemy combatants by suddenly providing for individual rights enforceable in the courts of the detaining nation. Obviously, the Executive's responsibility to adhere to a treaty is unrelated to whether the treaty provides individuals with judicially enforceable rights. If anything, the fact that the Executive has faithfully implemented the Convention for more than fifty years without recognizing judicially enforceable rights militates against judicial intervention in its functioning.

4. The district court ignored the obvious impact of its ruling. If the Convention provided individuals with judicially enforceable rights, then there is the obvious and substantial danger that enemies captured on the battlefield will

continue their fight in U.S. courts, filing habeas actions and other civil claims challenging the implementation of the Geneva Convention. There is no reason that the Executive and Senate were any more welcoming of that extraordinary prospect than Justice Jackson in his opinion for the Court in *Eisentrager*, 339 U.S. at 779. Such a result would indisputably encumber the President's authority as Commander in Chief. Indeed, it is nearly unimaginable to consider the implications of having permitted the more than two million POWs held during World War II to enforce their 1929 Geneva Convention protections through legal actions filed in the United States. Whenever possible, interpretations of a treaty that produce anomalous or illogical results should be avoided.[5] *See El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 171 (1999). The Executive Branch's construction of the Convention would avoid those consequences and is entitled to "great weight." *See, e.g., United States v. Stuart*, 489 U.S. 353, 369 (1989); *Sumitomo Shoji Am., Inc.*, 457 U.S. at 184-185.

5. The district court's contention that Congress somehow enacted the

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[5] For the same reasons, the district court erred in concluding that Common Article 3 of the Geneva Convention could supply a basis on which to grant Hamdan relief. Common Article 3 does not apply here for the additional reason that the conflict with al Qaeda is "of an international character," thereby falling outside the plain terms of the Article, which applies to "armed conflict not of an international character." Moreover, regardless of whether Common Article 3 has attained the status of customary international law, it cannot override a contrary executive act. See *The Paquete Habana*, 175 U.S. 677, 700 (1900).

procedural protections embodied in the Geneva Convention as judicially enforceable domestic law via 10 U.S.C. § 821's reference to the "law of war" is equally erroneous. That UCMJ Article provides, in relevant part, that

> 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[.]

10 U.S.C. § 821. The district court held that Hamdan is not an "offender" who by "the law of war" is triable by military commission, because he must be presumed to have POW status unless and until a "competent tribunal" under the Geneva Convention determines otherwise, and because that POW status entitles him to a trial by court-martial pursuant to Article 102 of the Geneva Convention. JA 398.

First, because the Geneva Convention is not judicially enforceable, it does not provide norms that the courts can interpret and apply to a statute that references the "law of war." *See Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2763, 2767 (2004) (courts cannot give effect to non-self-executing treaty in action brought under statute that recognizes federal jurisdiction over torts "in violation of the law of nations or a treaty of the United States").

Second, Article 21 in no way curtails the authority of the President. Rather, it preserves the President's preexisting constitutional authority to establish military commissions to try offenders or offenses against the laws of war. In fact,

the Supreme Court concluded that identical language in the predecessor provision to Article 21 — Article 15 of the Articles of War — "*authorized* trial of offenses against the laws of war before such commissions." *Quirin*, 317 U.S. at 29 (emphasis added). *See also id.* at 28 ("By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war").

The history of this provision also makes clear that its purpose was to express Congressional approval for the traditional use of military commissions under past practice. When the language now codified in Article 21 was first included in the Articles of War in 1916, it was intended to acknowledge and sanction the pre-existing jurisdiction of military commissions. The language was introduced as Article 15 of the Articles of War at the same time that the jurisdiction of general courts-martial was expanded to include all offenses against the laws of war. The new Article 15 stated (like current Article 21) that the "provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions * * * of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions." Act of August 29, 1916, 39 Stat. 619, 653.

Judge Advocate General of the Army Crowder, the proponent of the new article, testified before the Senate that the military commission "is our common-law war court," and that "[i]t has no statutory existence." S. Rep. No. 64-130, at 40 (1916). The new Article 15 thus was not *establishing* military commissions and defining or limiting their jurisdiction. Rather, as General Crowder explained, it was recognizing their existence and preserving their authority: "It just saves to these war courts the jurisdiction they now have and makes it concurrent with courts-martial * * *." *Id.* *See also* S. Rep. No. 63-229, at 53 (1914) (testimony of Judge Advocate General Crowder before House Committee on Military Affairs).

In explaining the history of the provision now codified in Article 21, the Supreme Court has described the testimony of Judge Advocate General Crowder as "authoritative." *Madsen*, 343 U.S. at 353. The Court thus determined that the effect of this language was to preserve for such commissions "the *existing* jurisdiction which they had over * * * offenders and offenses" under the laws of war. *Id.* at 352 (emphasis added). As the Court noted, because the statute simply *recognized* the existence of military commissions, "[n]either their procedure nor their jurisdiction has been prescribed by statute." *Id.* at 347.

Given the text and history of Article 21, the provision must be read as preserving the traditional jurisdiction exercised by military commissions over

offenses or offenders against the laws of war. The statute, in other words, simply preserves Executive Branch practice. The Supreme Court has adopted precisely this understanding of the Article and has thus explained that "[b]y * * * recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles [of War], Congress gave sanction * * * to *any* use of the military commission contemplated by the common law of war." *Yamashita*, 327 U.S. at 20 (emphasis added). *See also id.* at 7.

The district court apparently believed that Article 21's reference to the "law of war" means that certain procedural protections in the Geneva Convention became entitlements for those subject to military commissions, irrespective of whether the conduct for which they stand prosecuted would place them within the traditional jurisdiction of military commissions. But Article 21 did nothing more than recognize that "military tribunals shall have jurisdiction to try offenders or offenses against the law of war," *Quirin*, 317 U.S. at 28. In recognizing that jurisdiction, Congress "incorporated by reference * * * all offenses which are defined as such by the law of war," *id.* at 30. It did not purport to restrict the President's traditional authority to subject persons charged with such offenses to trial by military commission, and it certainly did not intend to make the Geneva Convention and the whole common-law body of war principles judicially

enforceable against the Executive.

Hamdan has undoubtedly been charged with an offense that by the law of war is triable by military commission – indeed, the district court did not hold otherwise; by conspiring with enemy forces to target civilians, he is also precisely the type of "offender" against the laws of war who falls within the traditional jurisdiction of military commissions recognized by Article 21. The district court therefore erred in holding that Article 21 bars the military commission from exercising the very type of jurisdiction that Article sought to preserve. Indeed, even if the district court's highly implausible understanding of what Article 21 meant by an "offender" were correct, Article 21 still recognizes the jurisdiction of the military commission over Hamdan by virtue of the offense with which he is charged. That is because Article 21 preserves the military commission jurisdiction over "offenders *or* offenses that by statute or by the law of war" are triable by military commission. That phrasing reflects the historical fact that military commissions not only exercised jurisdiction over individuals charged with offenses against the laws of war, but also over individuals charged with ordinary offenses committed, for example, in an occupation zone. *See Duncan v. Kahanamoku*, 327 U.S. 304, 313-314 & n.8 (1946) (citing "the well-established power of the military to exercise jurisdiction over * * * enemy belligerents,

prisoners of war, or others charged with violating the laws of war"); *id.* at 314 & n.9 (citing the additional "power of the military to try *civilians* in tribunals established as part of a temporary military government over occupied enemy territory" where "civilian government cannot and does not function") (emphasis added). The laws of war permitted the latter type of "offender" to be tried by military commission, despite the fact that the offense committed was not itself a violation of the laws of war.

Here, the district court never found that the law of war would not permit the charged offense to be tried by military commission, nor could it have done so given that the Charge implicates the most basic protections of the laws of war. The district court's conclusion that Article 21 bars Hamdan's trial for that offense is erroneous on that ground alone, because the statute clearly preserves the traditional jurisdiction of military commissions over "offenses" against the laws of war. See *Quirin*, *supra*.

The district court thus got it exactly backwards when it concluded that the President's action here conflicts with "the express or implied will of Congress" and thus falls "into the most restricted category of cases identified by Justice Jackson in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952)." JA 384. The President is acting with the approval of

Congress reflected in Article 21 and the Authorization to Use Military Force. As such, his action falls into Justice Jackson's first category, where "his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.* at 635-636 (Jackson, J., concurring). In these circumstances, the President's action is "supported by the strongest presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Ibid.*

Moreover, even assuming contrary to its text, structure, and history that Article 21 was designed to restrict the President's authority to try offenses against the laws of war, the district court's reliance on Justice Jackson's *Youngstown* concurrence still would have been misplaced. First, the President here, unlike in *Youngstown*, clearly believed he was acting with congressional authorization, as his invocation of Article 21 in the Military Order makes clear. The President's judgment that he is acting in accord with a federal statute should not lightly be brushed aside, especially where that judgment involves an exercise of his core authority over foreign affairs and enemy forces in wartime. Second, *Youngstown* is inapposite because it involved action in the *civilian* sector in the form of a directive to the Secretary of Commerce to assume control over private industry. In sharp contrast, an order directed to the military to try enemy

combatants for offenses against the laws of war is a quintessentially *military* measure that lies at the heart of the Commander in Chief's authority. *See Hamdi*, 124 S. Ct. at 2640; *Quirin*, 317 U.S. at 28-29. Finally, while the district court here went to great lengths to invalidate the President's action, Justice Jackson would have "indulge[d] the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society." 343 U.S. at 640.

B. The District Court Erred In Overruling The President's Determination That Al Qaeda Combatants Are Not Covered By The Geneva Convention.

Even assuming that the Geneva Convention were judicially enforceable and that Article 21 of the UCMJ incorporated it as a limitation on the President's authority, the Geneva Convention would not limit the President here, because the President determined that the Convention does not apply to al Qaeda. In particular, the President determined that "none of the provisions of [the] Geneva [Convention] apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to [the] Geneva" Convention.[6] The district court, however,

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[6] Memorandum for the Vice President, et al. from President, Re: Humane Treatment of al Qaeda and Taliban Detainees at 1. *See* Addendum 11.

"rejected" that conclusion, as well as the Commander in Chief's underlying rationale that the United States was engaged in separate conflicts with Afghanistan's Taliban regime and the al Qaeda terrorist network, operating within and outside of Afghanistan. Relying on advice to the President that he did not adopt, the court held that the Geneva "Conventions * * * are triggered by the place of the conflict, and not by what particular faction a fighter is associated with." JA 387. This ruling contravenes the President's Commander-in-Chief and foreign-affairs authority and is inconsistent with the plain terms of the Geneva Convention.

1. The President's determination that the Convention does not apply to the conflict with al Qaeda was an exercise of the President's war powers and his broad authority over foreign affairs, *see United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), and was made in accordance with the Congressional resolution authorizing the use of force. That quintessential exercise of Executive authority is binding on the courts. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964). ("Political recognition is exclusively a function of the Executive").

The decision whether the Geneva Convention applies to the conflict with al Qaeda goes to the core of the President's powers as Commander in Chief and is

inherently one of foreign policy, an area where courts must refrain from interfering with the authority of the elected branches. *See Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). Congress has not in any way endeavored, contrary to the President, to impose the requirements of the Convention upon our fight against al Qaeda operatives. *See Santiago v. Nogueras*, 214 U.S. 260, 266 (1909); *The Thomas Gibbons*, 12 U.S. (8 Cranch) 421, 427-428 (1814). To the contrary, Congress has acknowledged the very distinction made by the President here by authorizing the use of force against *both* any "*organization*[] * * * [that the President] determines planned, authorized, committed, or aided the" September 11 attacks — (*i.e.*, al Qaeda) — and also any "*nation*[] * * * [that] harbored such organization[]" —(*i.e.*, Afghanistan). AUMF (emphases added).

The decision whether the Convention applies to a terrorist network like al Qaeda is akin to the decision whether a foreign government has sufficient control over an area to merit recognition or whether a foreign state has ratified a treaty and is therefore entitled to benefit from its provisions. In both cases, the question is one for the Executive to make. *See Doe v. Braden*, 57 U.S. (16 How.) 635, 657 (1853) (the determination whether a state has properly ratified a treaty "belong[s] *exclusively* to the political department of the government") (emphasis added); *see also Charlton v. Kelly*, 229 U.S. 447, 469-476 (1913); *Holmes*, 459 F.2d at 1215

n.26.

The Executive must act without fear of judicial reversal in this area, because "it would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered." *Braden*, 57 U.S. (16 How.) at 657. Similarly, the President's determination that al Qaeda is not a party to the Geneva Convention and, accordingly, that terrorists fighting for al Qaeda cannot claim the benefits of that Convention, is binding on the courts.

2. Even if judicial review of the President's decision were appropriate, that decision is manifestly correct. The plain language of the Convention specifies that it applies not based upon *where* a conflict occurs, but instead upon whether a power engaged in the conflict is a High Contracting Party to the Convention. By its terms, the "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, Art. 2.

Thus, the Convention would apply to a conflict between the United States

and Afghanistan, both High Contracting Parties, and could therefore potentially apply to Afghanistan's Taliban regime — as the President determined it did. The final clause of Article 2, however, makes explicit that it does not apply to a conflict with an entity that is not a High Contracting Party, even if that conflict is one facet of a conflict between High Contracting Parties: "Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it *in their mutual relations*." *Ibid.* (emphasis added). A Contracting Party, on the other hand, is only bound by the Convention "in relation to the said Power [that is not a High Contracting Party], if the latter accepts and applies the provisions thereof." *Ibid.*

Here, al Qaeda is not a High Contracting Party, and, far from having accepted or applied the provisions of the Convention, it openly flouts them. Al Qaeda is not a State; rather, it is a terrorist network composed of members from many nations, with ongoing international terrorist operations. Al Qaeda therefore cannot qualify as a "Power in conflict" that could benefit from the Convention even if it were to "accept[] and appl[y]" the Convention (which, of course, it has not). Instead, the term "Power" refers to States that would be capable of ratifying the Convention and other international agreements — something that a terrorist

organization like al Qaeda cannot do.[7]

Even if al Qaeda could be thought of as a "Power" within the meaning of Article 2, al Qaeda has consistently acted in flagrant defiance of the law of armed conflict. For example, it has used operatives not in any kind of uniform to hijack civilian aircraft and to crash them into the World Trade Center, deliberately targeting civilians. And, of course, al Qaeda has not signed the Convention. Accordingly, the Convention, by its plain language, does not apply to operatives of the al Qaeda terrorist organization.[8]

Further, it would be perverse to bind the United States to the Geneva Conventions in its fight against al Qaeda, an organization which depends for success upon violating the traditional laws of war by kidnaping civilians, torturing

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[7] *See, e.g.*, G.I.A.D. Draper, The Red Cross Conventions 16 (1958) (arguing that "in the context of Article 2, para. 3, 'Powers' means States capable then and there of becoming Contracting Parties to these Conventions either by ratification or by accession"); 2B Final Record of the Diplomatic Conference of Geneva of 1949, at 108 (explaining that Article 2(3) would impose an "obligation to recognize that the Convention be applied to the non-Contracting adverse State, in so far as the latter accepted and applied the provisions thereof").

[8] Indeed, United Nations conference reports addressing the September 11 attacks acknowledged that the "1949 Geneva Conventions, specifying that they apply to the contracting parties, i.e. States, were not designed for a situation in which the chief adversary is a non-state group" such as the terrorist organization al Qaeda. Ho-Jin Lee, *The United Nation's Role in Combating International Terrorism* at 15, presented at U.N. Conference on Disarmament Issues (Aug. 2002) (available at http://disarmament.un.org:8080/rcpd/pdf/5cnfamblee.pdf).

and murdering detained individuals (both soldiers and civilians), and intentionally targeting civilians. The purpose of entering into treaties with foreign powers is for "their mutual protection" and the "common advancement of their interests and the interests of civilization," *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902), a purpose that would be manifestly undermined by according al Qaeda operatives Geneva Convention protections.

C. The District Court Erred In Finding That Hamdan Had A Colorable Claim Of POW Status.

Having found the Geneva Convention judicially enforceable and applicable to al Qaeda, the district court held (JA 386, 398) that trial by military commission would violate Hamdan's rights under Article 102 of the Convention, which provides that "[a] prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power." By its terms, however, that provision is limited to a "prisoner of war." Hamdan is not a POW under the Convention, because he is an al Qaeda operative, and the President has determined that the Convention does not apply to al Qaeda. The district court nevertheless concluded that "it is at least a matter of some doubt as to whether or not Hamdan is entitled to the protections" of the Convention and that, until "the 'competent tribunal' referred to in Article 5" eliminates that doubt, Hamdan must

be treated as a POW. JA 398. Neither the Convention nor U.S. Army regulations supports the district court's conclusion, even assuming, contrary to the President's determination, that the Convention generally applies to al Qaeda.

The Geneva Convention defines in Article 4 the "[p]risoners of war" who are entitled to the Convention's protections. That provision makes clear that its protections apply only if the group to which a combatant belongs displays "a fixed distinctive sign," "carr[ies] arms openly" and "conduct[s] its operations in accordance with the laws and customs of war." Geneva Convention Art. 4(A)(2)(b)-(d). Indeed, the categories set out in Article 4 make clear that the POW status of an enemy fighter depends on his membership in a group that satisfies the Article 4 criteria. See Art. 4(A)(1)-(3); *United States v. Lindh*, 212 F. Supp. 2d 541, 558 n.39 (E.D. Va. 2002) ("What matters for determination of lawful combatant status is not whether Lindh personally violated the laws and customs of war, but whether the Taliban did so.") (citing Article 4).

Al Qaeda fighters such as Hamdan clearly do not meet Article 4's standard, even assuming, contrary to the President's determination, that the Convention generally applies to al Qaeda, because al Qaeda's terrorism is the very antithesis of the regular military warfare to which the Geneva Convention was intended to apply. *See, e.g.*, S. Exec. Rep. No. 84-9, at 5 ("extension of [the treaty's]

protections to 'partisans' does not embrace that type of partisan who performs the role of farmer by day, guerilla by night").

Hamdan has never claimed that he belongs to an armed force that would qualify for POW protection. Rather, his claim all along has been that, despite his close association with and work for bin Laden, he is an innocent civilian. Petition ¶¶ 15-16, 19. To be sure, the Geneva Convention does protect civilians who accompany "armed forces," but this protection applies only to those who "have received authorization from the armed forces, which they accompany," and who carry an authorized identity card. Article 4(A)(4). What is more, "armed forces" under the Geneva Convention means only organizations that satisfy the criteria for lawful combatancy, such as responsible command, a fixed distinctive sign, carrying arms openly, and compliance with the laws of war. These conditions plainly do not apply here.

Moreover, Hamdan's claim that he is a civilian has been considered and rejected by the military numerous times, as reflected by, *inter alia*, his transfer to Guantanamo, the July 2003 finding by the Commander in Chief that Hamdan is a member of al Qaeda or otherwise involved in terrorism against the United States, the referral of the al Qaeda conspiracy charge against Hamdan to a military

commission, and the finding by the Combatant Status Review Tribunal (CSRT)[9] that Hamdan is an enemy combatant who is a member or affiliate of al Qaeda. Hamdan can raise his factual innocence claim once again, but the proper place to do so is before the military commission as a defense to the Charge.

The district court nevertheless reasoned that Hamdan was entitled to yet another pre-trial proceeding under Article 5 of the Convention, which provides that certain detainees are entitled to be treated as prisoners of war "until such time as their status has been determined by a competent tribunal." That provision applies, however, only if "doubt arise[s] as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy," meet the Convention's definition of POWs. Art. 5.

The district court reasoned that a detainee's claim of entitlement to POW status is itself sufficient to establish doubt. Nothing in the text or the history of

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[9] The CSRT was patterned after the sort of "competent tribunal" referred to in Geneva Convention Article 5 and Army regulation 190-8. In that vein, the CSRT provided Hamdan with the rights to, *inter alia*, call reasonably available witnesses; question witnesses called by the tribunal; testify or otherwise address the tribunal; not be compelled to testify; a decision by a preponderance of the evidence by commissioned officers sworn to execute their duties impartially; and review by the Staff Judge Advocate for legal sufficiency. See CSRT Implementation memorandum, July 29, 2004 <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf> In addition, unlike the Article 5 or AR 190-8 tribunal, the CSRT guaranteed Hamdan the rights to a personal representative for assistance in preparing his case, to receive an unclassified summary of the evidence in advance of the hearing, and to introduce relevant documentary evidence.

the Convention, however, supports this sweeping and counterintuitive interpretation of Article 5. Notably, the contracting parties apparently believed it necessary to adopt such a requirement in a subsequent protocol -- one that the United States has not ratified, and thus is not bound by as a matter of international law.[10] Because, as explained above, the Convention at issue here provides that protections will be afforded (or denied) to all members of a particular militia or other fighting forces, depending on the status of that *group*, a competent tribunal is necessary to resolve doubts only as to whether particular persons "belong" to a fighting force falling within one of the enumerated classes. *See* Art. 4(A)(1), (2), Art. 5. In light of the President's categorical determination with respect to al Qaeda, the CSRT's confirmatory finding that Hamdan is a member or affiliate of al Qaeda definitively resolved any possible "doubt" that ever arose about his POW status. The district court dismissed the relevance of the CSRT finding on the ground that the CSRT was established merely to determine whether an individual is an enemy combatant, rather than whether that combatant is entitled to POW status, JA 390. That decision ignores the fact that the CSRT here not only

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[10] Under Article 45 of the Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, which was adopted on June 8, 1977, "[a] person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he *claims* the status of prisoner of war."

confirmed Hamdan's status as an enemy combatant. but made the further finding that he is an al Qaeda combatant. That latter finding is tantamount to a finding by an Article 5 Tribunal, in light of the President's prior, categorical determination regarding al Qaeda or in light of the judicially noticeable fact that al Qaeda does not satisfy the criteria for lawful belligerent status. *See Lindh*, 212 F. Supp. 2d at 552 n. 16 ("[T]here is no plausible claim of lawful combatant immunity in connection with al Qaeda membership."). Accordingly, there cannot possibly be a need for yet another tribunal (other than the Commission itself) to consider Hamdan's claim that he is a civilian.[11]

III. THE PROCEDURES GOVERNING THE MILITARY COMMISSION ARE NOT "CONTRARY TO OR INCONSISTENT WITH" THE UCMJ RULES APPLICABLE ONLY TO COURTS-MARTIAL.

After concluding that the Geneva Convention requires that Hamdan may only be tried by court-martial unless and until a "competent tribunal" determines

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[11] The district court also relied on Army Regulation 190-8, Section 1-6, which, like Article 5 of the Geneva Convention, calls for a competent tribunal to determine the POW status of a detained person when "doubt arises." Because the CSRT has effectively confirmed Hamdan's non-POW status, there is no basis under the Army Regulation for any further proceedings. The district court misplaced reliance on the Army Regulation for the additional reasons that it provides no greater protection than the Geneva Convention itself, see § 1-1(b)(4) ("In the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence."), and because it is not judicially enforceable, see § 1-1(a) (regulation establishes internal policies and planning guidance).

that he is not entitled to POW status, the district court went on to hold that, when and if that determination is made, the UCMJ requires that any military commission proceeding conform to the rules for courts-martial.

There is no basis for the district court's conclusion that 32 C.F.R. § 9.6(b) — which permits the Commission to exclude Hamdan from portions of the proceedings in order to protect classified information and other national security interests — violates UCMJ Article 39, which mandates that "a *court-martial*" be conducted "in the presence of the accused." 10 U.S.C. § 839(b) (emphasis added); see JA 405. The court arrived at this conclusion by reading 10 U.S.C. § 836(a) — which provides that rules established for military commissions in cases arising under the UCMJ may not be "contrary to or inconsistent with" the UCMJ — to require that military commission rules not only conform to UCMJ provisions applicable to military commissions, but also to UCMJ provisions that apply solely to courts-martial. The district court's ruling cannot stand, because, just as the court did with respect to Article 21, it fundamentally misconstrues Article 36 to impose substantial restrictions on the President's authority to use military commissions. Indeed, if the district court's reading is correct, it is the death knell for military commissions, whose raison d'etre is to provide the President with a flexible war-time forum in which to prosecute enemy fighters.

The district court concluded that Article 36 mandates that the rules the President chooses to promulgate for military commissions be consistent not only with the UCMJ provisions governing military commissions, but also with the UCMJ provisions, such as Article 39, expressly limited to courts-martial. That theory rests on a fundamental misunderstanding of the UCMJ, which is directed almost exclusively to the procedures governing *courts-martial*. The UCMJ does not purport to establish similarly uniform procedures for *military commissions*; indeed, only nine of the statute's 158 articles even mention these latter tribunals, which, as explained above, predated the UCMJ and have tried enemy combatants since the earliest days of the Republic under such procedures as the President has deemed fit.

In interpreting Article 36 to constrain the President to prescribe only such *commission* procedures as are "consistent with" the UCMJ protections accorded to *court-martial* defendants, the district court erroneously conflated the two types of tribunals, effectively negated the relatively few express references to military commission rules in the relevant "chapter," and ignored long-settled Supreme Court precedent, the UCMJ's plain language, its legislative history, and several canons of statutory construction. In context, it is clear that the last clause of Section 836(a) simply preserves, with respect to courts-martial, the specific rules

in the chapter for courts-martial, and, with respect to military commissions, the few specific rules in the chapter for military commissions. It did not intend to obliterate the distinction between the two or superimpose all the courts-martial rules on military commissions.

The Supreme Court's decisions in *Yamashita* and *Madsen* confirm that the Commission convened to try Hamdan need not afford him all of the protections that the UCMJ provides in court-martial proceedings. In *Yamashita*, a military commission was convened to try General Yamashita, an enemy combatant, for violations of the law of war. Yamashita petitioned for a writ of habeas corpus on grounds that, *inter alia*, the commission's ability to consider certain hearsay and opinion evidence violated the Articles of War (the UCMJ's statutory predecessor), including Article 38 (the precursor provision to UCMJ Article 36).[12] 327 U.S. at 6, 18. The Court rejected Yamashita's procedural objections, reasoning in part that "the military commission before which he was tried * * * was not convened by virtue of the Articles of War, but pursuant to the common law of war." *Id.* at 20. A similar result should obtain in this case, because the Commission is convened to try Hamdan for an offense against the law of war as opposed to an

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[12] Article 38 was identical in all material respects to the current version of UCMJ Article 36. *Compare Yamashita*, 327 U.S. at 18 n.6 (providing text of Article 38) *with* 10 U.S.C. § 836(a).

offense "arising under" the UCMJ's specific prohibitions. 10 U.S.C. § 836(a); *see generally* 10 U.S.C. §§ 877-934.

The district court attempted to distinguish *Yamashita* on the basis that the UCMJ, which was enacted on May 5, 1950, was not yet in effect at the time of the Supreme Court's decision. It obviously was in effect, however, by the time the Court observed in *Madsen* that UCMJ Article 21 specifically preserved the military commissions' common-law-of-war jurisdiction and procedures. *Madsen*, 343 U.S. at 346-348, 351 n.17; *see supra* Part II(A)(5). To be sure, as the district court pointed out (JA 408-409), the petitioner in *Madsen* did not raise any specific procedural objection under the UCMJ. It is equally true, however, that the Court would not have confirmed so emphatically, and without qualification, the President's prerogative to establish procedures for "our commonlaw war courts" if the UCMJ had just two years earlier constrained the President's war-time authority in as dramatic a fashion as the district court here believed. *Madsen*, 343 U.S. at 346-347.

The Supreme Court's failure to perceive the significance that the district court here perceived in Article 36 stems not from the absence of a procedural claim in *Madsen*, but from the implausibility of the district court's reading. The UCMJ takes pains to distinguish between "military commissions" or "military

tribunals" on the one hand, and "courts-martial" on the other, using these distinct terms to connote discrete, rather than equivalent, types of tribunals. *See* 10 U.S.C. §§ 821, 828, 836, 847-850, 904, 906. Settled canons of construction "caution[ ] the court to avoid interpreting a statute in such a way as to make part of it meaningless." *E.g.*, *Abourezk* v. *Reagan*, 785 F.2d 1043, 1054 (D.C. Cir. 1986); *see Williams* v. *Taylor*, 529 U.S. 362, 404 (2000). Yet if the "court-martial" articles of the UCMJ were meant to apply to "military commissions," the specific use of the latter term — in no less than nine of the UCMJ's provisions, *see* Arts. 21, 28, 36, 47(a)(1), 48, 49(d), 50(a), 104 and 106 — would be superfluous. For that reason, a given Commission procedure cannot be "contrary to or inconsistent with" articles that are applicable exclusively to courts-martial.

IV. THE PRESIDENT HAS INHERENT POWER TO CONVENE MILITARY COMMISSIONS.

The district court's reading of Article 21 of the UCMJ to bar Hamdan's trial by military commission and of Article 36 to require that any military commission proceeding that is ultimately conducted provide the functional equivalent of a court-martial should be rejected not only because it is contrary to the text, structure, and history of those provisions, but also because, by interpreting the provisions to reflect congressional intent to limit the President's authority, it creates a serious constitutional question. *Cf. Quirin*, 317 U.S. at 47 (declining to

"inquire whether Congress may restrict the power of the Commander-in-Chief to deal with enemy belligerents" by restricting use of military commissions). A clear statement of Congressional intent would be required before a statute could be read to effect such an infringement on core executive powers. *See, e.g.*, *id.* at 9 ("[T]he detention and trial of petitioners – ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger – are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted."); *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 466 (1989); *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991).

The district court brushed this concern aside by stating without any elaboration that "[i]f the President does have inherent power in this area, it is quite limited." JA 384. That statement is incorrect. The President has inherent constitutional authority to create military commissions in the absence of Congressional authorization. This authority, which has been exercised as an inherent military power since the founding of the Nation, is derived from the Commander-in-Chief Clause, which vests in the President the full powers necessary to prosecute a military campaign successfully. U.S. Const. Art. II, Sec. 2, cl. 1. As the Supreme Court explained in *Eisentrager*, 339 U.S. at 788, "[t]he

first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And, of course, grant of war power includes all that is necessary and proper for carrying these powers into execution." In particular, that war power includes "the power * * * to punish those enemies who violated the law of war." *Hirota v. MacArthur*, 338 U.S. 197, 208 (1948) (Douglas, J., concurring) (citations omitted), because such punishment power is "directed to a dilution of enemy power and [to] retribution for wrongs done." *Id.* at 208; *see also Yamashita*, 327 U.S. at 11.

It was well recognized when the Constitution was written and ratified that one of the powers inherent in military command was the authority to institute tribunals for punishing enemy violations of the laws of war. For example, during the Revolutionary War, George Washington, as Commander in Chief of the Continental Army, appointed a "Board of General Officers" to try the British Major Andre as a spy. *See Quirin*, 317 U.S. at 31 n.9; *Proceedings of a Board of General Officers Respecting Major John Andre, Sept. 29, 1780* (Francis Bailey ed. 1780). At the time, there was no provision in the American Articles of War providing for jurisdiction in a court-martial to try an enemy for the offense of spying. *See* George B. Davis, *A Treatise on the Military Law of the United States* 308 n.1 (1913). In investing the President with full authority as Commander in

Chief, the drafters of the Constitution surely intended to give the President the same authority that General Washington possessed during the Revolutionary War to convene military tribunals to punish offenses against the laws of war.

The executive practice of using military commissions bears out this conclusion. Throughout this country's history, Presidents have exercised their inherent authority as Commanders in Chief to establish military commissions, without any authorization from Congress. In April 1818, for example, military tribunals were convened, without Congressional authorization, to try two British subjects for inciting the Creek Indians to war with the United States. *See* William Winthrop, MILITARY LAW AND PRECEDENTS 464, 832 (2d ed. 1920); William E. Birkhimer, MILITARY GOVERNMENT AND MARTIAL LAW 353 (3d ed. 1914). Similarly, during the Mexican War, tribunals called "council[s] of war" were convened to try offenses under the laws of war, and other tribunals, called "military commission[s]," were created to serve essentially as occupation courts administering justice for occupied territory. *See, e.g.*, Winthrop, *supra* at 832-33; Davis, *supra* at 308. Likewise, after the outbreak of the Civil War, military commissions were convened to try offenses against the laws of war. *See* Davis, *supra* at 308 n.2; Winthrop, *supra*, at 833. It was not until 1863 that military commissions were even mentioned in a statute enacted by Congress. In that year,

Congress specifically authorized the use of military commissions to try members of the military for certain offenses committed during time of war. *See* Act of March 3, 1863, § 30 (12 Stat. 731, 736). That statute, moreover, did not purport to *establish* military commissions. Rather, it acknowledged their pre-existence and provided that they could be used as alternatives to courts-martial in some cases.

That history of military practice is legally significant. As the Supreme Court repeatedly has explained, "'traditional ways of conducting government * * * give meaning' to the Constitution." *Mistretta v. United States*, 488 U.S. 361, 401 (1989). This principle of construction applies as well to the process of interpreting statutes. *See United States v. Midwest Oil Co.*, 236 U.S. 459, 473 (1915) ("in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself — even when the validity of the practice is the subject of the investigation").

The district court believed that *Quirin* "stands for the proposition that the authority to appoint military commissions is found, not in the inherent power of the presidency, but in the Articles of War * * * by which *Congress* provided rules for the government of the army." JA 381. In fact, *Quirin* expressly declined to decide "to what extent the President as Commander-in-Chief has constitutional power to create military commissions without the support of Congressional

legislation." 317 U.S. at 29. And, in later cases, the Supreme Court has not questioned the President's inherent authority. *See, e.g.*, *Madsen*, 343 U.S. at 348 ("In 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[.]").

Thus, contrary to the view of the district court, the text and history of the Constitution demonstrate that the President has broad inherent constitutional powers as Commander in Chief to create military commissions to try enemy belligerents for offenses against the laws of war. That text and history counsel against reading Articles 21 and 36 to curtail the President's authority, especially where, as explained above, a reading of the provisions that does not accomplish that result and that reflects a more faithful application of the text, structure, and history of those provisions is available.

CONCLUSION

For the foregoing reasons, the district court ruling should be reversed, and Hamdan's action should be denied.

Respectfully submitted,

PAUL D. CLEMENT
Acting Solicitor General

CHRISTOPHER A. WRAY
Assistant Attorney General

PETER D. KEISLER
Assistant Attorney General

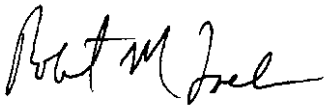
KENNETH L. WAINSTEIN
Acting United States Attorney

GREGORY G. KATSAS
Deputy Assistant Attorney General

JONATHAN L. MARCUS
Assistant to the Solicitor General

DOUGLAS N. LETTER
(202) 514-3602
ROBERT M. LOEB
(202) 514-4332
AUGUST FLENTJE
SHARON SWINGLE
ERIC MILLER
Attorneys, Appellate Staff
Civil Division, Room 7268
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

STEPHAN E. OESTREICHER, JR.
Criminal Division, Appellate Section



DECEMBER 8, 2004

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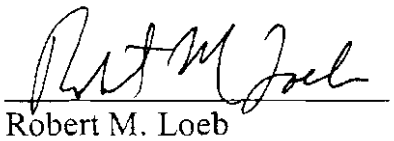


Robert M. Loeb

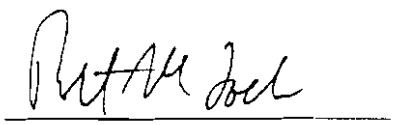
CERTIFICATE OF SERVICE

I hereby certify that on this December 8, 2004, I caused copies of the foregoing brief to be sent by hand delivery to the Court and the following counsel of record:

Kelly A. Cameron
PERKINS COIE, LLP
607 Fourteenth Street, NW
Suite 800
Washington, DC 20005
(202) 434-1652

Neal Katyal
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue
Washington, DC 20001
(202) 662-9000

Charles Swift
OFFICE OF CHIEF DEFENSE COUNSEL FOR MILITARY COMMISSIONS
1851 South Bell Street
Suite 103
Arlington, VA 22202
(703) 607-1521 Ext. 191



Robert M. Loeb

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