# 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 _V_ OF ___ TOTAL VOLUMES**

## FEDERAL COURT LITIGATION
## IN OTHER THAN *U.S. V. BARHOUMI*
## (SELECTED FILINGS—NO REDACTIONS)

# *United States v. Sufyian Barhoumi*, NO. 050006

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**Some volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.**

**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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OFFICE OF THE SECRETARY OF DEFENSE
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APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

December 10, 2004

APPOINTING AUTHORITY DIRECTIVE

IN THE MATTERS OF
UNITED STATES V. IBRAHIM AHMED MAHMOUD AL QOSI
UNITED STATS V. SALIM AHMED HAMDAN
UNITED STATES V. DAVID M. HICKS
UNITED STATES V. ALI HAMZA AHMAD SULAYMAN AL BAHLUL

Pursuant to my authority under MCO No. 1, 6(B)(4), I direct that proceedings in the above styled military commission cases be held in abeyance pending the outcome of the appeal in the case of Hamdan v. Rumsfeld, United States Court of Appeals for the District of Columbia Circuit, No. 04-5393. Oral argument in that case is presently scheduled for March 8, 2005.

The presiding officer is authorized to issue discovery orders in the commissions, hold pre-trial conferences, and/or attend to other matters that do not require convening the full commission.

This order remains in effect until revoked.

John D. Altenburg, Jr.
Appointing Authority for Military Commissions

U.S. District Court Litigation
Other than U.S. v. Barhoumi

prisoner-of-war, appointing authority, speedy trial, hostilities, appointed, detained, self-executing, habeas corpus, regulation, courtroom

**COUNSEL:** For CHARLES SWIFT, Lieutenant Commander, a Resident of the State of Washington, as next friend for Salim Ahmed Hamdan, military commission detainee, Camp Echo, Guantanamo Bay Naval Base, Guantanamo Bay, Cuba, Plaintiff: Charles Swift, OFFICE OF CHIEF DEFENSE COUNSEL FOR MILITARY COMMISSIONS, Arlington, VA; Joseph M. McMillan, PERKINS COIE LLP, Seattle, WA; Neal Katyal, GEORGETOWN UNIVERSITY LAW CENTER, Washington, DC; Kelly A. Cameron, PERKINS COIE, LLP, Washington, DC.

For DONALD H. RUMSFELD, JOHN D ALTENBURG, appointing authority for military commissions, Department of Defense, THOMAS L. HEMINGWAY, Brigadier General, Legal Advisor to the appointing authority for military commissions, JAY HOOD, Brigadier General Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba, GEORGE W. BUSH, President of the United States, Defendants: Brian C. Kipnis, U.S. ATTORNEY'S OFFICE/WA, Seattle, WA; Preeya M. Noronha, Terry Marcus Henry, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For ALLIED EDUCATIONAL FOUNDATION, WASHINGTON LEGAL FOUNDATION, Movants: David Andrew Price, WASHINGTON LEGAL FOUNDATION, Washington, **[**2]** DC.

For DAVID C. VLADECK, CARLOS M. VAZQUEZ, DAVID SLOSS, ANNE-MARIE SLAUGHTER, DAVID SCHEFFER, JUDITH RESNIK, JENNIFER S. MARTINEZ, KEVIN R. JOHNSON, DEREK JINKS, OONA HATHAWAY, RYAN GOODMAN, MARTIN S. FLAHERTY, WILLIAM S. DODGE, SARAH H. CLEVELAND, ROSA EHRENREICH BROOKS, BRUCE ACKERMAN, Movants: David C. Vladeck, Georgetown University Law Center, Institute for Public Representation, Washington, DC.

For RICHARD O'MEARA, General, JOHN D. HUTSON, Admiral, LEE F. GUNN, Admiral, DAVID M. BRAHMS, General, Movants: David H. Remes, COVINGTON & BURLING, Washington, DC.

For WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, Amicus: David Andrew Price, WASHINGTON LEGAL FOUNDATION, Washington, DC.

For 271 United Kingdom And European Parlimentarians, Amicus: Mary Jean Moltenbrey, FRESHFIELDS BRUCKHAUS DERINGER, LLP, Washington, DC.

For CENTER FOR INTERNATIONAL HUMAN RIGHTS, OF NORTHWESTERN UNIVERSITY SCHOOL OF LAW, MARCO SASSOLI, FRITS KALSHOVEN, GUY S. GOODWIN-GILL, LOUISE DOSWALD-BECK, Amicus: David Richard Berz, WEIL, GOTSHAL & MANGES, L.L.P., Washington, DC.

**JUDGES:** JAMES ROBERTSON, United States District Judge.

**OPINIONBY:** JAMES ROBERTSON

**OPINION: [*155] MEMORANDUM OPINION [**3]**

Salim Ahmed Hamdan petitions for a writ of habeas corpus, challenging the lawfulness of the Secretary of Defense's plan to try him for alleged war crimes before a military commission convened under special orders issued by the President of the United States, rather than before a court-martial convened under the Uniform Code of Military Justice. The government moves to dismiss. Because Hamdan has not been determined by a competent

tribunal to be an offender triable under the law of war, 10 U.S.C. § 821, and because in any event the procedures established for the Military Commission by the President's order are "contrary to or inconsistent" with those applicable to courts-martial, 10 U.S.C. § 836, Hamdan's petition will be **granted** in part. The government's motion will be **denied.** The reasons for these rulings are set forth below.

**BACKGROUND**

Hamdan was captured in Afghanistan in late 2001, during a time of hostilities in that country that followed the terrorist attacks in the United States on September 11, 2001 mounted by al Qaeda, a terrorist group harbored in Afghanistan. He was detained by American military forces **[**4]** and transferred sometime in 2002 to the detention facility set up by the Defense Department at Guantanamo Bay Naval Base, Cuba. On July 3, 2003, acting pursuant to the Military Order he had issued on November 13, 2001, n1 and finding "that there is reason to believe that [Hamdan] was a member of al Qaida or was otherwise involved in terrorism directed against the United States," the President designated Hamdan for trial by military commission. Press Release, Dep't of Defense, President Determines Enemy Combatants Subject to His Military Order (July 3, 2003), http://www.defenselink.mil/releases/2003/nr20030703-0173.html. In December 2003, Hamdan was placed in a part of the Guantanamo Bay facility known as Camp Echo, where he was held in isolation. On December 18, 2003, military counsel was appointed for him. On February 12, 2004, Hamdan's counsel filed a demand for charges and speedy trial under Article 10 of the Uniform Code of Military Justice. On February 23, 2004, the legal advisor to the Appointing Authority n2 ruled that the UCMJ did not apply to Hamdan's detention. On April 6, 2004, in the United States District Court for the Western District of Washington, Hamdan's counsel **[**5]** filed the petition for mandamus or habeas corpus that is now before this court. On July 9, 2004, Hamdan was formally charged with conspiracy to commit the **[*156]** following offenses: "attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism." Dep't of Defense, Military Commission List of Charges for Salim Ahmed Hamdan, http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf. Following the Supreme Court's decision on June 28, 2004, that federal district courts have jurisdiction of habeas petitions filed by Guantanamo Bay detainees, Rasul v. Bush, 159 L. Ed. 2d 548, 124 S. Ct. 2686 (2004), and the Ninth Circuit's decision on July 8, 2004, that all such cases should be heard in the District of the District of Columbia, Gherebi v. Bush, 374 F.3d 727 (9th Cir. 2004), the case was transferred here, where it was docketed on September 2, 2004. n3 Oral argument was held on October 25, 2004.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). **[**6]**

n2 The Department of Defense has implemented the President's Military Order of November 3, 2001 with a series of Military Commission Orders, Instructions, and other documents. See generally Dep't of Defense, Military Commissions (providing extensive links to background materials on the Military Commissions), at http://www.defenselink.mil/news/commissions.html. The Secretary of Defense may designate an "Appointing Authority" to issue orders establishing and regulating military commissions. Military Commission Order No. 1 (March 21, 2002), C.F.R. § 9.2,

http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf. Secretary Rumsfeld designated John D. Altenburg, Jr. as Appointing Authority. Press Release, Dep't of Defense, Appointing Authority Decision Made (December 30, 2003), http://www.defenselink.mil/releases/2003/nr20031230-0820.html.

n3 Hamdan's counsel, Charles Swift, initially filed the petition in this case in his own name as Hamdan's next friend. The government challenged Swift's standing to do so. At a conference on September 14, 2004, the petition was amended, by consent and nunc pro tunc, to be in Hamdan's name only.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**7]**

Hamdan's petition is stated in eight counts. It alleges the denial of Hamdan's speedy trial rights in violation of Article 10 of the Uniform Code of Military Justice, 10 U.S.C. § 810 (count 1); challenges the nature and length of Hamdan's pretrial detention as a violation of the Third Geneva Convention (count 2) and of Common Article 3 of the Geneva Conventions (count 3); challenges the order establishing the Military Commission as a violation of the separation of powers doctrine (count 4) and as purporting to invest the Military Commission with authority that exceeds the law of war (count 7); challenges the creation of the Military Commission as a violation of the equal protection guarantees of the Fifth Amendment (count 5) and of 42 U.S.C. § 1981 (count 6); and argues that the Military Order does not, on its face, apply to Hamdan (count 8).

Although Judge Lasnik (W.D. Wash.) ordered the respondents to file a "return," Order Granting Motion to Hold Petition in Abeyance (W.D. Wash. No. 04-0777) (May 11, 2004), and although the motion to dismiss now before this court is styled a "consolidated return to petition and memorandum of law in **[**8]** support of cross-motion to dismiss," no formal show cause order has issued, nor have the respondents ever filed a factual response to Hamdan's allegations. An order issued October 4, 2004 [Dkt # 26] by Judge Joyce Hens Green, who is coordinating and managing all of the Guantanamo Bay cases in this court, provided that "respondents are not required . . . to file a response addressing enemy combatant status issues . . . or a factual return providing the factual basis for petitioner's detention as an enemy combatant, pending further order of the Court." n4 The absence of a factual return is of no moment, however. The issues before me will be resolved as a matter of law. The only three facts that are necessary to my disposition of the petition for habeas corpus and of the cross-motion to dismiss are that Hamdan was captured in Afghanistan during hostilities after the 9/11 attacks, that he has asserted his entitlement to prisoner-of-war status under the Third Geneva Convention, and that the government has not convened a competent tribunal to determine whether Hamdan is entitled to such status. All of those propositions appear to be undisputed.

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n4 This order was issued only for the instant case, because briefing of these motions was nearly complete and the issues they raised did not require factual returns. Factual returns must be filed in all of the other Guantanamo detainee cases pending in this court.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**9]**

**[*157] ANALYSIS**

**1. Abstention is neither required nor appropriate.**

The well-established doctrine that federal courts will "normally not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted," Schlesinger v. Councilman, 420 U.S. 738, 43 L. Ed. 2d 591, 95 S. Ct. 1300 (1975), is not applicable here. Councilman involved a court-martial, not a military commission. Its holding is that, "when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention . . . ." Id. at 758. In reaching that conclusion, the Court found it necessary to distinguish its previous decisions in United States ex rel. Toth v. Quarles, 350 U.S. 11, 100 L. Ed. 8, 76 S. Ct. 1 (1955) (civilian ex-serviceman not triable by court-martial for offense committed while in service), Reid v. Covert, 354 U.S. 1, 1 L. Ed. 2d 1148, 77 S. Ct. 1222 (1957) (civilian dependent not triable by court-martial for murder of service member husband overseas in peacetime), and McElroy v. United States. ex rel. Guagliardo, 361 U.S. 281, 4 L. Ed. 2d 282, 80 S. Ct. 305 (1960) **[**10]** (civilian employees of armed forces overseas not subject to court-martial jurisdiction for noncapital offenses), none of which required exhaustion. The Councilman Court also repeated its observation in Noyd v. Bond, 395 U.S. 683, 696 n.8, 23 L. Ed. 2d 631, 89 S. Ct. 1876 (1969), that it is "especially unfair to require exhaustion . . . when the complainants raised substantial arguments denying the right of the military to try them at all." A jurisdictional argument is just what Hamdan present here.

Controlling Circuit precedent is found in New v. Cohen, 327 U.S. App. D.C. 147, 129 F.3d 639, 644 (D.C. Cir. 1997). In that case, following the Supreme Court's decision in Parisi v. Davidson, 405 U.S. 34, 31 L. Ed. 2d 17, 92 S. Ct. 815 (1972), the Court of Appeals noted that, HN1 although the abstention rule is often "'framed in terms of 'exhaustion' it may more accurately be understood as based upon the appropriate demands of comity between two separate judicial systems.'" Id. at 642, (quoting Parisi, 405 U.S. at 40).

None of the policy factors identified by the Supreme Court as supporting the doctrine of comity is applicable here. See Parisi, 405 U.S. at 41, discussed in New, 129 F.3d at 643. **[**11]** In the context of this case, according comity to a military tribunal would not "aid[] the military judiciary in its task of maintaining order and discipline in the armed services," or "eliminate[] needless friction between the federal civilian and military judicial systems," nor does it deny "due respect to the autonomous military judicial system created by Congress," because, whatever else can be said about the Military Commission established under the President's Military Order, it is not autonomous, and it was not created by Congress. Parisi, 405 U.S. at 40.

The New case identifies an exception to the exhaustion rule that it characterizes as "quite simple: HN2 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. That rule, squarely based on the Supreme Court's opinions in McElroy, Reed, and Toth, supra, applies here. Even Councilman supports the proposition that a district court should at least determine whether the petitioner has "'raised substantial arguments denying the right of the military to try [him] at all.'" 420 U.S. at 763 **[**12]** (quoting Noyd v. Bond, **[*158]** 395 U.S. at 696 n.8). Having done so, and having considered Hamdan's arguments that he is not triable by military commission at all, I conclude that abstention is neither required nor appropriate as to the issues resolved by this opinion.

**2. No proper determination has been made that Hamdan is an offender triable by**

**military tribunal under the law of war.**

a. The President may establish military commissions only for offenders or offenses triable by military tribunal under the law of war.

The major premise of the government's argument that the President has untrammeled power to establish military tribunals is that his authority emanates from Article II of the Constitution and is inherent in his role as commander-in-chief. None of the principal cases on which the government relies, Ex parte Quirin, 317 U.S. 1, 87 L. Ed. 3, 63 S. Ct. 2 (1942), Application of Yamashita, 327 U.S. 1, 90 L. Ed. 499, 66 S. Ct. 340 (1946), and Madsen v. Kinsella, 343 U.S. 341, 96 L. Ed. 988, 72 S. Ct. 699 (1952), has so held. In Quirin the Supreme Court located the power in Article I, § 8, emphasizing the President's executive power as commander-in-chief "to wage war which Congress **[**13]** has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war." Quirin, 317 U.S. at 10, 87 L. Ed. 3, 63 S. Ct. 2 (emphasis added). Quirin stands for the proposition that HN3 the authority to appoint military commissions is found, not in the inherent power of the presidency, but in the Articles of War (a predecessor of the Uniform Code of Military Justice) by which Congress provided rules for the government of the army. Id. Thus, Congress provided for the trial by courts-martial of members of the armed forces and specific classes of persons associated with or serving with the army, id., and "the Articles [of War] also recognize the 'military commission' appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial." Id. The President's authority to prescribe procedures for military commissions was conferred by Articles 38 and 46 of the Articles of War. Id. **[**14]** The Quirin Court sustained the President's order creating a military commission, because "by his Order creating the . . . Commission [the President] has undertaken to exercise the authority conferred upon him by Congress . . . ." Id. at 11.

This sentence continues with the words ". . . and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war." Id. at 11. That dangling idea is not explained -- in Quirin or in later cases. The Court expressly found it unnecessary in Quirin "to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions." Id.

In Yamashita, the Supreme Court noted that it had "had occasion [in Quirin] to consider at length the sources and nature of the authority to create military commissions for the trial of enemy combatants for offenses against **[**15]** the law of war," Yamashita, **[*159]** at 327 U.S. at 7, and noted:

We there pointed out that Congress, in the exercise of the power conferred upon it by Article I, § 8 Cl. 10 of the Constitution to 'define and punish . . . Offenses against the Law of Nations . . .,' of which the law of war is a part, had by the Articles of War [citation omitted] recognized the 'military commission' appointed by military command as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war.

Id. at 7 (emphasis added). Further on, the Court noted:

We further pointed out that Congress, by sanctioning trial of enemy combatants for violations of the law of war by military commission, had not attempted to codify the law of war or to mark its precise boundaries. Instead, by Article 15 it had incorporated, by reference, as within the preexisting jurisdiction of military commissions created by appropriate military command, all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction. It thus adopted **[**16]** the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention, to which the United States and the Axis powers were parties."

Id. at 7-8 (emphasis added). And again:

Congress, in the exercise of its constitutional power to define and punish offenses against the law of nations, of which the law of war is a part, has recognized the 'military commission' appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war.

Id. at 16 (emphasis added). Yamashita concluded that, *HN4* by giving "sanction . . . to any use of the military commission contemplated by the common law of war," Congress "preserved their traditional jurisdiction over enemy combatants unimpaired by the Articles [of War] . . . ." Id. at 20.

What was then Article 15 of the Articles of War is now Article 21 of the Uniform Code of Military Justice, 10 U.S.C. § 821. *HN5* It **[**17]** 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 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.**

Quirin and Yamashita make it clear that *HN6* Article 21 represents Congressional approval of the historical, traditional, non-statutory military commission. The language of that approval, however, does not extend past "offenders or offenses that by statute or by the law of war may be tried by military commissions . . . ." 10 U.S.C. § 821.

Any additional jurisdiction for military commissions would have to come from some inherent executive authority that Quirin, Yamashita, and Madsen neither define nor directly support. If the President does have inherent power in this area, it is quite limited. Congress has the power to amend those limits and could do so tomorrow. Were the President to act outside the limits now set for military commissions by Article 21, however, his actions would **[**18]** fall into the most restricted category of cases identified by Justice **[*160]** Jackson in his concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579,

637, 96 L. Ed. 1153, 72 S. Ct. 863, 62 Ohio Law Abs. 417 (1952), in which "the President takes measures incompatible with the expressed or implied will of Congress," and in which the President's power is "at its lowest ebb." n5

b. The law of war includes the Third Geneva Convention, which requires trial by court-martial as long as Hamdan's POW status is in doubt.

HN7 "From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals."

This language is from Quirin, 317 U.S. at 27-28, 87 L. Ed. 3, 63 S. Ct. 2. The United States has ratified the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135 (the Third Geneva Convention). Afghanistan is a party to the Geneva Conventions. n6 HN8 The Third Geneva Convention is acknowledged to be part of the law of war, 10/25/04 Tr. at 55; Military Commission **[**19]** Instruction No. 2, § (5)(G) (Apr. 30, 2003); 32 C.F.R. § 11.5(g), http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf. It is applicable by its terms in "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." Third Geneva Convention, art. 2. That language covers the hostilities in Afghanistan that were ongoing in late 2001, when Hamdan was captured there. If Hamdan is entitled to the protections accorded prisoners of war under the Third Geneva Convention, one need look no farther than Article 102 for the rule that requires his habeas petition to be granted:

HN9 **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, and if, furthermore, the provisions of the present Chapter have been observed. n7**

HN10 The Military Commission is not such a court. Its procedures are not such procedures.

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n5 For further development of this argument, see Brief Amici Curiae of Sixteen Law Professors at 9-13. **[**20]**

n6 See International Committee of the Red Cross, Treaty Database, at http://www.icrc.org/ihl.

n7 See Brief Amici Curiae of Sixteen Law Professors at 28-30.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The government does not dispute the proposition that prisoners of war may not be tried by military tribunal. Its position is that Hamdan is not entitled to the protections of the Third Geneva Convention at all, and certainly not to prisoner-of-war status, and that in any event the protections of the Third Geneva Convention are not enforceable by way of habeas corpus.

(1) The government's first argument that the Third Geneva Convention does not protect Hamdan asserts that Hamdan was captured, not in the course of a conflict between the United States and Afghanistan, but in the course of a "separate" conflict with al Qaeda. That argument is rejected. The government apparently bases the argument on a Presidential "finding" that it claims is "not reviewable." See Motion to Dismiss **[*161]** at 33, Hicks v. Bush (D.D.C. No. 02-00299) (October 14, 2004). The finding is set forth in Memorandum from the President, to the Vice President **[**21]** et al., Humane Treatment of al Qaeda and Taliban Detainees (February 7, 2002), http://www.library.law.pace.edu/research/020207_bushmemo.pdf, stating that the Third Geneva Convention applies to the Taliban detainees, but not to the al Qaeda detainees captured in Afghanistan, because al Qaeda is not a state party to the Geneva Conventions. Notwithstanding the President's view that the United States was engaged in two separate conflicts in Afghanistan (the common public understanding is to the contrary, see Joan Fitzpatrick, Jurisdiction of Military Commissions and the Ambiguous War on Terrorism, 96 Am. J. Int'l. L. 345, 349 (2002) (conflict in Afghanistan was international armed conflict in which Taliban and al Qaeda joined forces against U.S. and its Afghan allies)), the government's attempt to separate the Taliban from al Qaeda for Geneva Convention purposes finds no support in the structure of HN11 the Conventions themselves, which are triggered by the place of the conflict, and not by what particular faction a fighter is associated with. See Amicus Brief of General David M. Brahms (ret.), Admiral Lee F. Gunn (ret.), Admiral John D. Hutson (ret.), General Richard **[**22]** O'Meara (ret.) (Generals and Admirals Amicus Brief) at 17 (citing Memorandum from William H. Taft IV, Legal Adviser, Dep't of State, to Counsel to the President P3 (Feb. 2, 2002), http://www.fas.org/sgp/othergov/taft.pdf). Thus HN12 at some level -- whether as a prisoner-of-war entitled to the full panoply of Convention protections or only under the more limited protections afforded by Common Article 3, see infra note 13 -- the Third Geneva Convention applies to all persons detained in Afghanistan during the hostilities there.

(2) The government next argues that, even if the Third Geneva Convention might theoretically apply to anyone captured in the Afghanistan theater, members of al Qaeda such as Hamdan are not entitled to POW status because they do not satisfy the test established by Article 4(2) of the Third Geneva Convention -- they do not carry arms openly and operate under the laws and customs of war. Gov't Resp. at 35. See also The White House, Statement by the Press Secretary on the Geneva Convention (May 7, 2003), http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html. We know this, the government argues, because the President himself has determined that Hamdan **[**23]** was a member of al Qaeda or otherwise involved in terrorism against the United States. Id. Presidential determinations in this area, the government argues, are due "extraordinary deference." 10/25/04 Tr. at 38. Moreover (as the court was advised for the first time at oral argument on October 25, 2004) a Combatant Status Review Tribunal (CSRT) found, after a hearing on October 3, 2004, that Hamdan has the status of an enemy combatant "as either a member of or affiliated with Al Qaeda." 10/25/04 Tr. at 12.

Article 5 of the Third Geneva Convention provides:

HN13 **Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.**

This provision has been implemented and confirmed by Army Regulation 190-8, Enemy Prisoners of War, Retained **[*162]** Personnel, Civilian Internees and Other Detainees, http://www.army.mil/usapa/epubs/pdf/r190_8.pdf., Hamdan has asserted his entitlement to POW status, and the Army's regulations **[**24]** provide that HN14 whenever a detainee makes such a claim his status is "in doubt." Army Regulation 190-8, § 1-6(a); Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2658, 159 L. Ed. 2d 578 (Souter, J., concurring). The Army's regulation is in keeping with general international understandings of the meaning of Article 5. See generally Generals and Admirals Amicus Brief at 18-22.

Thus the government's position that no doubt has arisen as to Hamdan's status does not withstand scrutiny, and neither does the government's position that, if a hearing is required by Army regulations, "it was provided," 10/25/04 Tr. at 40. There is nothing in this record to suggest that a competent tribunal has determined that Hamdan is not a prisoner-of-war under the Geneva Conventions. Hamdan has appeared before the Combatant Status Review Tribunal, but the CSRT was not established to address detainees' status under the Geneva Conventions. It was established to comply with the Supreme Court's mandate in Hamdi, supra, to decide "whether the detainee is properly detained as an enemy combatant" for purposes of continued detention. Memorandum From Deputy Secretary of Defense, to Secretary of the Navy, Order Establishing **[**25]** Combatant Status Review Tribunal 3 (July 7, 2003), http://www.defenselink.mil/news/Jul2004/d20040707review.pdf; see also Memorandum From Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba (July 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

The government's legal position is that the CSRT determination that Hamdan was a member of or affiliated with al Qaeda is also determinative of Hamdan's prisoner-of-war status, since the President has already determined that detained al Qaeda members are not prisoners-of-war under the Geneva Conventions, see 10/25/04 Tr. at 37. HN15 The President is not a "tribunal," however. The government must convene a competent tribunal (or address a competent tribunal already convened) and seek a specific determination as to Hamdan's status under the Geneva Conventions. Until or unless such a tribunal decides otherwise, Hamdan has, and must be accorded, the full protections of a prisoner-of-war.

(3) The government's next argument, that Common Article 3 does not apply because it was meant to cover local and not international conflicts, **[**26]** is also rejected. n8 **[*163]** HN16 It is universally agreed, and is demonstrable in the Convention language itself, in the context in which it was adopted, and by the generally accepted law of nations, that Common Article 3 embodies "international human norms," Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1351 (N.D. Ga. 2002), and that it sets forth the "most fundamental requirements of the law of war." Kadic v. Karadzic, 70 F.3d 232, 243 (2d Cir. 1995). The International Court of Justice has stated it plainly: "There is no doubt that, in the event of international armed conflicts . . . [the rules articulated in Common Article 3] . . . constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the court in 1949 called 'elementary considerations of humanity'." Nicaragua v. United States,

1986 I.C.J. 14, 114 (Judgment of June 27). The court went on to say that, "because the minimum rules applicable to international and non-international conflicts are identical, there is no need to address the question whether . . . [the actions **[**27]** alleged to be violative of Common Article 3] must be looked at in the context of the rules which operate for one or the other category of conflict." n9 Id.

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n8 Article 3 of the Third Geneva Convention is called "Common Article 3" because it is common to all four of the 1949 Geneva Conventions. HN17 It provides:
In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be found to apply, as a minimum, the following provisions:
(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be sickness, wounds, detention, or any other cause, shall in all circumstances by treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
**(d) 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.**

(2) The wounded and sick shall be commected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

**[**28]**

n9 See also Brief Amici of Sixteen Law Professors at 33 n.32.

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The government has asserted a position starkly different from the positions and behavior of the United States in previous conflicts, one that can only weaken the United States' own

ability to demand application of the Geneva Conventions to Americans captured during armed conflicts abroad. *Amici* remind us of the capture of U.S. Warrant Officer Michael Durant in 1993 by forces loyal to a Somali warlord. The United States demanded assurances that Durant would be treated consistently with protections afforded by the Convention, even though, if the Convention were applied as narrowly as the government now seeks to apply it to Hamdan, "Durant's captors would not be bound to follow the convention because they were not a 'state'". Neil McDonald & Scott Sullivan, Rational Interpretation in Irrational Times: The Third Geneva Convention and "War On Terror", 44 Harv. Int'l. L.J. 301, 310 (2003). Examples of the way other governments have already begun to cite the United States' Guantanamo policy to justify their own repressive **[**29]** policies are set forth in Lawyers Committee for Human Rights, Assessing the New Normal: Liberty and Security for the Post-September 11 United States, at 77-80 (2003).

(4) The government's putative trump card is that Hamdan's rights under the Geneva Conventions, if any, and whatever they are, are not enforceable by this Court -- that, in effect, Hamdan has failed **[*164]** to state a claim upon which relief can be granted -- because the Third Geneva Convention is not "self-executing" and does not give rise to a private cause of action.

As an initial matter, it should be noted Hamdan has not asserted a "private right of action" under the Third Geneva Convention. The Convention is implicated in this case by operation of the statute that limits trials by military tribunal to "offenders . . . triable under the law of war." 10 U.S.C. § 821. The government's argument thus amounts to the assertion that no federal court has the authority to determine whether the Third Geneva Convention has been violated, or, if it has, to grant relief from the violation.

HN18 Treaties made under the authority of the United States are the supreme law of the land. U.S. Const. art. VI, cl. 2 **[**30]** . United States courts are bound to give effect to international law and to international agreements of the United States unless such agreements are "non-self-executing." The Paquete Habana, 175 U.S. 677, 708, 44 L. Ed. 320, 20 S. Ct. 290 (1900); Restatement (Third) of the Foreign Relations Law of the United States § 111. A treaty is "non-self-executing" if it manifests an intention that it not become effective as domestic law without enactment of implementing legislation; or if the Senate in consenting to the treaty requires implementing legislation; or if implementing legislation is constitutionally required. Id. at § 111(4). The controlling law in this Circuit on the subject of whether or not treaties are self-executing is Diggs v. Richardson, 180 U.S. App. D.C. 376, 555 F.2d 848 (D.C. Cir. 1976), a suit to prohibit the importation of seal furs from Namibia, brought by a citizen plaintiff who sought to compel United States government compliance with a United Nations Security Council resolution calling on member states to have no dealings with South Africa. The decision in that case instructs HN19 a court interpreting a treaty to look to the intent of the signatory parties as manifested by the **[**31]** language of the treaty and, if the language is uncertain, then to look to the circumstances surrounding execution of the treaty. Id. at 851. Diggs relies on the Head Money Cases, Edye v. Robertson, 112 U.S. 580, 28 L. Ed. 798, 5 S. Ct. 247 (1884), which established the proposition that a "treaty 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." Id. at 598. The Court in Diggs concluded that the provisions of the Security Council resolution were not addressed to the judicial branch of government, that they did not by their terms confer rights on individuals, and that instead the resolution clearly called upon governments to take action. Diggs, 555 F.2d at 851.

The Geneva Conventions, of course, are all about prescribing rules by which the rights of individuals may be determined. Moreover, as petitioner and several of the *amici* have

pointed out, see, e.g., Pet'r's Mem. Supp. of Pet. at 39 n.11, it is quite clear from the legislative history of the ratification of the Geneva Conventions that Congress carefully considered what further legislation, **[**32]** if any, was deemed "required to give effect to the provisions contained in the four conventions," S. Rep. No. 84-9, at 30 (1955), and found that only four provisions required implementing legislation. Articles 5 and 102, which are dispositive of Hamdan's case, supra, were not among them. What did require implementing legislation were Articles 129 and 130, providing for additional criminal penalties to be imposed upon those who engaged in "grave" violations of the Conventions, such as torture, medical experiments, or "wilful" denial of Convention protections, none of which is **[*165]** involved here. Third Geneva Convention, art. 130. Judge Bork must have had those provisions in mind, together with Congress' response in enacting the War Crimes Act, 18 U.S.C. § 2441, when he found that the Third Geneva Convention was not self-executing because it required "implementing legislation." Tel-Oren v. Libyan Arab Republic, et al., 233 U.S. App. D.C. 384, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring). That opinion is one of three written by a three-judge panel, none of which was joined by any other member of the panel. It is not Circuit precedent and it is, I respectfully **[**33]** suggest, erroneous. HN20 "Some provisions of an international agreement may be self-executing and others non-self-executing." Restatement (Third) of Foreign Relations Law of the United States § 111 cmt. h. n10

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n10 The observation in Al-Odah v. United States, 355 U.S. App. D.C. 189, 321 F.3d 1134, 1147 (D.C. Cir. 2003), that the Third Geneva Convention is not self-executing merely relies on the reasons stated by Judge Bork in Tel-Oren, 726 F.2d at 809. Since that observation was not essential to the outcome in Al-Odah, and since in any event Al-Odah was reversed by the Supreme Court, I am not bound by it.

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HN21 Because the Geneva Conventions were written to protect individuals, because the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation, because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and because nothing in the Third **[**34]** Geneva Convention itself manifests the contracting parties' intention that it not become effective as domestic law without the enactment of implementing legislation, I conclude that, insofar as it is pertinent here, the Third Geneva Convention is a self-executing treaty. n11 I further conclude that it is at least a matter of some doubt as to whether or not Hamdan is entitled to the protections of the Third Geneva Convention as a prisoner of war and that accordingly he must be given those protections unless and until the "competent tribunal" referred to in Article 5 concludes otherwise. It follows from those conclusions that Hamdan may not be tried for the war crimes he is charged with except by a court-martial duly convened under the Uniform Code of Military Justice.

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n11 Hamdan is a citizen of Yemen. The government has refused permission for Yemeni

diplomats to visit Hamdan at Guantanamo Bay. Decl. of Lieutenant Commander Charles Swift at 4 (May 3, 2004). It ill behooves the government to argue that enforcement of the Geneva Convention is only to be had through diplomatic channels.

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c. Abstention is appropriate with respect to Hamdan's rights under Common Article 3.

There is an argument that, even if Hamdan does not have prisoner-of-war status, Common Article 3 would be violated by trying him for his alleged war crimes in this Military Commission. Abstention is appropriate, and perhaps required, on that question, because, *HN22* unlike Article 102, which unmistakably mandates trial of POW's only by general court-martial and thus implicates the jurisdiction of the Military Commission, the Common Article 3 requirement of trial before a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" has no fixed, term-of-art meaning. A substantial number of rights and procedures conferred by the UCMJ are missing from the Military Commission's rules. See infra note 12; Generals and Admirals Amicus Brief at 24. I am aware of no authority **[*166]** that defines the word "guarantees" in Common Article 3 to mean that all of these rights must be guaranteed in advance of trial. Only Hamdan's right to be present at every phase of his trial and to see all the evidence admitted against him is of immediate pretrial concern. **[**36]** That right is addressed in the next section of this opinion.

**3. In at least one critical respect, the procedures of the Military Commission are fatally contrary to or inconsistent with those of the Uniform Code of Military Justice.**

In most respects, the procedures established for the Military Commission at Guantanamo under the President's order define a trial forum that looks appropriate and even reassuring when seen through the lens of American jurisprudence. The rules laid down by Military Commission Order No. 1, 32 C.F.R. § 9.3, provide that the defendant shall have appointed military counsel, that he may within reason choose to replace "detailed" counsel with another military officer who is a judge advocate if such officer is available, that he may retain a civilian attorney if he can afford it, that he must receive a copy of the charges in a language that he understands, that he will be presumed innocent until proven guilty, that proof of guilt must be beyond a reasonable doubt, that he must be provided with the evidence the prosecution intends to introduce at trial and with any exculpatory evidence known to the prosecution, with important exceptions discussed below, **[**37]** that he is not required to testify at trial and that the Commission may not draw an adverse inference from his silence, that he may obtain witnesses and documents for his defense to the extent necessary and reasonably available, that he may present evidence at trial and cross-examine prosecution witnesses, and that he may not be placed in jeopardy twice for any charge as to which a finding has become final. Id. at §§ 9.4 and 9.5.

The Military Commission is remarkably different from a court-martial, however, in two important respects. The first has to do with the structure of the reviewing authority after trial; the second, with the power of the appointing authority or the presiding officer to exclude the accused from hearings and deny him access to evidence presented against him. n12

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n12 A great many other differences are identified and discussed in David Glazier, Kangaroo Court or Competent Tribunal? Judging the 21st Century Military Commission, 89 Va. L. Rev. 2005, 2015-2020 (2003). Differences include (not an exhaustive list):

Article 16 requires that every court-martial consist of a military judge and no less than five members, as opposed to the Military Commission rules that require only three members. Military Commission Order No. 1 (4) (A); Article 10 of the UCMJ provides a speedy trial right, while the Military Commission rules provide none. Article 13 states that pre-trial detention should not be more rigorous than required to ensure defendant's presence, while the Commission rules contain no such provision and, in fact, Hamdan was held in solitary confinement in Camp Echo for over 10 months. Article 30 states that charges shall be signed by one with personal knowledge of them or who has investigated them. The Military Commission rules include no such requirement. Article 31 provides that the accused must be informed before interrogation of the nature of the accusation, his right not to make any statement, and that statements he makes may be used in proceedings against him, and further provides that statements taken from the accused in violation of these requirements may not be received in evidence at a military proceeding. The Military Commission rules provide that the accused may not be forced to testify at his own trial, but the rule does not "preclude admission of evidence of prior statements or conduct of the Accused." Military Commission Order No. 1 (5) (F). Article 33 states that the accused will receive notice of the charges against him within eight days of being arrested or confined unless written reason is given why this is not practicable. The Military Commission rules include no such requirement, and in fact, Hamdan, after being moved to Camp Echo for pre-commission detainment, was not notified of the charges against him for over 6 months. Article 38 provides the accused with certain rights before charges brought against him may be "referred" for trial, which include the right to counsel and the right to present evidence on his behalf. The Military Commission rules provide for no pre-trial referral process at all. Article 41 gives each side one peremptory challenge, while the Military Commission rules provide for none. Article 42 requires all trial participants to take an oath to perform their duties faithfully. The Military Commission rules allow witnesses to testify without taking an oath. Military Commission Order No. 1 (6) (D). Article 52 requires three-fourths concurrence to impose a life sentence. The Military Commission rules only require two-thirds concurrence of the members to impose such a sentence. Military Commission Order No. 1 (6) (F). Article 26 provides that military judges do not vote on guilt or innocence. Under the Military Commission rules, the Presiding Officer is a voting member of the trial panel. Military Commission Order No. 1 (4) (A).

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**[*167]** Petitioner's challenge to the first difference is unsuccessful. It is true that the President has made himself, or the Secretary of Defense acting at his direction, the final reviewing authority, whereas under the Uniform Code of Military Justice there would be two levels of independent review by members of the Third Branch of

government -- an appeal to the Court of Appeals for the Armed Forces, whose active bench consists of five civilian judges, and possible review by the Supreme Court on writ of certiorari. The President has, however, established a Review Panel that will review the trial record and make a recommendation to the Secretary of Defense, or, if the panel finds an error of law, return the case for further proceedings. The President has appointed to that panel some of the most distinguished civilian lawyers in the country (who may receive temporary commissions to fulfill the requirement that they be "officers," see Military Commission Order No. 1 (6)(H); 32 C.F.R. 9.6(h)). n13 And, as for the President's naming himself or the Secretary of Defense as the final reviewing authority, that, after all, is what a military commission is. If Hamdan is triable by any military **[**39]** tribunal, the fact that final review of a finding of guilt would reside in the President or his designee is not "contrary to or inconsistent with" the UCMJ.

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n13 Griffin B. Bell, a former United States Circuit Judge and Attorney General; William T. Coleman, Jr., a former Secretary of Transportation; Edward George Biester, Jr., a former Congressman, former Pennsylvania Attorney General, and current Pennsylvania Judge; and Frank J. Williams, Chief Justice of the Rhode Island Supreme Court. See Dep't of Defense, Military Commission Biographies, http://www.defenselink.mil/news/Aug2004/commissions_biographies.html.

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The second difference between the procedures adopted for the Miliary Commission and those applicable in a court-martial convened under the Uniform Code of Military Justice is far more troubling. That difference lies in the treatment of information that is classified; information that is otherwise "protected"; or information that might implicate the physical safety of participants, including witnesses, **[**40]** or the integrity of intelligence and law enforcement sources and methods, or "other national security interests." See Military Commission Order No. 1 (6)(B)(3); 32 C.F.R. § 9.6(b). Under the Secretary of Defense's regulations, the Military Commission must "hold open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer." Id. Detailed military defense counsel may not be excluded from proceedings, nor may evidence be received **[*168]** that has not been presented to detailed defense counsel, Military Commission Order No. 1 (6)(B)(3), (6)(D)(5); 32 C.F.R. §§ 9.6(b)(3), (d)(5). The accused himself may be excluded from proceedings, however, and evidence may be adduced that he will never see (because his lawyer will be forbidden to disclose it to him). See id.

Thus, for example, testimony may be received from a confidential informant, and Hamdan will not be permitted to hear the testimony, see the witness's face, or learn his name. If the government has information developed by interrogation of witnesses in Afghanistan or elsewhere, it can offer such evidence in transcript form, or even as summaries of transcripts. See Military Commission **[**41]** Order No. 1

(6)(D); 32 C.F.R. § 9.6(d). The Presiding Officer or the Appointing Authority may receive it in evidence if it meets the "reasonably probative" standard but forbid it to be shown to Hamdan. See id. As counsel for Hamdan put it at oral argument, portions of Mr. Hamdan's trial can be conducted "outside his presence. He can be excluded, not for his conduct, [but] because the government doesn't want him to know what's in it. They make a great big deal out of I can be there, but anybody who's practiced trial law, especially criminal law, knows that where you get your cross examination questions from is turning to your client and saying, 'Did that really happen? Is that what happened?' I'm not permitted to do that." 10/25/04 Tr. at 97.

It is obvious beyond the need for citation that such a dramatic deviation from the confrontation clause could not be countenanced in any American court, particularly after Justice Scalia's extensive opinion in his decision this year in Crawford v. Washington, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004). It is also apparent that the right to trial "in one's presence" is established as a matter of international humanitarian and human rights law. **[**42]** n14 But it is unnecessary to consider whether Hamdan can rely on any American constitutional notions of fairness, or whether the nature of these proceedings really is, as counsel asserts, akin to the Star Chamber, 10/25/04 Tr. at 97 (and violative of Common Article 3), because -- HN23 at least in this critical respect -- the rules of the Military Commission are fatally "contrary to or inconsistent with" the statutory requirements for courts-martial convened under the Uniform Code of Military Justice, and thus unlawful.

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n14 International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, art. 14(d)(3); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, art. 75.4(e). "This includes, at a minimum, all hearings in which the prosecutor participates. E.g., Eur.Ct.H.Rts., Belziuk v. Poland, App. No. 00023103/93, Judgment of 25 March 1998, para. 39." Brief Amici Curiae of Louise Doswald-Beck et al. at 32-33 n.137. In this country, as Justice Scalia noted in Crawford v. Washington, 124 S. Ct. at 1363, the right to be present was held three years after the adoption of the Sixth Amendment to be a rule of common law "founded on natural justice" (quoting from State v. Webb, 2 N.C. 103 (1794)).

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HN24 In a general court-martial conducted under the UCMJ, the accused has the right to be present during sessions of the court:
HN25 **When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military**

**judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and, in cases in which a military judge has [*169] been detailed to the court, the military judge.**

UCMJ Article 39(b), 10 U.S.C. § 839(b) (emphasis added).

HN26 Article 36 of the Uniform Code of Military Justice, 10 U.S.C. § 836(a), 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, and procedures for courts of inquiry, 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 [**44] in the United States district courts, but which may not be contrary to or inconsistent with this chapter. (Emphasis added.)**

The government argues for procedural "flexibility" in military commission proceedings, asserting that

construing Article 36 rigidly to mean that there can be no deviation from the UCMJ . . . would have resulted in having virtually all of the UCMJ provisions apply to the military commissions, which would clearly be in conflict with historical practice, as recognized by the Supreme Court, in both Yamashita and Madsen, and also inconsistent with Congress' intent, as reflected in Articles 21 and 36, and other provisions of the UCMJ that specifically mention commissions when a particular rule applies to them.

10/25/04 Tr. 26-27. But HN27 the language of Article 36 does not require rigid adherence to all of the UCMJ's rules for courts-martial. It proscribes only procedures and modes of proof that are "contrary to or inconsistent with" the UCMJ. n15

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n15 In *Kangaroo Court or Competent Tribunal?,* supra note 14 at 2020-22, the author suggests that one possible reading of this provision would require consistency only with those nine UCMJ articles (of 158 total) that expressly refer to or recite their applicability to military commissions. A review of the articles that contain such references or recitals, however, see id. at 2014 n.23, demonstrates the implausibility of such a reading.

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As for the government's reliance on Yamashita and Madsen: Yamashita offers support for the government's position only if developments between 1946 and 2004 are ignored. In 1946, the Supreme Court held that Article 38 of the Articles of War (the predecessor of Article 36 of the UCMJ) did not provide to enemy combatants in military tribunals the procedural protections (in that case, restrictions on the use of depositions) available in courts-martial under the Articles of War. Yamashita, 327 U.S. at 18-20. The Court's holding depended upon the fact that General Yamashita, an enemy combatant, was not subject to trial by courts-martial under then Article 2 of the Articles of War (the predecessor to Article 2 of the UCMJ), which conferred courts-martial jurisdiction only over U.S. military personnel and those affiliated with them. Id. at 19-20. The Court held that Congress intended to grant court-martial protections within tribunals only to those persons who could be tried under the laws of war in either courts-martial or tribunals. See id. The UCMJ and the 1949 Geneva Conventions had not come into effect in 1946. HN28 Article 2 of the UCMJ is now **[**46]** broader than Article 2 of the Articles of War. See generally Library of Congress, Index and Legislative History of the UCMJ (1950), http://www.loc.gov/rr/frd/Military_Law/index_legHistory.html. It has been expanded to include as persons subject to court-martial, both prisoners of war, 10 U.S.C. § 802(a)(9), and "persons within an area leased by or otherwise reserved or acquired **[*170]** for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands." Id. § 802(a)(12). One or both of those new categories undoubtedly applies to petitioner. For this reason, Yamashita's holding now arguably gives more support to petitioner's case than to the government's. n16

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n16 Yamashita has been undercut by history in another important respect. The Supreme Court found the guarantee of trial by court-martial for prisoners of war in the 1929 Geneva Convention inapplicable to General Yamashita because it construed that provision as applicable only to prosecutions for acts committed while in the status of prisoner of war. HN29 The Third Geneva Convention, adopted after and in light of Yamashita, made it clear that the court-martial trial provision applies as well to offenses committed by combatants while combatants. Third Geneva Convention, art. 85. See also, Glazier, supra note 12 at 2079-80.

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Madsen follows Yamashita in its general characterization of military commissions as "our commonlaw war courts" and states that "neither their procedure nor their jurisdiction has been prescribed by statute." Madsen, 343 U.S. at 346-47. It does not appear that any procedural issue was actually raised in Madsen, however, nor were the Geneva Conventions addressed in any way in that case. Madsen was an American citizen, the dependent wife of an Armed Forces member, charged with murdering her husband in the American Zone of Occupied Germany in 1947 and

tried there by the United States Court of the Allied High Commission for Germany. Her argument, which the Court rejected, was simply that the jurisdiction of military commissions over civilian offenders and non-military offenses was automatically ended by amendments to the Articles of War enacted in 1916 that extended the jurisdiction of courts-martial to persons accompanying United States forces outside the territorial jurisdiction of the United States. Id. at 351-52.

Even though Madsen presented no procedural issue, the Supreme Court did generally review the procedures applicable to Madsen's **[**48]** trial. A comparison between those procedures and the rules of the Guantanamo Military Commission is not favorable to the government's position here. In Madsen, United States Military Government Ordinance No. 2 (the analogue of the Military Commission Order in this case) provided, under "rights of accused":

Every person accused before a military government court shall be entitled . . . to be present at his trial, to give evidence and to examine or cross-examine any witness; but the court may proceed in the absence of the accused if the accused has applied for and been granted permission to be absent, or if the accused is believed to be a fugitive from justice.

Id. at 358 n.24. There was no provision for the exclusion of the accused if classified information was to be introduced.

The government's best argument, drawing on language found in both Yamashita and Madsen, is that a "commonlaw war court" has been "adapted in each instance to the need that called it forth," 343 U.S. at 347-48 (citing Yamashita, 327 U.S. at 18-23). Neither the President in his findings and determinations nor the government in its briefs **[**49]** has explained what "need" calls forth the abandonment of the right Hamdan would have under the UCMJ to be present at every stage of his trial and to confront and **[*171]** cross-examine all witnesses and challenge all evidence brought against him. Presumably the problems of dealing with classified or "protected" information underlie the President's blanket finding that using the regular rules is "not practicable." The military has not found it impracticable to deal with classified material in courts-martial, however. HN30 An extensive and elaborate process for dealing with classified material has evolved in the Military Rules of Evidence. Mil. R. Evid. 505; see 10/25/04 Tr. 131-32. Alternatives to full disclosure are provided, Mil. R. Evid. 505(i)(4)(D). Ultimately, to be sure, the government has a choice to make, if the presiding military judge determines that alternatives may not be used and the government objects to disclosure of information. At that point, the conflict between the government's need to protect classified information and the defendant's right to be present becomes irreconcilable, and the only available options are to strike or preclude the testimony of a witness, or declare **[**50]** a mistrial, or find against the government on any issue as to which the evidence is relevant and material to the defense, or dismiss the charges (with or without prejudice), Mil. R. Evid. 505(i)(4)(E). The point is that

the rules of the Military Commission resolve that conflict, not in favor of the defendant, but in favor of the government.

Unlike the other procedural problems with the Commission's rules that are discussed elsewhere in this opinion, this one is neither remote nor speculative: Counsel made the unrefuted assertion at oral argument that Hamdan has already been excluded from the *voir dire* process and that "the government's already indicated that for two days of his trial, he won't be there. And they'll put on the evidence at that point." 10/25/04 Tr. 132. Counsel's appropriate concern is not only for the established right of his client to be present at his trial, but also for the adequacy of the defense he can provide to his client. HN31 The relationship between the right to be present and the adequacy of defense is recognized by military courts, which have interpreted Article 39 of the UCMJ in the light of Confrontation Clause jurisprudence. The leading Supreme Court **[**51]** case is Maryland v. Craig, 497 U.S. 836, 111 L. Ed. 2d 666, 110 S. Ct. 3157 (1990) (one-way television viewing of witness in child abuse case permissible under rule of necessity), which noted that the "central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact" and that the "elements of confrontation" -- "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact," serve among other things to enhance the accuracy of fact-finding by "reducing the risk that a witness will wrongfully implicate an innocent person." Id. at 846 (internal citations omitted).

Following Craig in a military case involving child abuse, the Court of Appeals for the Armed Forces found that a military judge had misapplied the Supreme Court's holding when he excluded the defendant from the courtroom during a general court-martial:
There [in Craig], the witness was outside the courtroom and the defendant was present. Here, the witness was in the courtroom and appellant was excluded. While appellant could observe **[**52]** J's testimony, he could not observe the reactions of the court members or the military judge, and they could not observe his demeanor. He could not communicate with his counsel except through the bailiff, who was not a member of the defense team. We hold that this procedure violated the Sixth Amendment, Article 39, and RCM 804. HN32 While Craig and [United States v. Williams, 37 M.J. 289 (C.M.A. 1993)] permit restricting an accused's face-to-face **[*172]** confrontation of a witness, they do not authorize expelling an accused from the courtroom.

United States v. Daulton, 45 M.J. 212, 219 (C.A.A.F. 1996); see also United States v. Longstreath, 45 M.J. 366 (C.A.A.F. 1996) (defendant separated from witness by television but present in courtroom). n17

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n17 The statute Congress enacted after and in light of the Craig opinion, 18 U.S.C. § 3509, carefully protects the rights of child victims and witnesses in abuse cases but preserves the right of the accused to be present. Even if a child witness is permitted to testify by videotaped deposition, the accused must be "present" via two-way television, and the defendant must be "provided with a means of private, contemporaneous communication with the defendant's attorney during the deposition." 18 U.S.C. § 3509(b) (2) (B) (iv).

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HN33 A tribunal set up to try, possibly convict, and punish a person accused of crime that is configured in advance to permit the introduction of evidence and the testimony of witnesses out of the presence of the accused is indeed substantively different from a regularly convened court-martial. If such a tribunal is not a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," it is violative of Common Article 3. That is a question on which I have determined to abstain. In the meantime, however, I cannot stretch the meaning of the Military Commission's rule enough to find it consistent with the UCMJ's right to be present. 10 U.S.C. § 839. HN34 A provision that permits the exclusion of the accused from his trial for reasons other than his disruptive behavior or his voluntary absence is indeed directly contrary to the UCMJ's right to be present. I must accordingly find on the basis of the statute that, so long as it operates under such a rule, the Military Commission cannot try Hamdan.

**4. Hamdan's detention claim appears to be moot, and his speedy trial and equal protection claims need not be [**54] ruled upon at this time.**

Until a few days before the oral argument on Hamdan's petition, his most urgent and striking claim was that he had been unlawfully and inhumanely held in isolation since December 2003 and that such treatment was affecting his mental and psychological health as well as his ability to assist in the preparation of his defense. Late on the Friday afternoon before the oral argument held on Monday, October 25, 2004, the government filed its "notice of a change in circumstances," advising the court that Hamdan had been moved back to Camp Delta -- a separate wing of Camp Delta, to be sure, but nevertheless an open-air part of Camp Delta where pre-commission detainees can communicate with each other, exercise, and practice their religion. 10/25/04 Tr. at 11-12. That change in status may not exactly moot Hamdan's claim about his confinement in isolation, which the government is capable of repeating and which has evaded review. The treatment Hamdan may or may not be afforded in the future, however, is not susceptible to review on a writ of habeas corpus.

The second most urgent and most important claim in Hamdan's original petition was his claim of entitlement to **[**55]** the protection of the Uniform Code of Military Justice's speedy trial rule and his assertion that he had been detained more than the maximum 90 days permitted by Article 103 of the Third Geneva

Convention. These concerns were more urgent before Hamdan was transferred out of Camp Echo and back to Camp Delta and before the Supreme Court made it clear, in Hamdi, that, whether or not Hamdan has been charged with a crime, he may be detained **[*173]** for the duration of the hostilities in Afghanistan if he has been appropriately determined to be an enemy combatant. n18 HN35 The UCMJ's speedy trial requirements establish no specific number of days that will require dismissal of a suit. HN36 Article 103 of the Third Geneva Convention does bar pretrial detention exceeding 90 days, but it provides no mechanism or guidance for dealing with violations. The record does not permit a careful analysis of speedy trial issues under the test for the correlative Sixth Amendment right by Barker v. Wingo, 407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972). It is well established in any event that HN37 the critical element of prejudice is best evaluated post-trial. United States. v. MacDonald, 435 U.S. 850, 858-9, 56 L. Ed. 2d 18, 98 S. Ct. 1547 (1978).

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n18 Hamdan does not currently challenge his detention as an enemy combatant in proceedings before this Court.

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It is also unnecessary for me to decide whether, by virtue of his detention at Guantanamo Bay, Hamdan has any rights at all under the United States Constitution or under 42 U.S.C. § 1981. n19

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n19 The Supreme Court's recent decision in Rasul does little to clarify the Constitutional status of Guantanamo Bay but may contain some hint that non-citizens held at Guantanamo Bay have some Constitutional protection. See Rasul, 124 S. Ct. at 2698 n.15.

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**CONCLUSION**

It is now clear, by virtue of the Supreme Court's decision in Hamdi, that HN38 the detentions of enemy combatants at Guantanamo Bay are not unlawful per se. The granting (in part) of Hamdan's petition for habeas corpus accordingly brings only limited relief. The order that accompanies this opinion provides: (1) that, unless and until a competent tribunal determines that Hamdan is not entitled to POW status, he may be tried for the offenses with which he is charged only by court-martial under the Uniform Code **[**57]** of Military Justice; (2) that, unless and until the Military Commission's rule permitting Hamdan's exclusion from

commission sessions and the withholding of evidence from him is amended so that it is consistent with and not contrary to UCMJ Article 39, Hamdan's trial before the Military Commission would be unlawful; and (3) that Hamdan must be released from the pre-Commission detention wing of Camp Delta and returned to the general population of detainees, unless some reason other than the pending charges against him requires different treatment. Hamdan's remaining claims are in abeyance.

JAMES ROBERTSON

United States District Judge

November 8, 2004

**ORDER**

For the reasons set forth in the accompanying memorandum opinion it is

**ORDERED** that the petition of Salim Ahmed Hamdan for habeas corpus [1-1] is **granted in part.** It is

**FURTHER ORDERED** that the cross-motion to dismiss of Donald H. Rumsfeld [1-84] is **denied.** It is

**FURTHER ORDERED** that, unless and until a competent tribunal determines that petitioner is not entitled to the protections afforded prisoners-of-war under Article 4 of the Geneva Convention Relative to the Treatment of **[**58]** Prisoners of War of August 12, 1949, he may **[*174]** not be tried by Military Commission for the offenses with which he is charged. It is

**FURTHER ORDERED** that, unless and until the rules for Military Commissions (Department of Defense Military Commission Order No. 1) are amended so that they are consistent with and not contrary to Uniform Code of Military Justice Article 39, 10 U.S.C. § 839, petitioner may not be tried by Military Commission for the offenses with which he is charged. It is

**FURTHER ORDERED** that petitioner be released from the pre-Commission detention wing of Camp Delta and returned to the general population of Guantanamo detainees, unless some reason other than the pending charges against him requires different treatment. And it is

**FURTHER ORDERED** that petitioner's remaining claims are **in abeyance,** the Court having abstained from deciding them.

JAMES ROBERTSON

United States District Judge

In re Guantanamo Detainee Cases

Civil Action Nos. 02-CV-0299 (CKK), 02-CV-0828 (CKK), 02-CV-1130 (CKK), 04-CV-1135 (ESH), 04-CV-1136 (JDB), 04-CV-1137 (RMC), 04-CV-1144 (RWR), 04-CV-1164 (RBW) 04-CV-1194 (HHK), 04-CV-1227 (RBW), 04-CV-1254 (HHK)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

2005 U.S. Dist. LEXIS 5295

February 3, 2005, Decided

**PRIOR HISTORY:** In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 2005 U.S. Dist. LEXIS 1236 (D.D.C., 2005)

**COUNSEL:** **[*1]** For MAHMOAD ABDAH, Detainee, Camp Delta, MAHMOAD ABDAH AHMED as next friend of Mahmoad Abdah also known as MAHMOOD ABDO AHMED BIN AHMED, MAJID MAHMOUD AHMED, Detainee, Camp Delta, also known as MAJED MOHMOOD also known as MAJID M. ABDU AHMED, MAHMOUD AHMED as next friend of Majid Abdah Ahmed, ABDULMALIK ABDULWAHHAB AL-RAHABI, Detainee, Camp Delta, AHMED ABDULWAHHAB as next friend of Abdulmalik Abdulwahhab Al-Rahabi, MAKHTAR YAHIA NAJI AL-WRAFIE, Detainee, Camp Delta, FOADE YAHIA NAJI AL-WRAFIE, as next friend of Makhtar Yahia Naji Al-Wrafie, AREF ABD IL RHEEM, Detainee, Camp Delta, AREF ABD AL RAHIM as next friend of Aref Abd Il Rheem, YASEIN KHASEM MOHAMMAD ESMAIL, Detainee, Camp Delta, JAMEL KHASEM MOHAMMAD as next friend of Yasein Khasem Mohammad Esmail, ADNAN FARHAN ABDUL LATIF, Detainee, Camp Delta, MOHAMED FARHAN ABDUL LATIF as next friend of Adnan Farhan Abdul Laity, JAMAL MAR'I, Detainee, Camp Delta, NABIL MOHAMED MAR'I as next friend of Jamal Mar'I, OTHMAN ABDULRAHEEM MOHAMMAD, Detainee, Camp Delta, ARAF ABDULRAHEEM MOHAMMAD as next friend Othman Abdulraheem Mohammad, ADIL EL HAJ OBAID, Detainee, Camp Delta, NAZEM SAEED EL HAJ OBAID as next friend of Adil Saeed El Haj Obaid, **[*2]** MOHAMED MOHAMED HASSAN ODAINI, Detainee, Camp Delta, BASHIR MOHAMED HASSAN ODAINI as next friend of Mohamed Mohamed Hassan Odaini, SADEQ MOHAMMED SAID, Detainee, Camp Delta, ABD ALSALAM MOHAMMED SAEED as next friend of Sadeq Mohammed Said, FAROUK ALI AHMED SAIF, Detainee, Camp Delta, SHEAB AL MOHAMEDI as next friend of Farouk Ali Ahmed Saif, SALMAN YAHALDI HSAN MOHAMMED SAUD, Detainee, Camp Delta, YAHIVA HSANE MOHAMMED SAUD AL-RBUAYE as next friend of Salman Yahaldi Hsan Mohammed Saud, Petitioners: David H. Remes, COVINGTON & BURLING, Washington, DC; Marc D. Falkoff, COVINGTON & BURLING, New York, NY.

For GEORGE W. BUSH, JR., President of the United States, Respondent: Lisa Ann Olson, Preeya M. Noronha, Robert J. Katerberg, Terry Marcus Henry, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For DONALD RUMSFELD, Secretary, United States Department of Defense, JAY HOOD, Army Brig. Gen. Commander, Joint Task Force-GTMO, NELSON J. CANNON, Army Col., Commander, Camp Delta, all respondents are sued in their official and personal capacities, Respondents: David H. Remes, COVINGTON & BURLING, Washington, DC; Lisa Ann Olson, Preeya M. Noronha, Robert J. Katerberg, Terry Marcus Henry, U. **[*3]** S. DEPARTMENT OF JUSTICE, Washington, DC.

For CHARLES B. GITTINGS, JR., Amicus: Pro se, Manson, WA.

**JUDGES:** JOYCE HENS GREEN, United States District Judge.

**OPINIONBY:** JOYCE HENS GREEN

**OPINION: ORDER GRANTING IN PART AND DENYING IN PART RESPONDENTS' MOTION FOR CERTIFICATION OF JANUARY 31, 2005 ORDERS AND FOR STAY**

Upon consideration of respondents' Motion for Certification of January 31, 2005 Interlocutory Orders for Appeal Pursuant to 28 U.S.C. § 1292(b) and to Stay Proceedings Pending Appeal, it is hereby

ORDERED that the respondents' motion is granted in part and denied in part. It is

FURTHER ORDERED that the Court finds that its January 31, 2005 Order (and Memorandum Opinion) Denying in Part and Granting in Part Respondents' Motion to Dismiss or for Judgment as a Matter of Law and Requesting Briefing on the Future Proceedings in These Cases (hereinafter "Order on Motion to Dismiss") involves controlling questions of law as to which there is substantial ground for difference of opinion, such as whether petitioners possess enforceable rights under the Fifth Amendment to the United States Constitution; whether assuming arguendo that petitioners possess such **[*4]** rights, the Combatant Status Review Tribunals comport with those rights; and whether certain of the petitioners possess rights under the Third Geneva Convention that are judicially enforceable. It is

FURTHER ORDERED that the Court does not find that the Court's January 31, 2005 Order Granting November 18, 2004 Motion for Access to Unredacted Factual Returns (hereinafter "Order on Discovery Motion") involves controlling questions of law to which there is substantial ground for difference of opinion. It is

FURTHER ORDERED that the Court finds that an immediate appeal of the Order on Motion to Dismiss but not of the Order on Discovery Motion may materially advance the ultimate termination of this litigation. It is

FURTHER ORDERED that the Order on Motion to Dismiss is hereby CERTIFIED for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). It is

FURTHER ORDERED that, pursuant to 28 U.S.C. § 1292(b), the Order on Motion to Dismiss shall be deemed amended to include and reflect the findings in this Order. It is

FURTHER ORDERED that the respondents' request for certification of the Order on Discovery Motion is denied. It is

FURTHER **[*5]** ORDERED that the proceedings in the eleven above-captioned cases are stayed for all purposes pending resolution of all appeals in this matter. The stay for "all purposes" includes a stay of the resolution of the respondents' motions to dismiss the claims of petitioners who have been transferred out of the custody of the United States.

It shall be up to the individual Judges assigned to the other Guantanamo detainee cases not contained in the above caption to determine whether stays should be granted in those cases.

IT IS SO ORDERED.

February 3, 2005

JOYCE HENS GREEN

United States District Judge

In re Guantanamo Detainee Cases

Civil Action Nos. 02-CV-0299 (CKK), 02-CV-0828 (CKK), 02-CV-1130 (CKK), 04-CV-1135 (ESH), 04-CV-1136 (JDB), 04-CV-1137 (RMC), 04-CV-1144 (RWR), 04-CV-1164 (RBW), 04-CV-1194 (HHK), 04-CV-1227 (RBW), 04-CV-1254 (HHK)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

355 F. Supp. 2d 443; 2005 U.S. Dist. LEXIS 1236

January 31, 2005, Decided

**SUBSEQUENT HISTORY:** Counsel Amended February 4, 2005. Certification granted by, Stay granted by In re Guantanamo Detainee Cases, 2005 U.S. Dist. LEXIS 5295 (D.D.C., Feb. 3, 2005)
Motion denied by Fawzi Khalid Abdullah Fahad Al Odah v. United States, 355 F. Supp. 2d 482, 2005 U.S. Dist. LEXIS 2050 (D.D.C., 2005)
Motion denied by In re Guantanamo Detainee Cases, 355 F. Supp. 2d 482, 2005 U.S. Dist. LEXIS 2051 (D.D.C., 2005)

**PRIOR HISTORY:** In re Guantanamo Detainee Cases, 344 F. Supp. 2d 174, 2004 U.S. Dist. LEXIS 22525 (D.D.C., 2004)

**DISPOSITION:** Respondents' motions to dismiss or for judgment as matter of law granted in part and denied in part.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** In petitioner detainees' habeas corpus action filed under 28 U.S.C.S. §§ 2241, 2242 challenging the legality of their detention at the United States Naval Base at Guantanamo Bay, Cuba (Guantanamo Bay), respondent government moved to dismiss the action under Fed. R. Civ. P. 12(b)(6) or for judgment as a matter of law under Fed. R. Civ. P. 12(c).

**OVERVIEW:** The government held the detainees at Guantanamo Bay as "enemy combatants" following military operations in Afghanistan. The detainees sought habeas corpus relief, challenging the legality of their indefinite detention. The government moved to dismiss the action or for judgment as a matter of law, arguing that the detainees had no substantive rights under the United States Constitution. On review, the court denied the government's motions as to the detainees' claims under the Fifth Amendment, holding that the detainees had the fundamental right to due process under the Fifth Amendment. The court held that recognizing the existence of that right at Guantanamo Bay would not cause the government any more hardship than would recognizing the existence of constitutional rights of the detainees had they been held within the continental United States. Although the government had to take strong action to protect itself against enormous and unprecedented terrorist threats, that necessity did not negate the existence of fundamental due process rights for the detainees. The court further held that the Combatant Status Review Tribunal procedures

violated the detainees' due process rights.

**OUTCOME:** The government's motion to dismiss or for judgment on the pleadings was denied as to the detainees' Fifth Amendment claims.

**CORE TERMS:** detainee, enemy, combatant, u.s., territory, detention, tribunal, constitutional rights, motion to dismiss, plurality, classified information, alien, sovereign, military, terrorist, detained, treaty, classified, prisoner of war, terrorism, unclassified, interrogation, indefinite, abroad, torture, writ of habeas corpus, fair opportunity, fighter, custody, war crimes

**COUNSEL:** **[**1]** For SHAFIQ RASUL, SKINA BIBI, as Next Friend of Shafiq Rasul, ASIF IQBAL, MOHAMMED IQBAL, as Next Friend of Asif Iqbal, TERRY HICKS, as Next Friend of David Hicks, Petitioner: Jon W. Norris, Washington, DC; L. Barrett Boss, COZEN O'CONNOR, P.C., Washington, DC.

For DAVID HICKS, Petitioner: Barbara J. Olshansky, CENTER FOR CONSTITUTIONAL RIGHTS, New York, NY; Jon W. Norris, Washington, DC; L. Barrett Boss, COZEN O'CONNOR, P.C., Washington, DC; Leon Friedman, New York, NY; Andrew W. Vail, JENNER & BLOCK LLP, Chicago, IL; David E. Walters, JENNER & BLOCK LLP, Chicago, IL; Hillary A. Victor, JENNER & BLOCK LLP, Chicago, IL; Joshua L. Dratel, JOSHUA L. DRATEL, P.C., New York, NY; Michael D. Mori, OFFICE OF THE CHIEF DEFENSE COUNSEL, Arlington, VA; Donald Beaton Verrilli, JENNER & BLOCK, LLC., Washington, DC; Marc A. Goldman, JENNER & BLOCK, Washington, DC.

For BRICE A. GYURISKO Colonel, Commander, Joint Detention Operations Group, Joint Task, Guantanamo Bay, Cuba, JAY HOOD Brigadier General, Commander, Joint Task Force, Guantanamo Bay Cuba, JOHN D. ALTENBURG, JR., Appointing Authority for Mitlitary Commissions, Department of Defense, GORDON R. ENGLAND, Secretary of the United States **[**2]** Navy, Defendant: Lisa Ann Olson, U.S. DEPARTMENT OF JUSTICE, Washington, DC; Nicholas J. Patterson, U.S. DEPARTMENT OF JUSTICE, Washington, DC; Preeya M. Noronha, U.S. DEPARTMENT OF JUSTICE, Washington, DC; Terry Marcus Henry, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, Washington, DC.

For GEORGE WALKER BUSH, President of the United States, DONALD RUMSFELD, Secretary, United States Department of Defense, MICHAEL LEHNERT, Brigadier General, Commander, Joint Task Force-160, TERRY CARRICO, Colonel, Commander, Camp X-Ray; Respondents all sued in their official and individual capacities, Respondent: Robert D. Okun, UNITED STATES ATTORNEY'S OFFICE, Washington, DC; Lisa Ann Olson, U.S. DEPARTMENT OF JUSTICE, Washington, DC; Nicholas J. Patterson, U.S. DEPARTMENT OF JUSTICE, Washington, DC; Preeya M. Noronha, U.S. DEPARTMENT OF JUSTICE, Washington, DC; Terry Marcus Henry, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, Washington, DC.

For CENTER FOR INTERNATIONAL HUMAN RIGHTS OF NORTHWESTERN UNIVERSITY SCHOOL OF LAW, MARCO SASSOLI, VAUGHAN LOWE, FRITS KALSHOVEN, GUY S. GOOD WIN-GILL, LOUISE DOSWALD-BECK, Movants: David Richard Berz, WEIL, GOTSHAL & MANGES, L.L.P., Washington, DC.

For DAVID C. VLADECK, CARLOS M. VAZQUEZ, DAVID SLOSS, ANNE-MARIE SLAUGHTER, DAVID SCHEFFER, **[**3]** JUDITH RESNIK, JENNIFER S. MARTINEZ, KEVIN R. JOHNSON, DEREK JINKS, OONA HATHAWAY, RYAN GOODMAN, MARTIN S. FLAHERTY, WILLIAM S. DODGE, DAVID D. COLE, SARAH H. CLEVELAND, ROSA EHRENREICH BROOKS, BRUCE ACKERMAN, Movants: David C. Vladeck, Carlos M.Vazquez, Richard McKewen, Georgetown University Law Center, Institute for Public Representation, Washington, DC.

For CHARLES B. GITTINGS, JR., Amicus: Pro se, Manson, WA.

**JUDGES:** JOYCE HENS GREEN, United States District Judge.

**OPINIONBY:** JOYCE HENS GREEN

**OPINION: [*445] MEMORANDUM OPINION DENYING IN PART AND GRANTING IN PART RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW**

These eleven coordinated habeas cases were filed by detainees held as "enemy combatants" at the United States Naval Base at Guantanamo Bay, Cuba. Presently pending is the government's motion to dismiss or for judgment as a matter of law regarding all claims filed by all petitioners, including claims based on the United States Constitution, treaties, statutes, regulations, the common law, and customary international law. Counsel filed numerous briefs addressing issues raised in the motion and argued their positions at a hearing in early December 2004. Upon consideration of all filings submitted in these cases and the arguments made **[**4]** at the hearing, and for the reasons stated below, tie Court concludes that the petitioners have stated valid claims under the Fifth Amendment to the United States Constitution and that the procedures implemented by the government to confirm that the petitioners are "enemy combatants" subject to indefinite detention violate the petitioners' rights to due process of law. The Court also holds that at least some of the petitioners have stated valid claims under the Third Geneva Convention. Finally, the Court holds that the government is entitled to the dismissal of the petitioners' remaining claims.

Because this Memorandum Opinion references classified material, it is being issued **[*446]** in two versions. The official version is unredacted and is being filed with the Court Security Officer at the U.S. Department of Justice responsible for the management of classified information in these cases. The Court Security Officer will maintain possession of the original, distribute copies to counsel with the appropriate security clearances in accordance with the procedures earlier established in these cases, and ensure that the document is transmitted to the Court of Appeals should an appeal be taken. **[**5]** Classified information in the official version is highlighted in gray to alert the reader to the specific material that may not be released to the public. The other version of the Memorandum Opinion contains redactions of all classified information and, in an abundance of caution, portions of any discussions that might lead to the discovery of classified information. The redacted version is being posted in the electronic dockets of the cases and is available for public review.

**I. BACKGROUND**

In response to the horrific and unprecedented terrorist attacks by al Qaeda against the United States of America on September 11, 2001, Congress passed a joint resolution authorizing 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 . . ., 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." Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (hereinafter "AUMF"). In accordance with the AUMF, President **[**6]** George W. Bush ordered the commencement of military operations in Afghanistan against al Qaeda and the Taliban regime, which harbored the terrorist organization. During the course of the military campaign, United States forces took custody of numerous individuals who were actively fighting against allied forces on Afghan soil. Many of these individuals were deemed by military authorities to be "enemy combatants" and, beginning in early 2002, were transferred to facilities at the United States Naval Base at Guantanamo Bay, Cuba, where they continue to be detained by U.S. authorities.

In addition to belligerents captured during the heat of war in Afghanistan, the U.S. authorities are also detaining at Guantanamo Bay pursuant to the AUMF numerous individuals who were captured hundreds or thousands of miles from a battle zone in the traditional sense of that term. For example, detainees at Guantanamo Bay who are presently seeking habeas relief in the United States District Court for the District of Columbia include men who were taken into custody as far away from Afghanistan as Gambia, n1 Zambia, n2 Bosnia, n3 and Thailand. n4 Some have already been detained as long as three years **[**7]** n5 while others have been captured as recently as September 2004. n6 Although **[*447]** many of these individuals may never have been close to an actual battlefield and may never have raised conventional arms against the United States or its allies, the military nonetheless has deemed them detainable as "enemy combatants" based on conclusions that they have ties to al Qaeda or other terrorist organizations.

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n1 Jamil El-Banna and Bisher Al-Rawi, petitioners in El-Banna v. Bush, 04-CV-1144 (RWR).

n2 Martin Mubanga, petitioner in El-Banna v. Bush, 04-CV-L144 (RWR).

n3 Lakhdar Boumediene, Mohammed Nechle, Hadj Boudella, Belkacem Bensayah, Mustafa Ait Idr, and Saber Lahmar, petitioners in Boumediene v. Bush, 04-CV-l 166 (RJL).

n4 Saifullah Paracha, petitioner in Paracha v. Bush, 04-CV-2022 (PLF).

n5 E.g., the petitioners in Al Odah v. Bush, 02-CV-Q828 (CKK).

n6 E.g., Saifullah Paracha in Paracha v. Bush, 04-CV-2022 (PLF).

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All of the individuals who have been detained **[**8]** at Guantanamo Bay have been categorized to fall within a general class of people the administration calls "enemy combatants." It is the government's position that once someone has been properly designated as such, that person can be held indefinitely until the end of America's war on terrorism or until the military determines on a case by case basis that the particular detainee no longer poses a threat to the United States or its allies. Within the general set of "enemy combatants" is a subset of individuals whom the administration decided to prosecute for war crimes before a military commission established pursuant to a Military Order issued by President Bush on November 13, 2001. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). Should individuals be prosecuted and convicted in accordance with the Military Order, they would be subject to sentences with fixed terms of incarceration or other specific penalties.

Since the beginning of the military's detention operations at Guantanamo Bay in early 2002, detainees subject to criminal prosecution have been bestowed with more rights than detainees whom **[**9]** the military did not intend to prosecute formally for war crimes. For example, the military regulations governing the prosecutions of detainees required a formal notice of charges, a presumption of innocence of any crime until proven guilty, a right to counsel, pretrial disclosure to the defense team of exculpatory evidence and of evidence the prosecution intends to use at trial, the right to call reasonably available witnesses, the right to have defense counsel cross-examine prosecution witnesses, the right to have defense counsel attend every portion of the trial proceedings even where classified information is presented, and the right to an open tribal with the press present, at least for those portions not involving classified information. See Procedures for Trials by Military Commissions of Certain Non-United

States Citizens in the War Against Terrorism, 32 C.F.R. §§ 9.1 et seq. (2005). Although detainees at Guantanamo Bay not subject to prosecution could suffer the same fate as those convicted of war crimes -- potentially life in prison, depending on how long America's war on terrorism lasts -- they were not given any significant procedural rights to challenge their status **[**10]** as alleged "enemy combatants," at least until relatively recently. From the beginning of 2002 through at least June 2004, the substantial majority of detainees not charged with war crimes were not informed of the bases upon which they were detained, were not permitted access to counsel, were not given a formal opportunity to challenge their "enemy combatant" status, and were alleged to be held virtually incommunicado from the outside world. Whether those individuals deemed "enemy combatants" are entitled under the United States Constitution and other laws to any rights and, if so, the scope of those rights is the focus of the government's motion to dismiss and this Memorandum Opinion. n7

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n7 In a decision issued on November 8, 2004, Judge James Robertson ruled that the procedures for trying Guantanamo detainees for alleged war crimes by military commission were unlawful for failing to comply with the requirements for courts martial set forth in the Uniform Code of Military Justice. Hamdan v. Rumsfeld, 344 F. Supp.2d 152 (D.D.C. 2004). Only one of the detainees in the above-captioned cases has been given notice that he will be tried for war crimes. That detainee, David Hicks, a petitioner in **Hicks** v. **Bush**, 02-CV-0299 (CKK), has filed a separate motion for partial summary judgment challenging the legality of the military commission procedures. Pursuant to an order issued in that case on December 15, 2004, resolution of that motion is being held in abeyance pending final resolution of all appeals in Hamdan, This Memorandum Opinion does not address the legality of the military commission proceedings but rather focuses on the issue of the rights of detainees with respect to their classification as "enemy combatants" regardless of whether they have been formally charged with a war crime.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[**11]**

**[*448]** The first of these coordinated cases challenging the legality of the detention of alleged "enemy combatants" at Guantanamo Bay and the terms and conditions of that detention commenced nearly three years ago on February 19, 2002. Rasul v. Bush, 02-CV-0299 (CKK). The action, brought by relatives on behalf of one Australian and two British nationals as their "next friends," n8 was styled as a petition for writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2242. The initial relief sought included an order requiring the release of the detainees, an order permitting counsel to meet with the detainees in private and without government monitoring, and an order directing the cessation of interrogations of the detainees during the pendency of litigation. The asserted substantive bases for the requested relief ultimately included the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the International Covenant on Civil and Political Rights, the American Declaration on the Rights and Duties of Man, and customary international law.

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n8 *HN1* 28 U.S.C. § 2242 provides that a habeas petition may be brought "by the person for whose relief it is intended or by someone acting in his behalf."

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Less than three months after the commencement of Rasul, the second of these coordinated cases was filed. Al Odah v. Bush, 02-CV-0828 (CKK). The individuals filing suit on behalf of the twelve Kuwaiti detainees in that case did not expressly request release from custody but rather

sought judicial enforcement of the detainees' asserted rights to meet with family members, be informed of any charges against them, and have access to the courts or some other impartial tribunal to exonerate themselves of any wrongdoing. The alleged bases for these rights included the Fifth Amendment to the United States Constitution, the Alien Tort Claims Act, and the Administrative Procedure Act.

The government filed a motion to dismiss the two cases, arguing that both of them should be classified as habeas actions and asserting that because all of the detainees were aliens being held outside the sovereign territory of the United States, the District Court should dismiss the actions for lack of jurisdiction to hear their claims. The government's motion relied heavily on Johnson v. Eisentrager, 339 U.S. 763, 94 L. Ed. 1255, 70 S. Ct. 936 (1950), a Supreme Court case involving German nationals convicted by **[**13]** a United States military commission sitting in China for acts committed in China after Germany's surrender in World War II. The German nationals were eventually incarcerated in Landsberg prison in Germany and sought habeas relief, claiming their trial, conviction, and imprisonment violated Articles I and III of the United States Constitution, the Fifth Amendment, other laws of the United States, and the Geneva Convention governing the treatment of prisoners of war. The Supreme Court ultimately held that the petitioners in Eisentrager had no standing to file a claim for habeas relief in a United States court.

In a thoughtful analysis of Eisentrager and its progeny, Judge Colleen Kollar-Kotelly **[*449]** granted the government's motion to dismiss both cases. Rasul v. Bush, 215 F. Supp.2d 55 (D.D.C. 2002). The decision was based on an interpretation that Eisentrager barred claims of any alien seeking to enforce the United States Constitution in a habeas proceeding unless the alien is in custody in sovereign United States territory. Id. at 68. Recognizing that Guantanamo Bay is not part of the sovereign territory of the United States, id. at 69, **[**14]** the District Court dismissed the cases for lack of "jurisdiction to consider the constitutional claims that are presented to the Court for resolution." Id. at 73. After issuing a show cause order as to why an additional pending habeas case filed by a Guantanamo detainee, Habib v. Bush, 02-CV-1130 (CKK), should not be dismissed hi light of the decision in Rasul and Al Odah, the District Court also dismissed that case, and all three cases were appealed to the United States Court of Appeals for the District of Columbia Circuit.

On appeal, the D.C. Circuit affirmed the District Court's decisions in all three cases. Al Odah v. United States, 355 U.S. App. D.C. 189, 321 F.3d 1134 (D.C. Cir. 2003). Reviewing recent precedent involving aliens and constitutional rights, the Court of Appeals announced, "The law of the circuit now is that a foreign entity without property or presence in this country has no constitutional rights, under the dole process clause or otherwise.'" Id. at 1141 (citing People's Mojahedin Org. of Iran v. United States Dep't of State, 337 U.S. App. D.C. 106, 182 F.3d 17, 22 (D.C. Cir. 1999) and 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)). **[**15]** "The consequence," the court continued, "is that no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees, even if they have not been adjudicated enemies of the United States." Id. at 1141.

The Supreme Court reversed the D.C. Circuit's decision and held that the District Court did have jurisdiction to hear the detainees' habeas claims. Rasul v. Bush, 542 U.S. 466, 159 L. Ed. 2d 548, 124 S. Ct. 2686 (2004). The majority opinion, issued June 28, 2004, noted several facts that distinguished the Guantanamo detainees from the petitioners in Eisentrager more than fifty years earlier:

[The Guantanamo petitioners] are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States;

they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

124 S. Ct. at 2693. Emphasizing that "by **[**16]** the express terms of its agreements with Cuba, the United States exercises complete jurisdiction and control' over the Guantanamo Bay Naval Base," and highlighting that the government conceded at oral argument that "the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base," the Court concluded, "Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under [the habeas statute]." 124 S. Ct. at 2696.

The Supreme Court expressly acknowledged that the allegations contained in the petitions for writs of habeas corpus "unquestionably describe custody in violation of the Constitution or laws or treaties of the United States'" as required by the habeas statute, 124 S. Ct. at 2698 n.15 (quoting 28 U.S.C. § 2241(c)(3)), and concluded by instructing:

**[*450]** Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now. What is presently at stake is only whether the federal courts have jurisdiction to determine **[**17]** the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. Answering that question in the affirmative, we reverse the judgment of the Court of Appeals and remand for the District Court to consider in the first instance the merits of petitioners' claims.

124 S. Ct. at 2699.

On July 7, 2004, nine days after the issuance of the Rasul decision, Deputy Secretary of Defense Paul Wolfowitz issued an Order creating a military tribunal called the Combatant Status Review Tribunal (hereinafter "CSRT") to review the status of each detainee at Guantanamo Bay as an "enemy combatant." n9 It appears that this is the first formal document to officially define the term "enemy combatant" as used by the respondents. That definition is as follows:

The term "enemy combatant" shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

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n9 The document is attached as Exhibit A to the respondents' motion to dismiss and can also be found at http://www.defenseunk.mil/news/Jul2004/d20040707review.pdf.

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**[**18]**

The Deputy Secretary's Order notes that all Guantanamo detainees were previously determined to be "enemy combatants" through what the Order describes without additional specificity as "multiple levels of review by officers of the Department of Defense." Order at 1.

The Order sets forth procedures by which detainees can contest this status before a panel of three commissioned military officers.

The CSRT procedures will be described in more detail below, but in brief, under the terms of the July 7 Order and a July 29, 2004 Memorandum issued by Secretary of the Navy Gordon England implementing the Order, n10 detainees for the first time have the right to hear the factual bases for their detention, at least to the extent that those facts do not involve information deemed classified by the administration. Detainees also have the right to testify why they contend they should not be considered "enemy combatants" and may present additional evidence they believe might exculpate them, at least to the extent the tribunal finds such evidence relevant and "reasonably available." The detainees do not have a right to counsel in the proceedings, although each is assigned a military officer who **[**19]** serves as a "Personal Representative" to assist the detainee in understanding the process and presenting his case. Formal rules of evidence do not apply, and there is a presumption in favor of the government's conclusion that a detainee is in fact an "enemy combatant." Although the tribunal is free to consider classified evidence supporting a contention that an individual is an "enemy combatant," that individual is not entitled to have access to or know the details of that classified evidence.

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n10 The Implementing Memorandum is attached as Exhibit B to the motion to dismiss and can also be found at http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

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The record of the CSRT proceedings, including the tribunal's decision regarding "enemy combatant" status, is reviewed for legal sufficiency by the Staff Judge Advocate for the Convening Authority, the body **[*451]** designated by the Secretary of the Navy to appoint tribunal members and Personal Representatives. After that review, the Staff Judge Advocate makes a recommendation **[**20]** to the Convening Authority, which is then required either to approve the panel's decision or to send the decision back to the panel for further proceedings. It is the government's position that in the event a conclusion by the tribunal that a detainee is an "enemy combatant" is affirmed, it is legal to hold the detainee in custody until the war on terrorism has been declared by the President to have concluded or until the President or his designees have determined that the detainee is no longer a threat to national security. If the tribunal finally determines that a detainee should no longer be deemed an "enemy combatant," a written report of the decision is forwarded to the Secretary of Defense or his designee, who is then obligated to contact the Secretary of State for coordination of the transfer of the detainee either to his country of citizenship or elsewhere in accordance with law and U.S. foreign policy.

In the wake of the Supreme Court's decision in Rasul, several new habeas cases were filed on behalf of Guantanamo detainees in addition to those cases that were remanded by the Court as part of Rasul. As of the end of July 2004, thirteen cases involving more than sixty **[**21]** detainees were pending before eight Judges in this District Court. On July 23, 2004, the respondents filed a motion to consolidate all of the cases pending at that time. The motion was denied without prejudice three days later. On August 4, 2004, the respondents filed a motion seeking coordination of legal issues common to all cases. By order dated August 17, 2004, Judge Gladys Kessler on behalf of the Calendar and Case Management Committee granted the motion in part, designating this Judge to coordinate and manage all proceedings in the pending matters and, to the extent necessary, rule on procedural and substantive issues common to

the cases. An Executive Session Resolution dated September 15, 2004 further clarified that this Judge would identify and delineate both procedural and substantive issues common to all or some of these cases and, as consented to by the transferring judge in each case, rule on common procedural issues. The Resolution also provided that to the extent additional consent was given by the transferring. Judges, this Judge would address specified common substantive issues. The Resolution concluded by staring that any Judge who did not agree with any substantive **[**22]** decision made by this Judge could resolve the issue in his or her own case as he or she deemed appropriate. Although issues and motions were transferred to this Judge, the cases themselves have remained before the assigned Judges.

After two informal status conferences discussing, among other issues, the factual bases for the government's detention of the petitioners, this Judge issued a scheduling order requiring the respondents to file responsive pleadings showing cause why writs of habeas corpus and the relief sought by petitioners should not be granted. The order also incorporated the respondents' proposed schedule for the filing of factual returns identifying the specific bases upon which they claim the government is entitled to detain each petitioner at Guantanamo Bay as an "enemy combatant." Although most of the detainees had already been held as "enemy combatants" for more than two years and had been subjected to unspecified "multiple levels of review," the respondents chose to submit as factual support for their detention of the petitioners the records from the CSRT proceedings, which had only commenced in late August or early September 2004. Those factual returns **[**23]** were filed with the Court on a rolling basis as the CSRT proceedings were completed, with the earliest submitted on September 17, 2004 and **[*452]** the latest on December 30, 2004. Because every complete CSRT record contained classified information, respondents filed redacted, unclassified versions on the public record, submitted the full, classified versions for the Court's in camera review, and served on counsel for the petitioners with appropriate security clearances versions containing most of the classified information disclosed in the Court's copies but redacting some classified information that respondents alleged would not exculpate the detainees from their "enemy combatant" status.

During the fall, the Court resolved numerous procedural issues common to all cases, Among other matters, the Court ruled that the cases should not be transferred to the Eastern District of Virginia, where the primary respondent, Secretary of Defense Donald Rumsfeld, maintains his office, n11 ruled on protective order issues, n12 and granted the petitioners certain rights relating to access to counsel to assist in the litigation of these cases. n13

On October 4, 2004, the respondents filed their Response **[**24]** to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law in all thirteen cases pending before the Court at that time. Counsel for petitioners filed a joint opposition on November 5, 2004, which was supplemented by additional filings specific to the petitions filed in Al Odah v. United States, 02-CV-0828 (CKK); El-Banna v. Bush, 04-CV-1144 (RWR); and Boumediene v. Bush, 04-CV-1166 (RJL). Respondents filed replies in support of their original motion. The motions to dismiss in eleven of the thirteen cases were transferred by separate orders issued by the assigned Judges in accordance with the procedures set forth for the resolution of substantive matters in the September 15, 2004 Executive Resolution, n14 This Court held oral argument for the eleven cases with transferred motions on December 1, 2004. Subsequently, eight more habeas cases were filed on behalf of Guantanamo detainees. n15 Although this Memorandum Opinion addresses issues common to those new cases, counsel in those cases have not yet had the opportunity to fully briefer argue the issues on their own behalf. Accordingly, while the Judges assigned to those cases are free, **[**25]** of course, to adopt the reasoning contained in this Memorandum Opinion in resolving those motions, this Memorandum Opinion technically applies only to the eleven cases contained in the above caption.

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n11 Gherebi v. Bush, 338 F. Supp.2d 91 (D.D.C. 2004).

n12 November 8, 2004 Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, 344 F. Supp.2d 174 (D.D.C. 2004).

n13 Id.

n14 As was his prerogative, Judge Richard Leon did not transfer the motions to dismiss in his two Guantanamo cases, Khalid v. Bush, 04-CV-1142 (RJL) and Boumediene v. Bush. 04-CV-1166 (RJL), and this Memorandum Opinion therefore does not apply to those two cases.

n15 Belmar v. Bush, 04-CY-1897 (RMC); Al Oosi v. Bush, 04-CV-1937 (PLF); Paracha v. Bush, 04-CV-2022 (PLF); Al-Marri v. Bush, 04-CV-2035 (GK); Zemiri v. Bush, 04-CV-2046 (CKg): Deghaves v. Bush, 04-CV-2215 (RMC); Mustapha v. Bush, 05-CV-0022 (JR); and Abdullah v. Bush, 05-CV-0023 (RWR).

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**II. ANALYSIS**

The petitioners in these eleven cases allege that the detention at Guantanamo Bay and the conditions thereof violate a variety of laws. All petitions assert violations of the Fifth Amendment, and a majority claim violations of the Alien Tort Claims Act, n16 the Administrative Procedure **[*453]** Act, n17 and the Geneva Conventions. n18 In addition, certain petitions allege violations of the Sixth, Eighth, and Fourteenth Amendments; the War Powers Clause; n19 the Suspension Clause; n20 Array Regulation 190-8, entitled "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees;" the International Covenant on Civil and Political Rights ("ICCPR"); n21 the American Declaration on the Rights and Duties of Man ("ADRDM"); n22 the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict; n23 the International Labour Organization's Convention 182, Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; n24 and customary international law. The respondents contend that none of these provisions constitutes a valid basis for any of the petitioners' claims and **[**27]** seek dismissal of all counts as a matter of law under Fed. R. Civ. P. 12(b)(6) for failing to state a claim upon which relief can be granted. In the alternative, the respondents seek a judgment based on the pleadings pursuant to Fed. R. Civ. P. 12(c). The respondents have not requested entry of summary judgment pursuant to Fed. R. Civ. P. 56, and they have opposed requests for discovery made by counsel for the petitioners on the ground that those requests are premature at this stage of the proceedings. See, e.g., Respondents' Memorandum in Opposition to Petitioners' Motion for Leave to Take Discovery and For Preservation Order, filed January 12, 2005, at 6.

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n16 28 U.S.C. § 1350 (1993).

n17 5 U.S.C. §§ 555, 702, 706 (1996).

N18 (Third) Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949, 6 U.S.T. 3316; and Fourth Geneva Convention, 1956 WL 54810 (U.S. Treaty), T.I.A.S. No. 3365, 6 U.S.T. 3516.

n19 U.S. Const art. I, § 8, c1. 11.

n20 U.S. Const, art. I, § 9, c1. 2. **[**28]**

n21 999 U.N.T.S. 171, 6 I.L.M. 368 (1992), and 102d Cong., 138 Cong. Rec. S4781 (Apr. 2, 1992).

n22 O.A.S. Off. Rec. OEA/Ser. LV/L4 Rev. (1965).

n23 S. Treaty Doc. No. 106-37, 2000 WL 33366017.

n24 S. Treaty Doc. No. 106-5, 1999 WL 33292717.

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HN2 In addressing a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), the Court must accept as true all factual allegations contained in a petition and must resolve every factual inference in the petitioner's favor. Sparrow v. United Air Lines, Inc., 342 U.S. App. D.C. 268, 216 F.3d 1111, 1113 (D.C. Cir. 2000). The moving party is entitled to dismissal "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Croixland Properties Ltd. Partnership v. Corcoran, 335 U.S. App. D.C. 377, 174 F.3d 213, 215 (D.C. Cir. 1999) (quoting Hishon v. King & Spalding, 467 U.S. 69, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)). Similarly, in resolving a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), **[**29]** the Court must "accept as true the allegations in the opponent's pleadings, and as false all controverted assertions of the movant" and must "accord the benefit of all reasonable inferences to the non-moving party." Haynesworth v. Miller, 261 U.S. App. D.C. 66, 820 F.2d 1245, 1249 n.11 (D.C. Cir. 1987).

**A. EXTRATERRITORIAL APPLICATION OF THE CONSTITUTION TO ALIENS**

Notwithstanding the Supreme Court's decision in Rasul that the District Court's dismissal of the petitioners' claims was incorrect as a matter of law, the respondents **[*454]** argue in their October 2004 motion that the Rasul decision resolved only whether individuals detained at Guantanamo Bay had the right merely to allege in a United States District Court under the habeas statute that they are being detained in violation of the Constitution and other laws.

Respondents argue that the decision was silent on the issue of whether the detainees actually possess any underlying substantive rights, and they further contend that earlier Supreme Court precedent and the law of this Circuit make clear that the detainees do not hold any such substantive rights. Accordingly, it is the respondents' position that although **[**30]** Rasul clarified that a detainee has every right to file papers in the Clerk's Office alleging violations of the Constitution, statutes, treaties and other laws, and although the Court has jurisdiction to accept the filing and to consider those papers, the Court must not permit the case to proceed beyond a declaration that no underlying substantive rights exist. While the Court would have welcomed a clearer declaration in the Rasul opinion regarding the specific constitutional and other substantive rights of the petitioners, it does not interpret the Supreme Court's decision as narrowly as the respondents suggest it should. To the contrary, HN3 the Court interprets Rasul in conjunction with other precedent, to require the recognition that the detainees at Guantanamo Bay possess enforceable constitutional rights.

The significance and scope of the Rasul decision is best understood after a review of earlier case law addressing the applicability of the Constitution outside of the United States and to individuals who are not American citizens. At the end of the nineteenth century, the Supreme Court interpreted the Constitution to have no applicability outside of the United States, **[**31]** even to activities undertaken by the United States government with respect to American citizens, In Ross v. McIntyre (In re Ross), 140 U.S. 453, 464, 35 L. Ed. 581, 11 S. Ct. 897 (1891), a habeas case involving a U.S. citizen convicted of murder by an American consular tribunal in Japan, the Court declared, "By the constitution a government is ordained and established for the United States of America,' and not for countries outside of their limits. The guaranties it affords . . . apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad. The constitution can have no operation in another country." 140 U.S. at 464 (citing Cook v. United States 138 U.S. 157, 181, 34 L. Ed. 906, 11 S. Ct. 268 (1891)).

The Supreme Court reexamined this broad declaration beginning a decade later and recognized the potential for a more liberal view of the Constitution's applicability outside of the United States in a line of precedent known as the "Insular Cases." One of the earliest of those cases, Downes v. Bidwell, 182 U.S. 244, 45 L. Ed. 1088, 21 S. Ct. 770 (1901), addressed whether the imposition of duties **[**32]** on products from Puerto Rico after it became a U.S. territory was a violation of the Constitution's Uniformity Clause, which requires that "all duties, imposts, and excises shall be uniform throughout the United States." Art. I, § 8, c1. 2. As part of its analysis, the Court held that the "unincorporated" territory of Puerto Rico -- meaning a territory not destined for statehood -- was not part of the "United States" and that, as a result, the imposition of duties on Puerto Rican goods did not violate the Constitution. In dicta, the Court acknowledged that Congress had traditionally interpreted the Constitution to apply to territories "only when and so far as Congress shall so direct." 182 U.S. at 278-79. The Court noted the apprehension of "many eminent men" caused by such an **[*455]** interpretation, however, and it described that concern as "a fear lest an unrestrained possession of power on the part of Congress may lead to unjust and oppressive legislation in which the natural rights of territories, or their inhabitants, may be engulfed in a centralized despotism." Id. At 280. Significant to the resolution of the cases brought by the Guantanamo detainees, the **[**33]** Court went on to minimize such concern by suggesting that the Constitution prevented Congress from denying inhabitants of unincorporated U.S. territories certain "fundamental" rights, including "the right to personal liberty . . .; to free access to courts of justice, [and] to due process of law." Id. at 282. Because such fundamental rights were not at issue in Downes v. Bidwell, the Court did not address this concept in greater detail at that time.

Three years later, the Court faced more directly the applicability of the Constitution outside of the United States when it resolved whether the defendant in a criminal libel action in a

Philippines court was entitled to a trial by jury under Article III and the Sixth Amendment of the U.S. Constitution. Dorr v. United States, 195 U.S. 138, 49 L. Ed. 128, 24 S. Ct. 808 (1904). At the time of the litigation, the United States had control of the Philippines as an unincorporated territory after the conclusion of the Spanish-American War. Congress, however, had enacted legislation expressly exempting application of the U.S. Constitution to the area. The defendant in that case was prosecuted for libel under the previously existing **[**34]** Spanish system and was not permitted a trial by jury. On appeal, the defendant argued that the right to trial by jury was a "fundamental" right guaranteed by the U.S. Constitution and that Congress did not have the power to deny that right by statute. Although the Court ultimately ruled that the Constitution did not require a right to jury trial in the Philippines, it did so only after examining the legal traditions employed in the Philippines prior to annexation as a U.S. territory, the significance of the constitutional right asserted, and the ability of the existing system to accept the burdens of applying new constitutional constraints. In reaching its conclusion that a right to trial by jury was not a "fundamental" right guaranteed outside of the United States, the Court emphasized that the legal system pursuant to which the defendant was prosecuted already provided numerous procedural safeguards, including fact finding by judges, a right of appeal, a right to testify, a right to retain counsel, a right to confront witnesses, a right against self-incrimination, and a right to due process. Id., at 145. After suggesting that a large majority of the population would **[**35]** be unfit to serve as jurors, the Court further noted that recognizing a fundamental constitutional right to a jury trial might, in fact, "work injustice and provoke disturbance rather than . . . aid the orderly administration of justice." Id. at 148. n25

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n25 At a time critics might call less enlightened, the Dorr opinion expressed a fear that further expansion of the application of the Constitution might result in requiring "savages" to serve as jurors. Id.

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That holding was reaffirmed in a similar criminal case involving a prosecution for libel in Puerto Rico. Balzac v. People of Porto Rico, 258 U.S. 298, 66 L. Ed. 627, 42 S. Ct. 343 (1922). n26 Like the defendant in Dorr, the defendant in the Puerto Rican case claimed his denial of a jury trial violated Article III and the Sixth Amendment of the U.S. Constitution. **[*456]** Unlike the defendant in Dorr, however, the defendant in Balzac was a United States citizen. The Court rejected that this distinction held any significance, reiterating that **[**36]** a right to trial by jury was not a "fundamental" right and emphasizing that U.S. citizens had no constitutional right to a trial by jury in a proceeding outside of the United States. As the Court explained, HN4 "It is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it." 258 U.S. at 309.

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n26 Citations to most, if not all, Insular Cases decided during the period between Dorr and Balzac can be found in United States v. Pollard, 209 F. Supp.2d 525, 539 n.17 (D. Virgin Islands 2002), rev'd, 326 F.3d 397, 45 V.I. 672 (3rd Cir. 2003).

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A plurality opinion issued by the Supreme Court in Reid v. Covert, 354 U.S. 1, 1 L. Ed. 2d 1148, 77 S. Ct. 1222 (1957) sharply criticized this portion of the Balzac opinion and argued for the further liberalization of the application of the Constitution outside of the United States. Reid involved two wives charged with the capital murders of their husbands. **[**37]** Both men were soldiers in the United States military and were killed at overseas posts, one in England and the other in Japan, The wives, who were American citizens, were tried and convicted abroad by courts martial under the Uniform Code of Military Justice and subsequently sought habeas relief, arguing that as civilians they were entitled under the Constitution to civilian trials. Initially, a majority of the Court ruled in the Japanese case during the previous term that the guarantees of an indictment by grand jury and subsequent jury trial under the Fifth and Sixth Amendments in a prosecution by the United States government did not apply in foreign lands for acts committed outside the United States. Kinsella v. Krueger, 351 U.S. 470, 100 L. Ed. 1342, 76 S. Ct. 886 (1956). Upon further argument and reconsideration the following term, however, the Court overruled its earlier decision, with four Justices subscribing to a plurality opinion and two Justices issuing separate opinions concurring in the result.

The plurality began its analysis of the issues with the following pronouncement, a marked contrast from the language used a half century earlier in Ross:

At the beginning we reject **[**38]** the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept. To the contrary, it is as old as government.

354 U.S. at 5-6 (footnotes omitted). After noting the language of the Fifth Amendment expressly states that "no person" shall be tried for a capital crime without a grand jury indictment and acknowledging that the Sixth Amendment requires that "in all criminal prosecutions" the defendant shall enjoy the right to a speedy and public trial, id. at 7, the plurality was critical of the narrower, "fundamental rights" approach taken in the previous Insular Cases, at least as applied to U.S. citizens, and explained, "While it has been suggested **[**39]** that only those constitutional rights which are fundamental' protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of "Thou shall nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments." Id. at 8-9. **[*457]** The plurality went on to clarify that the "fundamental" rights approach limiting the full application of the Constitution to territories under U.S. control had been intended to avoid disruption of long established practices and to expedite the carrying out of justice in the insular possessions. Id. at 13. Accordingly, the plurality suggested that any further abridgement of constitutional rights under a "fundamental" rights approach should not be countenanced. They reasoned, "If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes." Id. at 14.

In his concurring opinion, Justice Harlan, who had voted to deny habeas relief **[**40]** in the case during the previous term, explained that his change of opinion was based on an increased concern about the fact that the underlying crimes for which the defendants were charged were

capital offenses. Id. at 65. He was careful to emphasize, however, his belief that the Insular Cases still had "vitality," id. at 67, and that the precedent remained "good authority for the proposition that there is no rigid rule that jury trial must always be provided in the trial of an American overseas, if the circumstances are such that trial by jury would be impractical and anomalous." Id. at 75 (emphasis in the original). Justice Harlan posited further that the types of constitutional rights that should apply overseas depended on "the particular local setting, the practical necessities, and the possible alternatives." Id. Agreeing with what Justice Frankfurter wrote in a separately concurring opinion, Justice Harlan commented that the issue was analogous to a due process inquiry in which the courts must look to the particular circumstances of a particular case to determine what constitutional safeguards should apply. Id. **[**41]**

Because of the lack of a five Justice majority in Reid, Balzac continues to be interpreted as binding authority. Thus, for example, the Fifth Circuit held that a U.S. citizen charged with distribution of cocaine in the United States District Court for the Canal Zone District at Balboa was not entitled to the nonfundamental rights to a grand jury indictment and to a jury that had the potential to include military personnel. Government of the Canal Zone v. Scott, 502 F.2d 566, 568 (5th Cir. 1974) ("non-citizens and citizens of the United States resident in such territories are treated alike, since it is the territorial nature of the Canal Zone and not the citizenship of the defendant that is dispositive"). Indeed, although Reid far from settled the issue of the Constitution's application abroad, it certainly did not weaken the long held doctrine that HN5 fundamental constitutional rights cannot be denied in territories under the control of the American government, even where the United States technically is not considered "sovereign" and where the claimant is not a United States citizen.

The District of Columbia Circuit so recognized in a case this Court finds **[**42]** to be particularly relevant to the litigation presently under consideration. Ralpho v. Bell, 186 U.S. App. D.C. 368, 569 F.2d 607 (D.C. Cir. 1977), required the application of the Fifth Amendment to U.S. government activities in Micronesia, a "Trust Territory" pursuant to a United Nations designation under which the United States acted as administrator. More specifically, the case involved a constitutional challenge to the procedures undertaken by a commission created by Congress to compensate residents who suffered property damage as a result of American military activities against Japan during World War EL The **[*458]** plaintiff in that case owned a home that had been destroyed by the American offensive, and although the commission ultimately awarded compensation, the commission's valuation of the plaintiff's loss was lower than what he had claimed. More significantly, the valuation was based on evidence that the plaintiff was not permitted to examine or rebut. In addressing whether the Due Process Clause of the Fifth Amendment regulated the commission's valuation procedures, the D.C. Circuit expressly recognized that the United States was not technically "sovereign" over Micronesia, 569 F.2d at 619 n.71, **[**43]** and noted that the exact scope of the Constitution's foreign reach was a "matter of some controversy.," commenting on the criticism in the Reid plurality opinion of the more limited "fundamental" rights approach taken in the Insular Cases. Id. at 618 & n.69. Nonetheless, the court concluded that at a minimum, HN6 due process was a "fundamental" right even with respect to property and that "it is settled that there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law.'" Id. at 618-19 (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 669 n.5, 40 L. Ed. 2d 452, 94 S. Ct. 2080 (1974)). Thus, the court required the commission to give the plaintiff access to the evidence upon which its decision relied. n27

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n27 At least twice since the Ralpho decision, the D.C. Circuit recognized the continuing murkiness of whether the Constitution provides protection to noncitizens abroad in cases

involving action by American authorities in locales far from the absolute control of the U.S. Congress. Sanchez-Espinoza v. Reagan, 248 U.S. App. D.C. 146, 770 F.2d 202 (D.C. Cir. 1985), involved a claim by Nicaraguan citizens and residents that the alleged support of the Contras by American government officials violated Fourth and Fifth Amendment rights. The Court of Appeals found it unnecessary to resolve whether the Constitution applied in Nicaragua by concluding that even if it did, other grounds prevented the plaintiffs from recovering the relief they sought. Id. at 208. The second case, United States v. Yunis, 273 U.S. App. D.C. 290, 859 F.2d 953 (D.C. Cir. 1988), involved the seizure and alleged mistreatment of a Lebanese citizen by FBI agents on a boat off the coast of Cyprus. At his trial in District Court for alleged hijacking, the defendant sought the suppression of a confession he provided while in international waters on the ground that his interrogation violated asserted Fifth Amendment rights. Again, the majority avoided the threshold issue of extraterritorial application of the Constitution by accepting a stipulation between the prosecution and defendant that the Fifth Amendment was applicable. Id. at 957.

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The Supreme Court again tried to bring some clarity to the issue of extraterritorial application of the Constitution when it reviewed the legality of the search and seizure by American government officials of items in the Mexican residence of a Mexican citizen charged with various narcotics-related offenses under U.S. law. United States v. Verdugo-Urquidez, 494 U.S. 259, 108 L. Ed. 2d 222, 110 S. Ct. 1056 (1990). Citing language from Reid that "the Constitution imposes substantive constraints on the Federal Government, even when it operates abroad," the Court of Appeals for the Ninth Circuit had ruled that the Fourth Amendment required the suppression of the evidence gained through the search, notwithstanding its conclusion that a search warrant obtained in the United States would have had no legal validity in Mexico. 856 F.2d 1214, 1218 (9th Cir. 1988). The Supreme Court reversed and began its analysis with a comparison of the language in the Fourth Amendment with the terminology in the Fifth and Sixth Amendments, noting that the Fourth Amendment is written to apply to "the people" while the Fifth and Sixth Amendments protect "person[s]" and the "accused." 494 U.S. at 265-66. **[**45]** The Court interpreted the linguistic **[*459]** differences as evidence that the drafters of the Fourth Amendment intended it to protect the people of the United States rather than to impose restrictions on the government against nonresident aliens. Id. at 266.

Perhaps more significant for purposes of these Guantanamo detainee cases, the majority opinion then addressed the Insular Cases and reaffirmed that HN7 in U.S. territories, only "fundamental" constitutional rights are guaranteed. Accordingly, the Court concluded that the ability of noncitizens in foreign countries to invoke Fourth Amendment rights must be even weaker. Id. at 268. Citing Johnson v. Eisentrager, 339 U.S. 763, 94 L. Ed. 1255, 70 S. Ct. 936 (1950), the Court then declared, "Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." 494 U.S. at 269. The Court described its rejection in Eisentrager of the extraterritorial application of the Fifth Amendment as "emphatic," and concluded that if the Fifth Amendment, with the universal term "person," did not apply to aliens extraterritorially, then neither should the **[**46]** Fourth Amendment, which applies only to "the people." Id.

Justice Kennedy joined the majority opinion but also wrote a separate concurring opinion. Minimizing the majority opinion's reliance on the term "the people" as used in the Fourth Amendment, Justice Kennedy preferred to focus on the Insular Cases and Reid, giving particular attention to Justice Harlan's concurring opinion. More specifically, Justice Kennedy invoked a contextual due process analysis to resolve the issue, making specific reference to Justice Harlan's comments that there is no rigid and abstract rule that requires Congress to

provide all constitutional guarantees overseas where to do so would be "impracticable and anomalous." Id. at 277-78 (quoting Reid, 354 U.S. at 74). Ultimately, Justice Kennedy concluded that under the facts of the case, it would have been impracticable and anomalous to require the U.S. authorities to obtain a warrant for a search of property in Mexico, citing the lack of Mexican judicial officials to issue such warrants, potentially differing concepts of privacy and what would constitute an "unreasonable" search, and practical difficulties involved in **[**47]** dealing with foreign officials. Id. at 278.

So existed the state of relevant constitutional law at the time of Judge Kollar-Kotelly's dismissals of Rasul, Al Odah, and Habib, As a technical matter, her dismissals were not based on a finding that the Guantanamo detainees lacked underlying substantive constitutional rights, although the opinion does make brief references to some of the Insular Cases and to the Supreme Court's reference in Verdugo-Urquidez to the lack of extraterritorial Fifth Amendment rights. Rather, the District Court dismissed on the basis that it lacked jurisdiction under the habeas statute, 28 U.S.C. §§ 2241 and 2242, in light of the Supreme Court's decision in Eisentrager. In that case, the Supreme Court held -- that federal courts did not have the authority to entertain the habeas claims of German nationals captured in China, convicted of war crimes by a U.S. military commission in China, and serving their sentences in a Landsberg prison, located in Germany but administered by the U.S. military. The crucial aspect of the Eisentrager decision, according to Judge Kollar-Kotelly, was its conclusion that **[**48]** habeas relief could not be granted to individuals in custody outside the sovereign territory of the United States. Her opinion emphasized the importance of the conclusion that the Guantanamo Bay Naval Base is not on sovereign United States territory, and rejected the argument made by counsel for **[*460]** the detainees that under Ralpho v. Bell, de facto sovereignty, rather than de jure sovereignty, was sufficient support for habeas jurisdiction. While recognizing that Micronesia, the location at issue in Ralpho, was not de jure sovereign U.S. territory, the District Court concluded that those islands are much more similar in character and status to sovereign territories than Guantanamo Bay is. According to the District Court, The military base at Guantanamo Bay, Cuba, is nothing remotely akin to a territory of the United States, where the United States provides certain rights to the inhabitants. Rather, the United States merely leases an area of land for use as a naval base." 215 F. Supp.2d at 71.

In reviewing the District Court's decision dismissing the cases for lack of habeas jurisdiction, the D.C. Circuit took a somewhat different approach, relying more heavily **[**49]** than the District Court on an analysis of the substantive constitutional rights upon which the detainees' petitions were based. The D.C. Circuit interpreted Eisentrager to characterize the right to a writ of habeas corpus as a "subsidiary procedural right that follows from the possession of substantive constitutional rights." 321 F.3d at 1140 (quoting Eisentrager, 339 U.S. at 781). Further noting that Eisentrager rejected the proposition "that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever then offenses," id., the Court of Appeals then commented that this language "may be read to mean that the constitutional rights mentioned are not held by aliens outside the sovereign territory of the United States, regardless of whether they are enemy aliens." Id., at 1140-41. Invoking the language in Verdugo-Urquidez that Eisentrager 'rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States" and that such rejection in Eisentrager was "emphatic," the Court of Appeals then noted its previous reliance on **[**50]** Verdugo-Urquidez and Eisentrager in earlier cases that made clear that "the law of the circuit now is that a foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.'" Id. at 1141 (quoting 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), and also citing Harbury v. Deutch, 344 U.S. App. D.C. 68, 233 F.3d 596 (D.C. Cir. 2000), rev'd sub nom. Christopher v. Harbury, 536 U.S. 403, 153 L. Ed. 2d 413, 122 S. Ct. 2179 (2002); Pauling v. McElroy, 107 U.S. App. D.C. 372, 278 F.2d 252 (D.C. Cir. 1960); and 32 County Sovereignty Comm. v. Dep't of State, 352 U.S. App. D.C. 93, 292 F.3d 797 (D.C.

Cir. 2002)). Emphasizing that Guantanamo Bay was not part of sovereign U.S. territory and rejecting any material significance to the U.S. government's practical control over the area, the court thus concluded in Al Odah:

The consequence is that no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees, even if they have not been adjudicated enemies of the United States. We cannot see why, or how, the writ may be made available **[**51]** to aliens abroad when basic constitutional protections ate not This much is at the heart of Eisentrager. If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty. Eisentrager itself directly tied jurisdiction to the extension of constitutional provisions. . . .

Id. at 1141.

The D.C. Circuit's decision was reversed in Rasul v. Bush, U.S. , 159 L. Ed. 2d 548, 124 S. Ct. 2686 (2004). **[*461]** In reviewing the decision of the Court of Appeals, the majority opinion addressed two grounds upon which a detainee traditionally could assert a right to habeas relief: statutory and constitutional. The Rasul majority interpreted Eisentrager to have focused primarily on the German detainees' lack of a constitutional right to habeas review, and distinguished the material facts upon which that portion of the Eisentrager decision relied from the circumstances concerning the Guantanamo Bay detainees. Among other distinguishing facts, the Rasul opinion emphasized that the Guantanamo Bay detainees were **[**52]** not citizens of countries formally at war with the United States, denied committing any war crimes or other violent acts, were never charged or convicted of wrongdoing, and -- most significant to the present motion to dismiss -- are imprisoned in "territory over which the United States exercises exclusive jurisdiction and control." 124 S. Ct. at 2693. Next, Rasul turned to the issue of statutory habeas jurisdiction and ruled that HN8 post-Eisentrager precedent required the recognition of statutory jurisdiction even over cases brought by petitioners held outside the territorial jurisdiction of any federal district court. Noting that the habeas statute made no distinction between citizens and aliens held in federal custody, the Court ultimately ruled that "aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241." Id. at 2696.

While conceding as they must in light of the Rasul decision that this Court has habeas jurisdiction over these cases, the respondents assert in their current motion to dismiss that the Supreme Court did not grant certiorari to review the D.C. Circuit's **[**53]** decision that the Guantanamo Bay detainees have no underlying constitutional rights. Accordingly, the respondents argue, the D.C. Circuit's pronouncement in Al Odah that the detainees lack substantive rights is still binding on this Court and the portions of the petitions invoking the Constitution must be dismissed for failure to state a claim upon which relief can be granted. Counsel for the petitioners, on the other hand, assert that in upholding this Court's habeas jurisdiction, the Supreme Court also made clear that the Constitution applies to Guantanamo Bay and that the detainees possess substantive constitutional rights. This Court finds the arguments made on behalf of the petitioners in this regard far more persuasive.

As an initial matter, the conclusion that the D.C. Circuit's holding on lack of substantive constitutional rights is no longer the law of the case could be deduced merely from the facts that: (1) the appellate court's opinion emphasized that the existence of habeas jurisdiction and substantive constitutional rights were "directly tied," 321 F.3d at 1141; (2) the appellate court believed Eisentrager applied to the facts of these cases **[**54]** and prevented the detainees

from asserting substantive constitutional rights; and (3) the Supreme Court held that habeas jurisdiction did in fact exist and that Eisentrager was inapplicable to these cases. Additionally, and on a more detailed level, careful examination of the specific language used in Rasul reveals an implicit, if not express, mandate to uphold the existence of fundamental rights through application of precedent from the Insular Cases.

On appeal to the D.C. Circuit, counsel for the petitioners argued for the application of Ralpho v. Bell by challenging the District Court's finding that Guantanamo Bay was simply another naval base on land leased from a foreign sovereign and nowhere near the legal equivalent of a United States territory. 215 F. Supp.2d at 71. The D.C. Circuit rejected the challenge **[*462]** and agreed with the District Court on this point. Although the appellate court conceded that Micronesia, like Guantanamo Bay, was not technically sovereign U.S. territory, it concluded that Ralpho nonetheless did not "justify this court, or any other, to assert habeas corpus jurisdiction at the behest of an alien held at a military base leased **[**55]** from another nation." 321 F.3d at 1144. Instead, the appellate court found Landsberg prison in Germany to be a more suitable analogy, and because Eisentrager held that no constitutional rights existed there, the D.C. Circuit concluded that no constitutional rights could exist at Guantanamo Bay. Rasul, however, unequivocally rejected the D.C. Circuit's analogy and made clear that Guantanamo Bay cannot be considered a typical overseas military base.

In his concurring opinion in Rasul, Justice Kennedy unambiguously repudiated the D.C. Circuit's analogy of Guantanamo-Bay to Landsberg prison, and he made a Ralpho-type conclusion that Guantanamo Bay was, for all significant purposes, the equivalent of sovereign U.S. territory. He explained:
Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. . . . [The Guantanamo Bay lease] is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo **[**56]** Bay has produced a place that belongs to the United States, extending the "implied protection" of the United States to it.

Id. at 2700 (Kennedy, J., concurring) (citing Eisentrager. 339 U.S. at 777-78). Although the majority opinion was not as explicit as Justice Kennedy's concurrence, it too found significant the territorial nature of Guantanamo Bay and dismissed the D.C. Circuit's characterization of Guantanamo Bay as nothing more, than a foreign military prison. For example, in refusing the application of Eisentrager's constitutional analysis to these Cases, the majority took special note that, unlike the German prisoners, the Guantanamo detainees "have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control." 124 S. Ct at 2693. Additionally, in rejecting an argument made by respondents that applying the habeas statute to prisoners at Guantanamo Bay would violate a canon of statutory interpretation against extraterritorial application of legislation, the majority wrote:

HN9 Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no **[**57]** application to the operation of the habeas statute with respect to persons detained within the "territorial jurisdiction" of the United States. . . . By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.

124 S. Ct. at 2696 (citing Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285, 93 L. Ed. 680, 69 S. Ct. 575 (1949), in which the Court refused to interpret a statute mandating an eight hour work day to have application to an American citizen working for a contractor in Iran and Iraq absent evidence that the "United States had been granted by the respective sovereignties any authority, legislative or otherwise, over the labor laws or customs of Iran or Iraq.").

These passages alone would be sufficient for this Court to recognize the special nature of Guantanamo Bay and, in accordance with Ralpho v. Bell, to treat it as the equivalent of sovereign U.S. territory **[*463]** where fundamental constitutional rights exist. But perhaps the strongest basis for recognizing that the detainees have fundamental rights to due process **[**58]** rests at the conclusion of the Rasul majority opinion. In summarizing the nature of these actions, the Court recognized:

Petitioners' allegations -- that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing -- 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, 277-278, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990) (Kennedy, J., concurring), and cases cited therein.

124 S. Ct. at 2698 n.15. This comment stands in sharp contrast to the declaration in Verdugo-Urquidez relied upon by the D.C. Circuit in A3 Odah that the Supreme Court's "rejection of extraterritorial application of the Fifth Amendment [has been] emphatic." 494 U.S. at 269. Given the Rasul majority's careful scrutiny of **[**59]** Eisentrager, it is difficult to imagine that the Justices would have remarked that the petitions "unquestionably describe custody in violation of the Constitution or laws or treaties of the United States'" unless they considered the petitioners to be within a territory in which constitutional rights are guaranteed. Indeed, had the Supreme Court intended to uphold the D.C. Circuit's rejection in Al Odah of underlying constitutional rights, it is reasonable to assume that the majority would have included in its opinion at least a brief statement to that effect, rather than delay the ultimate resolution of this litigation and require the expenditure of additional judicial resources in the lower courts. To the contrary, rather than citing Eisentrager or even the portion of Verdugo-Urquidez that referenced the "emphatic" inapplicability of the Fifth Amendment to aliens outside U.S. territory, the Rasul Court specifically referenced the portion of Justice Kennedy's concurring opinion in Verdugo-Urquidez that discussed the continuing validity of the Insular Cases, Justice Harlan's concurring opinion in Reid v. Covert, and Justice Kennedy's own consideration of whether **[**60]** requiring adherence to constitutional rights outside of the United States would be "impracticable and anomalous." HN10 This Court therefore interprets that portion of the opinion to require consideration of that precedent in the determination of the underlying rights of the detainees.

There would be nothing impracticable and anomalous in recognizing that the detainees at Guantanamo Bay have the fundamental right to due process of law under the Fifth Amendment. Recognizing the existence of that right at the Naval Base would not cause the United States government any more hardship than would recognizing the existence of constitutional rights of the detainees had they been held within the continental United States. American authorities are in full control at Guantanamo Bay, their activities are immune from Cuban law, and there are few or no significant remnants of native Cuban culture or tradition remaining that can interfere with the implementation of an American system of justice. n28

The situation in these cases is **[*464]** very different from the circumstances in Verdugo-Urquidez, where the defendant claimed the United States government was required to get a warrant to perform a search in **[**61]** Mexico, a sovereign country that employs an entirely different legal system, lacks officials to issue warrants, and has potentially different concepts of privacy. Similarly, the imposition of constitutional rights would be less difficult at Guantanamo Bay than it was in any of the Insular Cases, where the courts were required to determine whether imposition of American rights such as the right to trial by jury and indictment by grand jury were even possible in places such as the Philippines and Puerto Rico with native legal systems and populations previously unexposed to American jurisprudence.

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n28 Ironically, the Cuban government has alleged that the U.S. military is violating the human rights of the detainees at Guantanamo Bay and has demanded more humane treatment of the prisoners. The U.S. government, however, does not appear to have conceded the Cuban government's sovereignty over these matters. See What's News, The Wall Street Journal, Jan. 20, 2005, at A1(2005 WL 59838432); Cuba Demands US Stop Alleged Abuses at "Illegally Occupied" Guantanamo Base, Agerice France Presse, Jan. 19, 2005 (2005 WL 69517025).

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Of course, it would be far easier for the government to prosecute the war on terrorism if it could imprison all suspected "enemy combatants" at Guantanamo Bay without having to acknowledge and respect any constitutional rights of detainees. That, however, is not the relevant legal test. By definition, constitutional limitations often, if not always, burden the abilities of government officials to serve their constituencies. Although this nation unquestionably must take strong action under the leadership of the Commander in Chief to protect itself against enormous and unprecedented threats, that necessity cannot negate the existence of the most basic fundamental rights for which the people of this country have fought and died for well over two hundred years. As articulated by the Supreme Court after the conclusion of the Civil War:

The Constitution of the United States 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 **[**63]** any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Ex Parte Milligan, 71 U.S. 2, 120-21, 18 L. Ed. 281 (1866). See also United States v. Robel, 389 U.S, 258, 264, 19 L. Ed. 2d 508, 88 S. Ct. 419 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.").

In sum, there can be no question that the Fifth Amendment right asserted by the Guantanamo detainees in this litigation -- the right not to be deprived of liberty without due process of law -- is one of the most fundamental rights recognized by the U.S. Constitution. 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. Accordingly, and

under the precedent **[**64]** set forth in Verdugo-Urquidez, Ralpho, and the earlier Insular Cases, the respondents' contention that the Guantanamo detainees have no constitutional rights is rejected, and the Court recognizes the detainees' rights under the Due Process Clause of the Fifth Amendment.

**[*465] B. SPECIFIC REQUIREMENTS OF THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE**

Having found that HN11 the Guantanamo detainees are entitled to due process under the Fifth Amendment to the United States Constitution, the Court must now address the exact contours of that right as it applies to the government's determinations that they are "enemy combatants." HN12 Due process is an inherently flexible concept, and the specific process due in a particular circumstance depends upon the context in which the right is asserted. Morrissey v. Brewer, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972). Resolution of a due process challenge requires the consideration and weighing of three factors: the private interest of the person asserting the lack of due process; the risk of erroneous deprivation of that interest through use of existing procedures and the probable value of additional or substitute procedural safeguards; and the competing **[**65]** interests of the government, including the financial, administrative, and other burdens that would be incurred were additional safeguards to be provided. Mathews v. Eldridge, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976).

The Supreme Court applied a Mathews v. Eldridge analysis in Hamdi v. Rumsfeld, 542 U.S. 507, 159 L. Ed. 2d 578, 124 S. Ct. 2633 (2004), a decision issued the same day as Rasul which considered an American citizen's due process challenge to the U.S. military's designation of him as an "enemy combatant." Although none of the detainees in the cases before this Court is an American citizen, the facts under Hamdi are otherwise identical in all material respects to those in Rasul, Accordingly, Hamdi forms both the starting point and core of this Court's consideration of what process is due to the Guantanamo detainees in these cases.

In addressing the detainee's private interest in, Hamdi for purposes of the Mathews v. Eldridge analysis, the plurality opinion called it "the most elemental of liberty interests -- the interest in being free from physical detention by one's own government." 124 S. Ct. at 2646. Although the **[**66]** detainees in the cases before this Court are aliens and are therefore not being detained by their own governments, that fact does not lessen the significance of their interests in freedom from incarceration and from being held virtually incommunicado from the outside world. HN13 There is no practical difference between incarceration at the hands of one's own government and incarceration at the hands of a foreign government; significant liberty is deprived in both situations regardless of the jailer's nationality.

As was the case in Hamdi, the potential length of incarceration is highly relevant to the weighing of the individual interests at stake here. The government asserts the right to detain an "enemy combatant" until the war on terrorism has concluded or until the Executive, in its sole discretion, has determined that the individual no longest poses a threat to national security. The government, however, has been unable to inform the Court how long it believes the war on terrorism will last. See December 1, 2004 Transcript of Motion to Dismiss (hereinafter Transcript") at 22-23. Indeed, the government cannot even articulate at this moment how it will determine when the **[**67]** war on terrorism has ended. Id. at 24. At a minimum, the government has conceded that the war could last several generations, thereby making it possible, if not likely, that "enemy combatants" will be subject to terras of life imprisonment at Guantanamo Bay. Id. at 21; Hamdi, 124 S. Ct. at 2641. Short of the death penalty, life imprisonment is the ultimate deprivation of liberty, and the uncertainty of whether the war on terror -- and thus the **[*466]** period of incarceration -- will last a lifetime may be even worse than if the detainees had been tried, convicted, and definitively sentenced to a fixed term.

It must be added that the liberty interests of the detainees cannot be minimized for purposes of applying the Mathews v. Eldridge balancing test by the government's allegations that they are in fact terrorists or are affiliated with terrorist organizations. HN14 The purpose of imposing a due process requirement is to prevent mistaken characterizations and erroneous detentions, and the government is not entitled to short circuit this inquiry by claiming ab initio that the individuals are alleged to have committed bad acts. See Hamdi, 124 S. Ct. at 2647 **[**68]** ("our starting point for the Mathews v. Eldridge analysis is unaltered by the allegations surrounding the particular detainee or the organizations with which he is alleged to have associated"). Moreover, all petitioners in these cases have asserted that they are not terrorists and have not been involved in terrorist activities, and under the standards provided by the applicable rules of procedure, those allegations must be accepted as true for purposes of resolving the government's motion to dismiss.

On the other side of the Mathews v. Eldridge analysis is the government's significant interest in safeguarding national security. Having served as the Chief Judge of the United States Foreign Intelligence Surveillance Court (also known as "the FISA Court"), the focus of which involves national security and international terrorism, n29 this Judge is keenly aware of the determined efforts of terrorist groups and others to attack this country and to harm American citizens both at home and abroad. Utmost vigilance is crucial for the protection of the United States of America. Of course, one of the government's most important obligations is to safeguard this country and its citizens **[**69]** by ensuring that those who have brought harm upon U.S. interests are not permitted to do so again. Congress itself expressly recognized this when it enacted the AUMF authorizing the President to use all necessary and appropriate force against those responsible for the September 11 attacks. The Supreme Court also gave significant weight to this governmental concern and responsibility in Hamdi when it addressed the "interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States." 124 S. Ct. at 2647. The plurality warned against naivete regarding the dangers posed to the United States by terrorists and noted that the legislative and executive branches were in the best positions to deal with those dangers. As articulated by the plurality, HN15 "The law of war and the realities of combat may render . . . detentions both necessary and appropriate, and our due process analysis need not blink at those realities. Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." Id. Indeed, **[**70]** a majority of the Court affirmed the Executive's authority to seize and detain Taliban fighters as long as the conflict in Afghanistan continues, regardless of how indefinite the length of that war may be. See the plurality opinion, id. at 2641-42, and the dissenting opinion of Justice Thomas, id. at 2674.

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n29 See 50 U.S.C. § 1803 (2003).

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Given the existence of competing, highly significant interests on both sides of the equation -- the liberty of individuals asserting complete innocence of any terrorist activity versus the obligation of the government to protect this country against terrorist attacks -- the question becomes what procedures will help ensure that innocents **[*467]** are not indefinitely held as "enemy combatants" without imposing undue burdens on the military to ensure the security of this nation and its citizens. The four member Hamdi plurality answered this question in some detail, and although the two concurring members of the Court, Justice **[**71]** Souter and

Justice Ginsburg, emphasized a different basis for ruling in favor of Mr. Hamdi, they indicated their agreement that, at a minimum, he was entitled to the procedural protections set forth by the plurality. Id., at 2660.

According to the plurality in Hamdi, HN16 an individual detained by the government on the ground that he is an "enemy combatant" "must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." Id. at 2648. Noting the potential burden these requirements might cause the government at a time of ongoing military conflict, the plurality stated that it would not violate due process for the decision maker to consider hearsay as the most reliable available evidence. Id. at 2649. In addition, the plurality declared it permissible to adopt a presumption in favor of "enemy combatant" status, "so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided." Id. For that presumption to apply and for the onus to shift to the detainee, however, the plurality clarified that the government **[**72]** first would have to "put[] forth credible evidence that the [detainee] meets the enemy-combatant criteria." Id. n30

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n30 Justice Souter, whose opinion was joined by Justice Ginsburg, indicated he did not believe that such a presumption was constitutionally permissible when he wrote, "I do not mean to imply agreement that the Government could claim an evidentiary presumption casting the burden of rebuttal on [the detainee]." Id. at 2660.

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After setting forth these standards, the plurality suggested the "possibility" that constitutional requirements of due process could be met by an "appropriately authorized and properly constituted military tribunal" and referenced the military tribunals used to determine whether an individual is entitled to prisoner of war status under the Geneva Convention. Id. at 2651 (citing Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, § 1-6 (1997)). In the absence of a tribunal following constitutionally mandated **[**73]** procedures, however, the plurality declared that it was the District Court's obligation to provide those procedural rights to the detainee in a habeas action. Again recognizing the enormous significance of the interests of both detainees and the government, the plurality affirmed the proper role of the judiciary in these matters, stating "We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns." Id. at 2652. The plurality concluded by affirming that the detainee "unquestionably [had] the right to access to counsel in connection with the proceedings on remand." Id.

Hamdi was decided before the creation of the Combatant Status Review Tribunal, and the respondents contend in their motion to dismiss that were this Court to conclude that the detainees are entitled to due process under the Fifth Amendment, the CSRT proceedings would fully comply with all constitutional requirements. More specifically, the respondents claim that the **[**74]** CSRT regulations were modeled after Army Regulation 190-8 governing the determination of prisoner of war status, referenced in Hamdi, and actually **[*468]** exceed the requirements set forth by the Hamdi plurality. For example, respondents cite the facts that under CSRT rules, tribunal members must certify that they have not been involved in the "apprehension, detention, interrogation, or previous determination of status of the detainee[s]," that detainees are provided a "Personal Representative" to assist in the

preparation of their cases, that the "Recorder" -- that is, the person who presents evidence in support of "enemy combatant" status -- must search for exculpatory evidence, that the detainee is entitled to an unclassified summary of the evidence against him, and that the tribunal's decisions are reviewed by a higher authority. Motion to Dismiss at 34-35. Notwithstanding the procedures cited by the respondents, the Court finds that the procedures provided in the CSRT regulations fail to satisfy constitutional due process requirements in several respects.

**C. SPECIFIC CONSTITUTIONAL DEFECTS IN THE CSRT PROCESS AS WRITTEN IN THE REGULATIONS AND AS APPLIED TO THE DETAINEES [**75]**

The constitutional defects in the CSRT procedures can be separated into two categories. The first category consists of defects which apply across the board to all detainees in the cases before this Judge. Specifically, those deficiencies are the CSRT's failure to provide the detainees with access to material evidence upon which the tribunal affirmed their "enemy combatant" status and the failure to permit the assistance of counsel to compensate for the government's refusal to disclose classified information directly to the detainees. The second category of defects involves those which are detainee specific and may or may not apply to every petitioner in this litigation. Those defects include the manner in which the CSRT handled accusations of torture and the vague and potentially overbroad definition of "enemy combatant" in the CSRT regulations. While additional specific defects may or may not exist, further inquiry is unnecessary at this stage of the litigation given the fundamental deficiencies detailed below.

**1. General Defects Existing in All Cases Before the Court: Failure to Provide Detainees Access to Material Evidence Upon Which the CSRT Affirmed "Enemy Combatant" Status [**76] and Failure to Permit the Assistance of Counsel**

The CSRT reviewed classified information when considering whether each detainee presently before this Court should be considered an "enemy combatant," and it appears that all of the CSRT's decisions substantially relied upon classified evidence. No detainee, however, was ever permitted access to any classified information nor was any detainee permitted to have an advocate review and challenge the classified evidence on his behalf. Accordingly, the CSRT failed to provide any detainee with sufficient notice of the factual basis for which he is being detained and with a fair opportunity to rebut the government's evidence supporting the determination that he is an "enemy combatant."

The inherent lack of fairness of the CSRT's consideration of classified information not disclosed to the detainees is perhaps most vividly illustrated in the following unclassified colloquy, which, though taken from a case not presently before this Judge, exemplifies the practical and severe disadvantages faced by all Guantanamo prisoners. In reading a list of allegations forming the basis for the detention of Mustafa Ait Idr, n31 a petitioner in Boumediene **[**77] [*469]** v. Bush, 04-CV-1166 (RJL), the Recorder of the CSRT asserted, "While living in Bosnia, the Detainee associated with a known Al Qaida operative." In response, the following exchange occurred:

Detainee: Give me his name.

Tribunal President: I do not know.

Detainee: How can I respond to this?

Tribunal President: Did you know of anybody that was a member of Al Qaida?

Detainee: No, no.

Tribunal President: I'm sorry, what was your response? Detainee: No.

Tribunal President: No?
Detainee: No. This is something the interrogators told me a long while ago. I asked the interrogators to tell me who this person was. Then I could tell you if I might have known this person, but not if this person is a terrorist. Maybe I knew this person as a friend. Maybe it was a person that worked with me. Maybe it was a person that was on my team. But I do not know if this person is Bosnian, Indian or whatever. If you tell me the name, then I can respond and defend myself against this accusation.

Tribunal President: We are asking you the questions and we need you to respond to what is on the unclassified summary.

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n31 Although the petition for writ of habeas corpus filed on behalf of this detainee and related documents refer to him as "Mustafa Ait Idir," the proper spelling of his name appears to be "Mustafa Ait Idr."

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**[**78]**

Respondents' Factual Return to Petition for Writ of Habeas Corpus by Petitioner Mustafa Ait Idir, filed October 27, 2004, Enclosure (3) at 13. Subsequently, after the Recorder read the allegation that the detainee was arrested because of his alleged involvement in a plan to attack the U.S. Embassy in Sarajevo, the detainee expressly asked in the following colloquy to see the evidence upon which the government's assertion relied:
Detainee: . . . The only thing I can tell you is I did not plan or even think of [attacking the Embassy]. Did you find any explosives with me? Any weapons? Did you find me in front of the embassy? Did you find me in contact with the Americans? Did I threaten anyone? I am prepared now to tell you, if you have anything or any evidence, even if it is just very little, that proves I went to the embassy and looked like that [Detainee made a gesture with his head and neck as if he were looking into a building or a window] at the embassy, then I am ready to be punished. I can just tell you that I did not plan anything. Point by point, when we get to the point that I am associated with Al Qaida, but we already did that one.

Recorder: It was [the] **[**79]** statement that preceded the first point.

Detainee: If it is the same point, but I do not want to repeat myself. These accusations, my answer to all of them is I did not do these things. But I do not have anything to prove this. The only thing is the citizenship. I can tell you where I was and I had the papers to prove so. But to tell me I planned to bomb, I can only tell you that I did not plan.

Tribunal President: Mustafa, does that conclude your statement?

Detainee: That is it, but I was hoping you had evidence that you can give me. If I was in your

place -- and I apologize in advance for these words -- but if a supervisor came to me and showed me accusations like these, I would take these accusations and I would hit him in the face with them. Sorry about that.

[Everyone in the Tribunal room laughs.]

Tribunal President: We had to laugh, but it is okay.

**[*470]** Detainee: Why? Because these are accusations that I can't even answer. I am not able to answer them. You tell me I am from Al Qaida, but I am not an Al Qaida. I don't have any proof to give you except to ask you to catch Bin Laden and ask him if I am a part of Al Qaida. To tell me that I thought, I'll **[**80]** just tell you that I did not. I don't have proof regarding this. What should be done is you should give me evidence regarding these accusations because I am not able to give you any evidence. I can just tell you no, and that is it.

Id. at 14-15. The laughter reflected in the transcript is understandable, and this exchange might have been truly humorous had the consequences of the detainee's "enemy combatant" status not been so terribly serious and had the detainee's criticism of the process not been so piercingly accurate. n32

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n32 This is not to say whether or not the government was able to present any inculpatory evidence during the CSRT proceeding against the detainee. The primary purpose of the Memorandum Opinion's reference to the transcript at this stage of the litigation is to illustrate the detainees' lack of any reasonable opportunity to confront the government's evidence against them and not to resolve whether or not this particular detainee did in fact plan to attack the U.S. Embassy.

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Another **[**81]** illustration of the fundamental unfairness of the CSRT's reliance on classified information not disclosed to the detainees arises in the government's classified factual return to the petition filed by Murat Kumaz in Kurnaz v. Bush, 04-CV-1135 (ESH). Mr. Kumaz is a Turkish citizen and permanent resident of Germany who was arrested by police in Pakistan and turned over to American authorities. The CSRT concluded mat he was a member of al Qaeda and stated that this determination was based on unclassified evidence and on one classified document, attached to the factual return as Exhibit R19. Respondents' Factual Return to Petition for Writ of Habeas Corpus by Petitioner Murat Kumaz (hereinafter "Kurnaz Factual Return"), filed October 18, 2004, Enclosure (2). n33

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n33 Although the tribunal makes several references to its reliance on Exhibit R12, those references were typographical errors and the document actually relied upon was Exhibit R19, as recognized by the tribunal's Legal Advisor. See October 14, 2004 Memorandum from James R. Crisfield Jr. to the Director, Combatant Status Review Tribunal, attached to the Kurnaz Factual Return.

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The Court does not find that the unclassified evidence alone is sufficiently convincing in supporting the CSRT's conclusion that he is a member of al Qaeda. n34 That evidence establishes that Mr. Kurnaz attended a mosque in Bremen, Germany which the CSRT found to be moderate in its views but also to have housed a branch of Jama'at-Al-Tabliq (hereinafter "JT"), a missionary organization alleged to have supported terrorist organizations. Kurnaz Factual Return, Enclosure (1) at 2. The unclassified evidence also establishes that Mr. Kumaz had been friends with an individual named Selcuk Belgin, who is alleged to have been a suicide bomber, and that the detainee traveled to Pakistan to attend a JT school. Id. at 2-3. Nowhere does the CSRT express any finding based on unclassified evidence that the detainee planned to be a suicide bomber himself, took up arms against the United States, or otherwise intended to attack American interests. Thus, the most reasonable interpretation of the record is that the classified document formed the most important basis for the CSRT's ultimate determination. That document, however, was never **[*471]** provided to the detainee, and had he received it, he would **[**83]** have had the opportunity to challenge its credibility and significance. [TEXT REDACTED BY THE COURT.]

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n34 In fact, for reasons stated later in this opinion, even if all of the unclassified evidence were accepted as true, it alone would not form a constitutionally permissible basis for the indefinite detention of the petitioner. See infra section II.C.2.b.

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[TEXT REDACTED BY THE COURT] call into serious question the nature and thoroughness of the prior "multiple levels of review" of "enemy combatant" status referenced in Deputy Secretary of Defense Paul Wolfbwitz's July 7, 2004 Order establishing the CSRT system. At a minimum, the documents raise the question of [TEXT REDACTED BY THE COURT.] Interpreted in a light most favorable to the petitioners, the CSRT's decision to deem Exhibit R19 the most credible evidence without a sufficient explanation for [TEXT REDACTED BY THE COURT.] the "CSRTs do not involve an impartial decisionmaker." Al Odah Petitioners' Reply to the Government's Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss," filed in Al Odah v. United States, 02-CV-0828 (CKK), on October 20, 2004, at **[**84]** 23-24. But however the record in Kurnaz is interpreted, it definitively establishes that the detainee was not provided with a fair opportunity to contest the material allegations against him.

The Court fully appreciates the strong governmental interest in not disclosing classified evidence to individuals believed to be terrorists intent on causing great harm to the United States. Indeed, this Court's protective order prohibits the disclosure of any classified information to any of the petitioners in these habeas cases. Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, 344 F. Supp.2d 174 (D.D.C. 2004) at P 30. To compensate for the resulting hardship to the petitioners and to ensure due process in the litigation of these cases, however, the protective order requires the disclosure of all relevant classified information to the petitioners' counsel who have the appropriate security clearances. Id. at PP 17-34. Although counsel are not permitted to share any classified information with their clients, they at least have the opportunity to examine all evidence relied upon by the government **[**85]** in making an "enemy combatant" status determination and to investigate and ensure the accuracy, reliability and relevance of that evidence. Thus, the governmental and private

interests have been fairly balanced in a manner satisfying constitutional due process requirements. In a similar fashion, the rules regulating the military commission proceedings for aliens -- rules which the government so vigorously defended in Hamdan v. Rumsfeld -- expressly provide that although classified evidence may be withheld from the defendant, it may not be withheld from defense counsel. Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 32 C.F.R. § 9.6(b)(3) ("A decision to close a proceeding or portion thereof may include a decision to exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof."). In contrast, the CSRT regulations do not properly balance the detainees' need for access to material evidence considered by the tribunal against the government's interest in protecting classified information.

The CSRT regulations do acknowledge **[**86]** to some extent the detainees' need for assistance during the tribunal process, but they fall far short of the procedural protections that would have existed had counsel been permitted to participate. The implementing regulations create the position of "Personal Representative" for the purpose of "assisting the detainee in reviewing all relevant unclassified information, in preparing **[*472]** and presenting information, and in questioning witnesses at the CSRT." July 29, 2004 Implementing Regulations at Enclosure (1), P C, (3). But notwithstanding the fact that the Personal Representative may review classified information considered by the tribunal, that person is neither a lawyer nor an advocate and thus cannot be considered an effective surrogate to compensate for a detainee's inability to personally review and contest classified evidence against him. Id. at Enclosure (3), P D. Additionally, there is no confidential relationship between the detainee and the Personal Representative, and the Personal Representative is obligated to disclose to the tribunal any relevant inculpatory information he obtains from the detainee. Id. Consequently, there is inherent risk and little corresponding **[**87]** benefit should the detainee decide to use the services of the Personal Representative.

The lack of any significant advantage to working with the Personal Representative is [TEXT REDACTED BY THE COURT.] the Personal Representative made no request for further inquiry regarding [TEXT REDACTED BY THE COURT.] Kurnaz Factual Return, Enclosure (5). Clearly, the presence of counsel for the detainee, even one who could not disclose classified evidence to his client, would have ensured a fairer process in the matter by highlighting weaknesses in evidence considered by the tribunal and helping to ensure that erroneous decisions were not made regarding the detainee's "enemy combatant" status. The GSRT rules, however, prohibited that opportunity.

In sum, the CSRT's extensive reliance on classified information in its resolution of "enemy combatant" status, the detainees' inability to review that information, and the prohibition of assistance by counsel jointly deprive the detainees of sufficient notice of the factual bases for their detention and deny them a fair opportunity to challenge their incarceration. These grounds alone are sufficient to find a violation of due process rights and to require the denial of the respondents' motion to dismiss these **[**88]** cases.

**2. Specific Defects That May Exist in Individual Cases: Reliance on Statements Possibly Obtained Through Torture or Other Coercion and a Vague and Overly Broad Definition of "Enemy Combatant"**

Additional defects in the CSRT procedures support the denial of the respondents' motion to dismiss at least some of the petitions, though these grounds may or may not exist in every case before the Court and though the respondents might ultimately prevail on these issues once the petitioners have been given an opportunity to litigate them fully in the habeas proceedings.

**a. Reliance on Statements Possibly Obtained Through Torture or Other Coercion**

The first of these specific grounds involves the CSRT's reliance on statements allegedly obtained through torture or otherwise alleged to have been provided by some detainees involuntarily. HN17 The Supreme Court has long held that due process prohibits the government's use of involuntary statements obtained through torture or other mistreatment, In the landmark case of Jackson v. Denno, 378 U.S. *368*, 12 L. Ed. 2d 908, 84 S. Ct. 1774 (1964), the Court gave two rationales for this rule: first, "because of the probable unreliability of confessions **[**89]** that are obtained in a manner deemed coercive," and second "because of the strongly felt attitude of our society that important human **[*473]** values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.'" 378 U.S. at 386 (quoting Blackburn v. Alabama, 361 U.S. 199, 4 L. Ed. 2d 242, 80 S. Ct. 274 (I960)). See also Lam v. Kelchner, 304 F.3d 256, 264 (3rd Cir. 2002) ("The voluntariness standard is intended to ensure the reliability of incriminating statements and to deter improper police conduct."). Arguably, the second rationale may not be as relevant to these habeas cases as it is to criminal prosecutions in U.S. courts, given that the judiciary clearly does not have the supervisory powers over the U.S. military as it does over prosecutors, who are officers of the court. Cf. United States v. Toscanino, 500 F.2d 267, 276 (2d Cir. 1974) (the supervisory power of the district courts "may legitimately be used to prevent [them] from themselves becoming accomplices in willful disobedience of law'") (quoting McNabb v. United States, 318 U.S. 332, 345, 87 L. Ed. 819, 63 S. Ct. 608 (1943)). **[**90]** HN18 At a minimum, however, due process requires a thorough inquiry into the accuracy and reliability of statements alleged to have been obtained through torture. See Clanton v. Cooper, 129 F.3d 1147, 1157-58 (10th Cir. 1997) ("Because the evidence is unreliable and its use offends the Constitution, a person may challenge the government's use against him or her of a coerced confession given by another person."); Buckley v. Fitzsimmons, 20 F.3d 789, 795 (7th Cir. 1994) ("Confessions wrung out of their makers may be less reliable than voluntary confessions, so that using one person's coerced confession at another's trial violates his rights under the due process clause.").

Interpreting the evidence in a light most favorable to the petitioners as the Court must when considering the respondents' motion to dismiss, it can be reasonably inferred that the CSRT did not sufficiently consider whether the evidence upon, which the tribunal relied in making its "enemy combatant" determinations was coerced from the detainees. The allegations and factual return of Mamdouh Habib, a petitioner in Habib v. Bush, 02-CV-1130 (CKK) are illustrative in this regard. Mr. **[**91]** Habib has alleged that after his capture by allied forces in Pakistan, he was sent to Egypt for interrogation and was subjected to torture there, including routine beatings to the point of unconsciousness. Petitioner's Memorandum of Points and Authorities in Support of His Application for Injunctive Relief, filed with the Court Security Officer on November 23, 2004 and on the public record on January 5, 2005. Additionally, the petitioner contends that he was locked in a room that would gradually be filled with water to a level just below his chin as he stood for hours on the tips of his toes. Id. He further claims that he was suspended from a wall with his feet resting on the side of a large electrified cylindrical drum, which forced him either to suffer pain from hanging from his arms or pain from electric shocks to his feet. Id. The petitioner asserts that as a result of this treatment, he made numerous "confessions" that can be proven false. Id. at n.3. According to the classified factual return for Mr. Habib, [TEXT REDACTED BY THE COURT.] and the CSRT found the allegations of torture serious enough to refer the matter on September 22, 2004 to title Criminal Investigation Task Force. Id., Enclosure **[**92]** (1) at 3. [TEXT REDACTED BY THE COURT.] Examined in the light most favorable to the petitioner, this reliance cannot be viewed to have satisfied the requirements of due process.

Mr. Habib is not the only detainee before this Court to have alleged making confessions to interrogators as a result of torture. [TEXT REDACTED BY THE COURT.] Notwithstanding the

inability of counsel for petitioners to take formal discovery beyond **[*474]** interviewing their clients at Guantanamo Bay, they have introduced evidence into the public record indicating that abuse of detainees occurred during interrogations not only in foreign countries but at Guantanamo Bay itself. One illustration of alleged mistreatment during interrogation by U.S. authorities is Exhibit D to the petitioners' Motion for Leave to Take Discovery and for Preservation Order, filed in several of these cases with the Court Security Officer on January 6, 2005 and filed on the public record on January 10, 2005. In that document, dated August 2, 2004, the author, apparently affiliated with the Federal Bureau of Investigation but whose identity has been redacted, summarized his or her observations of interrogation activities at Guantanamo Bay as follows:

On a couple of occassions [sic], I entered **[**93]** interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defacated [sic] on themselves, and had been left there for 18-24 hours or more. On one occassion [sic], the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. When I asked the MP's what was going on, I was told that interrogators from the day prior had ordered this treatment, and the detainee was not to be moved. On another occassion [sic], the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconcious [sic] on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night. On another occassion [sic], not only was the temperature unbearably hot, but extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor.

The identities of the detainees referenced in this document are unknown **[**94]** to the Court and therefore, it is not certain whether they are even petitioners in any of these cases and, if so, whether the results of the above-described interrogations were used against them in CSRT proceedings. Of course, the veracity of Exhibit D itself must be investigated before it can be, definitively relied upon. Indeed, at this stage of the litigation it is premature to make any final determination as to whether any information acquired during interrogations of any petitioner in these cases and relied upon by the CSRT was in fact the result of torture or other mistreatment. What this Court needs to resolve at this juncture, however, is whether the petitioners have made sufficient allegations to allow their claims to survive the respondents' motion to dismiss. On that count, the Court concludes that the petitioners have done so.

**b. Vague and Overly Broad Definition of "Enemy Combatant"**

Although the government has been detaining individuals as "enemy combatants" since the issuance of the AUMF in 2001, it apparently did not formally define the term until the July 7, 2004 Order creating the CSRT. The lack of a formal definition seemed to have troubled at least the plurality **[**95]** of the Supreme Court in Hamdi, but for purposes of resolving the issues in that case, the plurality considered the government's definition to be an individual who was "part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who engaged in an armed conflict against the United States' there." 542 U.S. 507, 159 L. Ed. 2d 578, 124 S. Ct. 2633, 2639 (quoting Brief for the Respondents) (emphasis added). The Court agreed with the government that the AUMF authorizes **[*475]** the Executive to detain individuals falling within that limited definition, id., with the plurality explaining that "because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here." Id. at 2641. The plurality cautioned, however, "that indefinite detention for the purpose of interrogation is not authorized" by the AUMF, and added that a congressional grant of authority to the President to use "necessary and appropriate force" might not be properly interpreted to include

the **[**96]** authority to detain individuals for the duration of a particular conflict if that conflict does not take a form that is based on "longstanding law-of-war principles." Id.

The definition of "enemy combatant" contained in the Order creating the CSRT is significantly broader than the definition considered in Hamdi. According to the definition currently applied by the government, an "enemy combatant" "shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." July 7, 2004 Order at 1 (emphasis added). Use of the word "includes" indicates that the government interprets the AUMF to permit the indefinite detention of individuals who never committed a belligerent act or who never directly supported hostilities against the U.S. or its allies. This Court explored the government's position on the matter by posing a series of hypothetical questions to counsel at the December 1, 2004 hearing on the motion to dismiss. In response **[**97]** to the hypotheticals, counsel for the respondents argued that the Executive has the authority to detain the following individuals until the conclusion of the war on terrorism: "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities," Transcript at 25, a person who teaches English-to the son of an al Qaeda member, id. at 27, and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source. Id. at 29.

The Court can unequivocally report that no factual return submitted by the government in this litigation reveals the detention of a Swiss philanthropist, an English teacher, or a journalist. The Court can also acknowledge the existence of specific factual returns containing evidence indicating that certain detainees fit the narrower definition of "enemy combatant" approved by the Supreme Court in Hamdi. The petitioners have argued in opposition to the respondents' motion to dismiss, however, that at least with respect to some detainees, the expansive definition of "enemy combatant" currently in use in the **[**98]** CSRT proceedings violates long standing principles of due process by permitting the detention of individuals based solely on their membership in anti-American organizations rather than on actual activities supporting the use of violence or harm against the United States. Al Odah Petitioners' Reply to the Government's "Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss" at 25-26 (citing Scales v. United States, 367 U.S. 203, 224-225, 6 L. Ed. 2d 782, 81 S. Ct. 1469 (1961); Carlson v. Landon, 342 U.S. 524, 541, 96 L. Ed. 547, 72 S. Ct. 525 (1952)).

*HN19* Whether the detention of each individual petitioner is authorized by the AUMF and satisfies the mandates of due process must ultimately be determined on a detainee by detainee basis. At this stage of the litigation, **[*476]** however, sufficient allegations have been made by at least some of the petitioners and certain evidence exists in some CSRT factual returns to warrant the denial of the respondents' motion to dismiss on the ground that the respondents have employed an overly broad definition of "enemy combatant." Examples of cases where this issue is readily apparent are Kurnaz v. Bush, 04-CV-1135 (ESH), and El-Banna v. Bush, 04-CV-1144 (RWR). **[**99]**

As already discussed above, the unclassified evidence upon which the CSRT relied in determining Murat Kurnaz's "enemy combatant" status consisted of findings that he was "associated" with an Islamic missionary group named Jama'at-Al-Tabliq, that he was an "associate" of and planned to travel to Pakistan with an individual who later engaged in a suicide bombing, and that he accepted free food, lodging, and schooling in Pakistan from an organization known to support terrorist acts. Kurnaz Factual Return, Enclosure (1) at 1. While these facts may be probative and could be used to bolster the credibility of other evidence, if any, establishing actual activities undertaken to harm American interests, by themselves they fall short of establishing that the detainee took any action or provided any direct support for

terrorist actions against the U.S. or its allies. Nowhere does any unclassified evidence reveal that the detainee even had knowledge of his associate's planned suicide bombing, let alone establish that the detainee assisted in the bombing in any way. In fact, the detainee expressly denied knowledge of a bombing plan when he was informed of it by the American authorities. Id., **[**100]** Enclosure (3) at 1 [TEXT REDACTED BY THE COURT.] n35 Absent other evidence, n36 it would appear that the government is indefinitely holding the detainee -- possibly for life -- solely because of his contacts with individuals or organizations tied to terrorism and not because of any terrorist activities that the detainee aided, abetted, or undertook himself. Such detention, even if found to be authorized by the AUMF, would be a violation of due process. Accordingly, the detainee is entitled to fully litigate the factual basis for his detention in these habeas proceedings and to have a fair opportunity to prove that he is being detained on improper grounds.

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n35 [FOOTNOTE REDACTED BY THE COURT.]

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n36 It is true that Exhibit R19 to the Kurnaz Factual Return does assert that [TEXT REDACTED BY THE COURT] uphold the detention of any petitioner, including Mr. Kurnaz, as long as "some evidence" exists to support a conclusion that he actively participated in terrorist activities. Motion to Dismiss at 47-51. Hamdi, however, holds that the "some evidence" standard cannot be applied where the detainee was not given an opportunity to challenge the evidence in an administrative proceeding, 124 S. Ct. at 2651, and Mr. Kurnaz was never provided access to Exhibit R19. Additionally, in resolving a motion to dismiss, the Court must accept as true the petitioner's allegations and must interpret the evidence in the record in the light most favorable to the nonmoving party. Because Exhibit R19 [TEXT REDACTED BY THE COURT] the Court cannot at this stage of the litigation give the document the weight the CSRT afforded it.

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Similar defects might also exist with respect to the detention of Jamil El-Banna, a petitioner in El-Banna v. Bush, 04-CV-1144 (RWR). At the CSRT proceedings, the tribunal concluded that the detainee was an "enemy combatant" on the ground that he was "part of or supporting Al Qaida forces." Respondents' In Camera Factual Return to Petition for Writ of Habeas Corpus by Petitioner Jamil El-Banna (hereinafter "El-Banna Factual Return"), filed December 17, 2004, Enclosure (1) at 5. The CSRT reached this conclusion notwithstanding the Personal Representative's position that it was unsupported by the record before the tribunal. See October 16, 2004 Memorandum of James R. **[*477]** Crisfield Jr., attached to the El-Banna Factual Return. During the CSRT proceedings, the tribunal rejected two grounds cited by the Recorder in support of the detainee's "enemy combatant" status. First, although the detainee was alleged to have been indicted by a Spanish National High Court Judge for membership in a terrorist organization, id, Enclosure (3) at 2, the tribunal did not find any evidence relating to that indictment "helpful in establishing the detainee's association with Al Qaida." Id., Enclosure **[**102]** (1) at 4. [TEXT REDACTED BY THE COURT.] Second, although the detainee was alleged to have attempted "to hoard an airplane with equipment that resembled a homemade electronic device," id., Enclosure (3) at 3, [TEXT REDACTED BY THE COURT.] Even accepting these factual conclusions as true, a serious legal question exists as to whether such activities would be sufficient to detain the petitioner at Guantanamo Bay indefinitely

without formally charging him with a crime. See Hamdi, 124 S. Ct. at 2640 ("The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.") and at 2642 ("If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding [that the AUMF allows indefinite detention] may unravel."). In any event, however, final resolution of that question must be left for another day because at this stage of the proceedings, the Court must interpret the facts in the light most favorable to the party opposing a motion to dismiss. Under that approach, evidence in the record can be fairly interpreted to conclude that the petitioner is being detained indefinitely **[**103]** not because[TEXT REDACTED BY THE COURT.]

It may well turn out that after the detainee is given a fair opportunity to challenge his detention in a habeas proceeding, the legality of his detention as an "enemy combatant" will be upheld and he will continue to be held at Guantanamo Bay until the end of the war on terrorism or until the government determines he no longer poses a threat to U.S. security. It is also possible, however, that once given a fair opportunity to litigate his case, the detainee will establish that he is being indefinitely detained not because of anything he has done and not to prevent his return to any "battlefield," metaphorical or otherwise, but simply because [TEXT REDACTED BY THE COURT] and the respondents' motion to dismiss must therefore be denied.

This concludes the Court's analysis of the due process issues arising from the respondents' motion to dismiss. Nothing written above should be interpreted to require the immediate release of any detainee, nor should the conclusions reached be considered to have fully resolved whether or not sufficient evidence exists to support the continued detention of any petitioner. The respondents' motion to dismiss asserted that no evidence exists and that the petitioners could **[**104]** make no factual allegations which, if taken as true, would permit the litigation of these habeas cases to proceed further. For the reasons stated above, the Court has concluded otherwise. The Court, however, has not addressed all arguments made by the petitioners in opposition to the respondents' motion to dismiss, and it may be that the CSRT procedures violate due process requirements for additional reasons not addressed in this Memorandum Opinion. In any event, and as Hamdi acknowledged, in the absence of **[*478]** military tribunal proceedings that comport with constitutional due process requirements, it is the obligation of the court receiving a habeas petition to provide the petitioner with a fair opportunity to challenge the government's factual basis for his detention. Id. at 2651-52. Accordingly, the accompanying Order requests input from counsel regarding how these cases should proceed in light of this Memorandum Opinion.

**D. CLAIMS BASED ON THE GENEVA CONVENTIONS**

The petitioners in all of the above captioned cases except Al Odah v. United States, 02-CV-0828, have also asserted claims based on the Geneva Conventions, which regulate the treatment **[**105]** of certain prisoners of war and civilians. The respondents contend that all Geneva Convention claims filed by the petitioners must be dismissed because Congress has not enacted any separate legislation specifically granting individuals the right to file private lawsuits based on the Conventions and because the Conventions are not "self-executing," meaning they do not by themselves create such a private right of action. Motion to Dismiss at 68-71. In the alternative, the respondents argue that even if the Geneva Conventions are self-executing, they do not apply to members of al Qaeda because that international terrorist organization is not a state party to the Conventions. Id. at 70 n.80. Finally, although respondents concede that Afghanistan is a state party to the Conventions and admit that the Geneva Conventions apply to Taliban detainees, they emphasize that President Bush has determined that Taliban fighters are not entitled to prisoner of war status under the Third Geneva Convention and contend that this decision is the final word on the matter. Id.

HN20 The Constitution provides that "all Treaties made . . . under the Authority of the United States, shall be the supreme Law of **[**106]** the Land." U.S. Const, art. VI, cl. 2. HN21 Unless Congress enacts authorizing legislation, however, an individual may seek to enforce a treaty provision only if the treaty expressly or impliedly grants such a right See Edye v. Robertson, 112 U.S. 580, 598-99, 28 L. Ed. 798, 5 S. Ct. 247, Treas. Dec. 6714 (1884). If a treaty does not create an express right of private enforcement, an implied right might be found by examining the treaty as a whole. See Diggs v. Richardson, 180 U.S. App. D.C. 376, 555 F.2d 848, 851 (D.C. Cir. 1976).

HN22 The Third and Fourth Geneva Conventions do not expressly grant private rights of action, and whether they impliedly create such rights has never been definitively resolved by the D.C. Circuit. n37 The Court of Appeals is currently reviewing the matter in the appeal of Hamdan v. Rumsfeld, 344 F. Supp.2d 152 (D.D.C. 2004), but until that court issues a definitive ruling, n38 this Court must make its own determination. After reviewing Hamdan and the briefs filed by petitioners and respondents in the instant cases, HN23 the Court concludes that the Conventions are self-executing and adopts **[*479]** the following reasoning provided by Judge Robertson:

Because the Geneva Conventions were **[**107]** written to protect individuals, because the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation, because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and because nothing in the Third Geneva Convention itself manifests the contracting parties' intention that it not become effective as domestic law without the enactment of implementing legislation, I conclude that, insofar as it is pertinent here, the Third Geneva Convention is a self-executing treaty.

Id. at 165.

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n37 The closest the Court of Appeals came to ruling on the issue was the case of Tel-Oren v. Libyan Arab Republic, 233 U.S. App. D.C. 384, 726 F.2d 774 (D.C. Cir. 1984), a suit brought by victims of a brutal attack in Israel by the Palestinian Liberation Organization, The main issue on appeal was whether the District Court correctly ruled that there was no subject-matter jurisdiction to hear the case, and although the three-judge panel ultimately affirmed the lower court's decision, each judge relied on a separate rationale and no judge joined any other judge's opinion. In reaching his own conclusion, Judge Robert Bork determined that the Third Geneva Convention was not self-executing. Id. at 808-09. The other two judges on the panel did not address the issue, however, and the matter remains unsettled as of this date. **[**108]**

n38 Oral argument on the respondents' appeal in Hamdan is currently scheduled for March 8, 2005.

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Although the Court rejects the primary basis argued by the respondents for dismissal of claims based on the Geneva Conventions, it does accept one of the alternative grounds put forth in their motion, namely that the Geneva Conventions do not apply to al Qaeda. Article[HN24] 2 of the Third and Fourth Geneva Conventions provides, "In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." Clearly, al Qaeda is not a "High Contracting Party" to the Conventions, and thus individuals detained on the ground that they are members of that terrorist organization are not entitled to the protections of the treaties.

This does not end the analysis for purposes of resolving the respondents' motion to dismiss, however, because some of the petitioners in the above-captioned cases are **[**109]** being detained either solely because they were Taliban fighters or because they were associated with both the Taliban and al Qaeda. Significantly, the respondents concede that the Geneva Conventions apply to the Taliban detainees in light of the fact that Afghanistan is a High Contracting Party to the Conventions. Motion to Dismiss at 70-71 n.80 (citing White House Fact Sheet (Feb. 7, 2002), available at http://www.wMtehouse.gov/news/releases/2002/02/20020207-13.html). They argue in their motion to dismiss, however, that notwithstanding the application of the Third Geneva Convention to Taliban detainees, the treaty does not protect Taliban detainees because the President has declared that no Taliban fighter is a "prisoner of war" as defined by the Convention. Id. The respondents' argument in this regard must be rejected, however, for the Third Geneva Convention does not permit the determination of prisoner of war status in such a conclusory fashion.

[HN25]Article 4 of the Third Geneva Convention defines who is considered a "prisoner of war" under the treaty. Paragraph (1) provides that the term "prisoners of war" includes "members of the armed forces of a Party to the conflict, **[**110]** as well as members of militias or volunteer corps forming part of such armed forces." As provided in Paragraph (2), the definition of "prisoners of war" also includes "members of other militias and members of other volunteer corps, including those of organized resistance movements," but only if they fulfill the following conditions: "(a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war." If there is any doubt as to whether individuals satisfy the Article 4 prerequisites, Article 5 entitles them to be treated as prisoners of war "until such time as their **[*480]** status has been determined by a competent tribunal." Army Regulation 190-8 created the rules for the "competent tribunal" referenced in Article 5 of the Third Geneva Convention, and the CSRT was established in accordance with that provision. See Army Regulation 190-8 § 1-1.b, Motion to Dismiss at 32.

[HN26]Nothing in the Convention itself or in Army Regulation 190-8 authorizes the President of the United States to rule by **[**111]** fiat that an entire group of fighters covered by the Third Geneva Convention falls outside of the Article 4 definitions of "prisoners of war." To the contrary, and as Judge Robertson ruled in Hamdan, the President's broad characterization of how the Taliban generally fought the war in Afghanistan cannot substitute for an Article 5 tribunal's determination on an individualized basis of whether a particular fighter complied with the laws of war or otherwise falls within an exception denying him prisoner of war status. 344 F. Supp.2d at 161-62. Clearly, had an appropriate determination been properly made by an Article 5 tribunal that a petitioner was not a prisoner of war, that petitioner's claims based on the Third Geneva Convention

could not survive the respondents' motion to dismiss. But although numerous petitioners in the above-captioned cases were found by the CSRT to have been Taliban fighters, nowhere do the CSRT records for many of those petitioners reveal specific findings that they committed some particular act or failed to satisfy some defined prerequisite entitling the respondents to deprive them of prisoner of war status, n39 Accordingly, the Court denies **[**112]** that portion of the respondents' motion to dismiss addressing the Geneva Convention claims of those petitioners who were found to be Taliban fighters but who were not specifically determined to be excluded from prisoner of war status by a competent Article 5 tribunal.

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n39 See, e.g., [TEXT REDACTED BY THE COURT.] This list provides only examples of petitioners for whom the CSRT did not make a full Article 5 type inquiry regarding prisoner of war status. There may be additional petitioners who fought for the Taliban and who were not given individualized determinations as to their prisoner of war status. Absence from this list should not be interpreted to imply that a petitioner can no longer assert his Geneva Convention claims in this habeas litigation.

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**E. DISMISSAL OF REMAINING CLAIMS**

Upon review of the remaining causes of action asserted by the various petitioners in these cases, the Court concludes that the respondents are entitled to dismissal of the claims not addressed in the preceding sections of this Memorandum Opinion. **[**113]** The Court agrees with the respondents that claims based on the Sixth, Eighth, and Fourteenth Amendments to the Constitution are not sustainable because HN27 the Sixth Amendment applies only to criminal proceedings, because HN28 the Eighth Amendment applies only after an individual is convicted of a crime, and because HN29 the Fourteenth Amendment applies only to the states and not to the federal government. In addition, any claims based on the Suspension Clause, U.S. Const, art. I, § 9, cl. 2, must be dismissed because the habeas jurisdiction of this court has not been suspended. Except as discussed in part II.D above regarding the Geneva Conventions, the Court agrees that the remaining treaty-based claims and the claim based on Army Regulation 190-8 asserted by the petitioners should be dismissed primarily for the reasons stated by the respondents in their motion to dismiss. See Motion to Dismiss at 71-72. The Court also agrees with the reasoning of Judge Kollar-Kotelly in her original Rasul decision and with Judge Randolph's concurrence **[*481]** in the Al Odah appeal that the doctrine of sovereign immunity bars claims based on the Alien Tort Claims Act and that the general waiver of sovereign **[**114]** immunity contained in the Administrative Procedure Act is inapplicable because of the "military authority" exception in 5 U.S.C. § 701(b)(1)(G). Al Odah, 321 F.3d at 1149-50 (Randolph, J. concurring); Rasul, 215 F. Supp.2d at 64 n.11. Finally, having found that all detainees possess Fifth Amendment due process rights and that some detainees possibly possess rights under the Geneva Conventions, it is unnecessary to look to customary international law to resolve the petitioners' claims. See The Paquete Habana, 175 U.S. 677, 699, 44 L. Ed. 320, 20 S. Ct. 290 (1900) ("where there is no treaty and no controlling executive or legislative act or

judicial decision, resort must be had to the customs and usages of civilized nations").

**III. CONCLUSION**

For the reasons provided above, the Court holds that the petitioners have stated valid claims under the Fifth Amendment and that the CSRT procedures are unconstitutional for failing to comport with the requirements of due process. Additionally, the Court holds that Taliban fighters who have not been specifically determined to be excluded from prisoner of war status by a competent Article 5 tribunal **[**115]** have also stated valid claims under the Third Geneva Convention. Finally, the Court concludes that the remaining claims of the petitioners must be denied. Accordingly, this Memorandum Opinion is accompanied by a separate Order denying in part and granting in part the respondents' Motion to Dismiss or for Judgment as a Matter of Law.

This Judge began her participation as the coordinator of these cases on August 17, 2004, and her involvement will soon be ending. These cases have always remained before the original Judges assigned to them and only particular issues or motions were referred to this Judge for resolution. Therefore, there will be no need to transfer the cases back to those Judges. In the interest of the effective management of this litigation, however, the accompanying Order requests briefing from counsel on an expedited basis regarding their views as to how these cases should proceed in light of this Memorandum Opinion and this Judge's imminent departure.

January 31, 2005

JOYCE HENS GREEN

United States District Judge

**ORDER DENYING IN PART AND GRANTING IN PART RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW AND REQUESTING BRIEFING ON THE FUTURE [**116] PROCEEDINGS IN THESE CASES**

For reasons stated in the Memorandum Opinion issued this date, it is hereby

ORDERED that the respondents' Motion to Dismiss or for Judgment as a Matter of Law is denied in part and granted in part. It is

FURTHER ORDERED that counsel for the petitioners and for the respondents shall file on or before 12:00 noon, Thursday, February 3, 2005, submissions regarding how they believe these cases should proceed in light of the Memorandum. Opinion and this Judge's imminent departure.

IT IS SO ORDERED.

January 31, 2005

JOYCE HENS GREEN

United States District Judge

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| **DAVID M. HICKS,** | ) | |
| **Petitioner,** | ) | |
| **v.** | ) | **Civil Action No. 02-CV-0299 (CKK)** |
| **GEORGE W. BUSH,** | ) | |
| **President of the United States, *et al.*,** | ) | |
| **Respondents.** | ) | |

**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

/s/
JOYCE HENS GREEN
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

IBRAHIM AHMED MAHMOUD AL QOSI,

Petitioner,

v.

GEORGE W. BUSH, President of the United States; DONALD RUMSFELD, United States Secretary of Defense; GORDON R. ENGLAND, Secretary of the United States Navy; JOHN D. ALTENBURG, JR., Appointing Authority for Military Commissions, Department of Defense; Brigadier General JAY HOOD, Commander, Joint Task Force, Guantanamo Bay, Cuba, and Colonel BRICE A. GYURISKO, Commander, Joint Detention Operations Group, Joint Task, Guantanamo Bay, Cuba,

Respondents.

**PETITION FOR WRIT OF MANDAMUS AND/OR WRIT OF HABEAS CORPUS, AND COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF**

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Dated: November 8, 2004

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Petitioner Ibrahim Ahmed Mahmoud al Qosi ("Mr. al Qosi" or "Petitioner") has been imprisoned without cause by the United States military for nearly three years. Abducted by Pakistani bounty hunters in December 2001, he was turned over to U.S. armed forces and subsequently transported to the U.S. Naval Station at Guantanamo Bay, where he has been physically and mentally abused, coerced, humiliated, and dehumanized in ways that violate the most basic norms of civilized societies, and were previously thought unimaginable in the United States of America. He has also been refused access to his family, prevented from consulting counsel and denied a panoply of other rights the United States has expressly guaranteed to all people at all times in our Constitution, our laws, and our international treaty obligations.

As American citizens, as members of the legal profession and officers of this Court, it is shameful to admit but, yes: it can -- and did -- happen here. This, despite the fact that Mr. al Qosi has always said that he committed no crime, international or otherwise; never took up arms against the United States; never took part in either planning or executing any acts of terrorism; and never belonged to *al Qaeda* or any other terrorist organization. In fact, the Government no longer even alleges that he did so. Essentially, it charges him with the "war crime" of being a cook and an accountant.

Between December 2001 and June 2004, a period of more than two and a half years, Mr. al Qosi's American jailers afforded him no opportunity to challenge the legitimacy of his detention before any judicial or administrative body, whether civilian or military. They simply locked him up, beat him up, and threw away the key.

Only after the Supreme Court ordered them do so in June of this year, did U.S. military authorities take the trouble to ask themselves whether Mr. al Qosi was properly detained as an "enemy combatant." But the "Combatant Status Review Tribunals" ("CSRT") the military hastily convened for Petitioner and others similarly situated were a travesty, made up of non-neutral decision-makers who had no inclination or ability to afford Petitioner a serious opportunity to challenge his detention. Although, by this time, Mr. al Qosi had been appointed military counsel and insisted on consulting with them, he was not permitted to do so. His lawyers were not only barred from the "hearing" before the CSRT, they were prevented even from traveling to Guantanamo for the week leading up to it. To no one's surprise, the CSRT determined that he was properly detained, although there is no evidence that any court, worthy of the name, would consider a sufficient basis for such a finding.

Having brushed off the U.S. Supreme Court in this manner, the same military authorities now propose to submit Mr. al Qosi to trial by a "military commission" for the "war crime" of conspiracy, an offense unknown to the laws of war, or to any other field of international law. That the only charge against him is the nebulous catch-all "conspiracy" is itself an acknowledgement that there is no evidence that Mr. al Qosi ever engaged in any *acts*, violent or otherwise, that could even arguably be characterized as "war crimes."

Compounding the unlawfulness of being charged with a non-existent offense, Mr. al Qosi is being prosecuted by a military commission that has no legal authority to consider the charge (or any others) made against him. Worse yet, the procedures under which the military commissions will operate make a mockery of domestic and

international notions of due process, violate even the terms of the Presidential Order nominally authorizing them, and contradict the military's own fundamental principles of fairness set forth in the Uniform Code of Military Justice.

In short, Mr. al Qosi's predicament would be well suited to a Kafka novella, but has no place in the United States justice system.

For these reasons, Petitioner seeks a Writ of Mandamus and/or Writ of Habeas Corpus, together with such declaratory and/or injunctive relief as may be necessary and appropriate, ordering Respondents to release Mr. al Qosi from his unlawful detention immediately; to terminate their unlawful attempt to prosecute him for a non-existent crime before an illegitimate tribunal; and, in the event Respondents decide to reinitiate prosecution of Petitioner, to do so before a lawfully-established court where his constitutional, statutory and international rights to due process and fundamental fairness will be scrupulously observed.

In support of his Petition, Mr. al Qosi alleges as follows:

## PARTIES

1. Petitioner **Ibrahim Ahmed Mahmoud al Qosi** was born in 1960 in Atbara, Sudan. He is a citizen of Sudan.

2. Mr. al Qosi was trained as an accountant at Khartoum Polytechnic University from which he graduated in 1987. He is married and has two daughters.

3. He is not, and never has been, a member of *al Qaeda*. Nor does he subscribe in any way to its avowed *jihad* against the United States of America.

4. Petitioner is not a soldier or any other kind of combatant. He has never attacked, injured, killed, fired upon, or directed fire upon U.S. military personnel or

civilians. He has not himself engaged in, or conspired with anyone else to engage in, any criminal or terrorist conduct, much less violated the laws of war.

5. Even so, Mr. al Qosi has been detained as a so-called "enemy combatant" by the United States military since approximately December 2001. He has been incarcerated at the United States Naval Station at Guantanamo Bay, Cuba since roughly January, 2002.

6. Respondent **George W. Bush** is President of the United States, and executed the Military Order (discussed at length below) that purports to authorize both Petitioner's continued detention and his impending trial by military commission.

7. Respondent **Donald H. Rumsfeld** is the Secretary of Defense of the United States, and commands all aspects of the United States Military, including the Office of Military Commissions established pursuant to the Military Order issued by Respondent Bush. Respondent Rumsfeld executed the Military Commission Orders setting forth the procedures pursuant to which the military proposes to try Mr. al Qosi.

8. Respondent **John D. Altenburg, Jr.**, a retired military officer, is Respondent Rumsfeld's designee with overall responsibility for the Military Commissions tasked with trying Mr. al Qosi and other foreign nationals detained at Guantanamo Bay.

9. Respondent **Gordon R. England** is Secretary of the Navy, and is Respondent Rumsfeld's designee responsible for the Combatant Status Review Tribunals, the hastily concocted bodies the military reluctantly charged with reviewing Mr. al Qosi's status as an "enemy combatant" only after the United States Supreme Court ordered it to do so.

10. Respondent **Jay Hood** is the Commander of Joint Task Force Guantanamo and, in that capacity, is responsible for Petitioner's continued and indefinite detention at Guantanamo Bay.

11. Respondent **Brice A. Gyurisko** is the Commander of Joint Detention Operations Group and is responsible for the U.S. facility where Petitioner is presently detained. He exercises immediate custody over Petitioner pursuant to orders issued by Respondents Bush, Rumsfeld, Altenberg, England and Hood.

## JURISDICTION

12. This action arises under the Constitution, laws and treaties of the United States, including Articles I, II, III, and VI of the United States Constitution, as well as the Fifth and Sixth Amendments thereto; 5 U.S.C. Section 702; 28 U.S.C. Sections 1331, 1350, 1361, 1391, 1651, 2241 and 2242; and 42 U.S.C. Section 1981.

13. This Court has subject matter jurisdiction pursuant to 28 U.S.C. Sections 1332, 1350, 1361, and 2241, as well as 5 U.S.C. Section 702.

14. Venue is proper in this Court under 28 U.S.C. §§ 1391(b) and (e).

## STATEMENT OF FACTS

15. On September 18, 2001, in response to the September 11, 2001 attacks on New York and Washington, Congress passed a resolution authorizing 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.

Joint Resolution 23, Authorization for Use of Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 224 (2001).

16. In early October 2001, acting pursuant to the AUMF, the President sent United States Armed Forces into Afghanistan to attack *al Qaeda* and dislodge the Taliban regime that supported it. American forces in Afghanistan allied themselves with the "Northern Alliance," a consortium of armed Afghan foes of the Taliban.

17. Within ninety days of the United States' invasion, the Taliban Government was defeated, *al Qaeda* was on the run, and Northern Alliance and U.S. forces had detained scores of people thought to be members of the Taliban and/or *al Qaeda*.

18. Authorities in neighboring Pakistan, which previously had enjoyed close ties with the Taliban Government of Afghanistan, were anxious to show cooperation with the United States. To underscore their allegiance, Pakistani officials began rounding up refugees fleeing the fighting in Afghanistan, nominally on suspicion of having ties to *al Qaeda* and/or the Taliban.

19. U.S. military and Pakistani authorities were so eager to get results that they offered bounties of up to $50,000 to the local Pakistani population for the capture of individuals suspected of ties to the Taliban and/or *al Qaeda*.

**The Detention Order**

20. In November 2001, as the military campaign in Afghanistan raged and suspected associates of *al Qaeda* and/or the Taliban in other countries were seized, Respondent Bush declared that he had the authority to detain *indefinitely* any non-U.S. citizen suspected of ties to international terrorism without legal processes of any kind.

21. In a November 13, 2001 military order (the "President's Military Order"), Respondent Bush authorized the detention of any non-U.S. citizen whom he determined there was "reason to believe:"

> i. is or was a member of the organization known as *al Qaeda*;
>
> ii. has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threatened to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
>
> iii. has knowingly harbored one or more individuals described in subparagraphs (i) and (ii).

President's Military Order, 66 FED. REG. 57,833 (Nov. 13, 2001) (attached hereto at Tab A).

22. The President's Military Order was not authorized or otherwise sanctioned by Congress.

23. The President's Military Order purports to give Respondent Bush a free hand in identifying individuals who fall within its scope. It sets no standards constraining the President's discretion. *Id.* § 2(a).

24. The President's Military Order also does not provide that detainees shall be notified of their rights under domestic and international law (largely because Respondents do not believe they have any such rights). Indeed, in contrast with Army regulations governing the treatment of Prisoners of War, see Army Regulation 190-8, it does not contemplate that detainees will even be told why they are being held or of any criminal charges they may face. *See generally* 66 FED. REG. 57,833.

25. Even more, the President's Military Order gives detained persons no right of access to a neutral tribunal to seek review of their detention, much less provide for an

appeal to an Article III court. In fact, the President's Military Order purports to bar any sort of review by Article III courts, *id.* § 7(b), a provision already over-ruled by the United States Supreme Court in *Rasul et al. v. Bush et al.*, 542 U.S. __, 124 S.Ct. 2686 (2004).

26. In short, the President's Military Order authorizes indefinite and unreviewable detention based on what amounts to little more than the President's unsubstantiated say-so.

27. The President's Military Order also provides that, if Respondents ever do get around to charging detainees with specific offenses, they will be tried by Military Commission pursuant to the Order and implementing regulations devised by the Department of Defense, not according to the principles of law generally recognized in the trial of criminal cases in U.S. district courts or military courts-martial. 66 FED. REG. 57,833 § 4.

28. Again, this stands in stark contrast to long-standing military practice and army regulations that require enemy Prisoners of War to be tried by regular courts-martial and afforded all the procedural protections provided in the Uniform Code of Military Justice ("UCMJ"). Army Regulation 190-8 § 1-5(a)(3).

29. Respondent Bush claims to have determined that it is "not practicable" to apply the procedural and evidentiary safeguards afforded other criminal defendants "given the danger to the safety of the United States and the nature of international terrorism." 66 FED. REG. 57,833 § 1(f).

30. Acting under the ostensible authority conferred on him in the President's Military Order, Respondent Rumsfeld outlined the format for Military Commission

proceedings in a series of "Military Commission Orders" (each an "MCO," or collectively, the "MCOs") issued as early as March 21, 2002, and continuing thereafter.

31. By their terms, the jurisdiction of Military Commissions established by the MCOs extends only to "violations of the laws of war and other offenses triable by military commission." MCO No. 1 § 3(B) (attached hereto at Tab B.)

32. Respondent Rumsfeld or his designee (the "Appointing Authority") is given authority to appoint one or more Military Commissions to try individuals who are subject to the President's Military Order. *Id.* § 2. Respondent Rumsfeld has designated retired military officer John Altenberg as his "Appointing Authority."

33. Under the MCOs, the Military Commission for each charged detainee is to be comprised of no less than three (3) and no more than seven (7) military officers, the exact number in each case is left to Respondent Altenberg's discretion. *Id.* § 4(A). From each Commission, the Appointing Authority is to select one "Presiding Officer." *Id.*

34. The MCOs also provide for the creation of an Office of the Chief Prosecutor and Chief Defense to establish rules of "evidence" and set forth procedures for the review of Military Commission decisions. *Id.* §§ 4 - 6.

35. As detailed more fully in Paragraphs 154 through 192 below, not only do the proposed Military Commission proceedings not afford detainees the rights accorded criminal defendants in U.S. district courts or in trial by U.S. courts-martial, they fall well short of the fundamental due process guarantees enshrined in our Constitution, our laws and our treaties.

**Presidential Determination That**
**The Geneva Conventions Do Not Apply**

36. Ironically, although the MCOs purport to provide for trial by Military Commission for violations of the "laws of war," they make no reference to, and in fact are in violation of, the primary instruments of the laws of war; namely, the four Geneva Conventions of 1949, to which the United States is party and Respondents are thus bound. *See* Geneva Convention Relative to the Treatment of Prisoners of War ("Geneva III"), 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("Geneva IV"), 6 U.S.T. 3516, 75 U.N.T.S. 287.

37. Under the Geneva Conventions, every person in military custody has a status. One is either a Prisoner of War under Geneva III or a civilian covered by Geneva IV. No captured person is outside the Conventions.

38. If there is any doubt as to whether a detained person falls under Geneva III and is thus entitled to all the protections afforded POWs, or instead is a civilian entitled to the protections of Geneva IV, Article 5 of Geneva III mandates a hearing before a "competent tribunal" to make an individualized determination as to whether the detained person is or is not a POW. Geneva III, art. 5. Until that tribunal meets and makes a decision, a captured individual must be treated as a POW. *Id.*; *see also* Army Regulation 190-8 § 1-5(a)(2).

39. The United States military has adopted regulations implementing Article 5 of Geneva III. *See, e.g.*, Army Regulation 190-8.

40. In practice, it has also regularly recognized the applicability and meaning of Article 5. For example, during the Vietnam War, it regularly treated all prisoners -- even the archetypal, non-uniformed guerilla force, the VietCong -- as POWs pending the

outcome of individual Article 5 proceedings. *See* C. Berans & J. Silber, "Contemporary Practice of the United States Relating to International Law," 62 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 766 (1968).

41. Moreover, statistics show that during the First Gulf War in 1990, a total of 1,196 Article 5 tribunals were conducted. 310 persons were found to be POWs, while all the rest were determined to be displaced civilians and treated as refugees. U.S. Department of Defense Conduct of Persian Gulf War: Final Report to Congress (1992).

42. Notwithstanding military regulations and past practice, in or around February 2002, Respondent Bush nominally determined that the Geneva Conventions had only limited application to Taliban captured on the battlefield in Afghanistan, and no application whatsoever to other persons picked up in Afghanistan, Pakistan or other parts of the world and suspected of being members of *al Qaeda*.

43. According to Respondents, the Guantanamo detainees are neither POWs nor civilians. Rather, they are the wholly new breed of "enemy combatants" (sometimes "unprivileged belligerent" or "unlawful combatant") without rights under international law.

44. The purposes of ignoring the safeguards set forth in the Geneva Conventions are obvious: to circumvent the prohibitions on coercive interrogation techniques set out in the Conventions; to "eliminate any argument regarding the need for case-by-case determinations for POW status;" and as a way to "substantially reduce[ ] the threat of domestic criminal prosecution [of administration officials] under the War Crimes Act (18 U.S.C. 2441)." *See* Memo. from A.R. Gonzales to the Respondent Bush Jan. 25, 2002 (attached hereto at Tab C.)

**Petitioner's Seizure In Pakistan**

45. In December 2001, while feeling the chaos in Afghanistan and after crossing the border into Pakistan, Petitioner was picked up by Pakistani authorities near Parachinar, Pakistan. On information and belief, he was turned in by Pakistani civilians eager to cash in on the bounties being offered by American and Pakistani authorities.

46. At the time of his capture, Petitioner was unarmed. After being held in Parachinar for about a day, Petitioner was taken to Peshawar, Pakistan, where he was interrogated for approximately two weeks. Only once during that period was he questioned by a United States agent, and even then perfunctorily.

47. For reasons he does not know, Mr. al Qosi was then turned over to the custody of the United States and taken to Kandahar, Afghanistan, for further interrogation.

48. Before interrogation sessions in Afghanistan, Petitioner was forced to lie face down on the ground, after which his hands and feet were tied tightly and painfully behind him. The military guards would often step on his back (which had been stripped bare) with their boots for extra leverage as they roped him up. He would then be dragged bodily into the interrogation tent for questioning. Petitioner soon developed serious lacerations on his legs where the ropes abraded his skin.

49. Between interrogation sessions in Kandahar, detainees were kept approximately 25 men to a tent. For the bodily functions of all 25 men, each tent contained two exposed buckets for bowel movements and a single exposed pipe in the ground for urinating.

50. Talk among the detainees was strictly prohibited, and they were subject to constant humiliation and harassment from American soldiers. For example, soldiers

made a point of ridiculing and laughing at detainees when they were forced to perform their bodily functions in the exposed "facilities." Detainees were even gratuitously denied the freedom to wear the underwear provided to them by the International Red Cross.

51. After roughly two weeks at Kandahar in such conditions, Petitioner was shipped on to Guantanamo Bay.

52. The morning of his flight to Guantanamo (though Mr. al Qosi only became aware of the destination long after he got there), Petitioner and other detainees were made to wait, motionless in an excruciating position that involved balancing on the knees and toes of one leg with the head of one detainee resting on the back of another in front. Petitioner's hands were tied tightly behind his back and his head covered in a black sack.

53. Detainees were kept in this same position for hours; they were not permitted to move for any reason. After repeated begging, one detainee was forced to urinate on himself.

54. After many hours like this, Mr. al Qosi and the others were taken to be force-shaved, head, beard and moustache. The blue overalls he had previously been provided were then literally cut off his body as American personnel stood by laughing at and ridiculing him. Finally, he was provided a new orange jump suit and made to sit on the ground for hours more before being dragged aboard the flight to Guantanamo.

**Severe, Intense, Near Daily Interrogations For Over Two Years**

55. Immediately upon touch down at Guantanamo in or around January 2002, Petitioner and the others were forced back into the same painful position they had spent

so many hours in before the flight – head-to-back with other detainees and balanced on one leg. Many of the detainees were screaming from the intolerable pain. When any tried to move, they were struck on the head and forced to return to the original position.

56. One by one, the detainees were taken first to be fingerprinted and photographed, and then on to their cells at the make-shift Camp X-Ray.

57. The hastily constructed Camp X-Ray was really nothing more than a collection of kennel-like mesh cages exposed to the elements.

58. Individual cages measured roughly 2.4 meters long by 1.8 meters wide (approximately eight feet by six feet). In each was a mattress placed directly on a concrete slab, together with two buckets -- one for water and one for urinating. Bowel movements were to be performed in an exposed toilet outside the individual cages, frequently with United States soldiers laughing, pointing and hurling insults.

59. Not even food was delivered in a humane way at Camp X-Ray. It was literally thrown through the cage mesh directly onto the concrete floor. And even then, Petitioner was given no more than 15 minutes to finish his meals, lest any remaining food be taken away.

60. Mr. al Qosi was confined in his kennel at Camp X-Ray for approximately three and a half months, until about April 2002, at which time he was transferred to a newly built facility known as Camp Delta, consisting of several wards, with 48 metal cells in each ward. Individual cells at Camp Delta measure approximately the same dimensions as the cages in Camp X-Ray.

61. Interrogation of Petitioner and other detainees became increasingly intense and abusive after transfer to Camp Delta. Among the "techniques" employed on Mr. al

Qosi and other detainees, all of which had devastating physical and psychological effects and contributed to a pervasive atmosphere of fear, intimidation and humiliation, were:

(a) strapping detainees to the floor of an interrogation room and wrapping them in the Israeli flag. On such occasions, hard-core pornographic pictures were frequently on display in the interrogation room. (The detainees referred to this particular room as "Hell Room.");

(b) taunting detainees in sexually humiliating ways, including having sex in detainees' presence or having female interrogators rub their bodies suggestively against detainees;

(c) leaving detainees alone in a refrigerated interrogation room for extended periods with the constant pounding of deafening music hammering detainees' ears;

(c) stripping detainees of even the few indicia of humanity they were typically afforded -- water, tooth brushes, tooth paste, access to the Koran;

(d) threatening to turn detainees over to the secret police of countries like Egypt or Jordan, well-known in the region for their grotesque treatment of prisoners.

62. Perhaps because he found the prospect so utterly terrifying, Mr. al Qosi's interrogators seemed to take particular pleasure in threatening to hand him over to the Egyptian police. Indeed, they seemed to enjoy the ruse as a sort of prank, sometimes engaging in role play to maximize the effect on him.

63. Mr. al Qosi found the thought of being turned over to Egyptian custody so terrorizing, he was only too happy to tell his tormentors what they seemed to want to hear.

**Petitioner Designated Eligible For Trial;**
**Charge Referred**

64. On July 3, 2003, after over 500 days of confinement, cruelty and interrogation without charges, Respondent Bush designated Petitioner as one of the first

six Guantanamo detainees to be tried by Military Commission. Memo. from Respondent Bush to Respondent Rumsfeld (July 3, 2003) (attached hereto at Tab D.)

65. For still eight more months after Respondent Bush's determination that Mr. al Qosi was to be placed on trial, however, Respondents continued to detain and interrogate him, without informing Petitioner that he had been designated for trial before a Military Commission, let alone informing him of the "war crimes" charges against him or providing him counsel.

66. Throughout this time, Lt. Col. Sharon Shaffer, who had been recruited to the Office of Chief Military Defense Counsel to represent detainees designated for trial, sat idly by awaiting assignment.

67. In January 2004, Petitioner was moved to yet another locale at Guantanamo known as Camp Echo, the detention facility for individuals awaiting trial by Military Commission. At Camp Echo, where he remains, he is kept in isolation in a small cell inside the cottage assigned to him. He may not speak with other detainees, and has been denied access to religious books, including a copy of the Koran given to Lt. Col. Shaffer for him.

68. On February 3, 2004, Lt. Col. Shaffer was finally detailed to represent Petitioner before the Military Commission. Even then, it took three more weeks -- until February 24, 2004 -- before Col. Shaffer was given an undated charge sheet charging Mr. al Qosi with a single count of "conspiracy," a fictitious offense unknown to the laws of war. (A copy of the Charge is attached hereto at Tab E.)

69. It was yet three more weeks -- until March 17, 2004 -- before Col. Shaffer met Mr. al Qosi for the first time. By that time, Petitioner had been incarcerated and subject to constant interrogation for more than 800 days.

70. On June 28, 2004 (coincidentally, the same day that the Supreme Court handed down its decisions in *Rasul* and *Hamdi*), Respondent Altenburg formally approved the charge against Petitioner and referred it to the Military Commission.

71. The Military Commission procedures pursuant to which Respondents intend to try Mr. Mahmoud violate the Constitution, laws and treaties of the United States.

72. Under the system decreed by Respondent Bush, and implemented by Respondent Rumsfeld, the Executive alone defines the crimes, prosecutes the accused, adjudicates guilt, reviews all appeals, and administers punishment.

73. Not only are all of the members of each Commission and the Review Panel appointed by Respondent Altenberg (who was himself appointed by Respondent Rumsfeld), he, along with Respondents Bush and Rumsfeld, each retain the ability to overrule any Commission findings they do not like, including a finding of not guilty.

74. The Appointing Authority, the Office of Chief Military Prosecutor and the Presiding Officers operate out of the same office suite, share the same support staff, and, upon information and belief, routinely confer on matters material to Petitioner's case with no notice to Petitioner's counsel.

75. The Office of Chief Defense Counsel, in contrast, is located in an entirely different suite, and does not enjoy nearly the same logistical, administrative or financial support as the Prosecutor's Office.

76. A few simple examples demonstrate the seamless overlap among the Appointing Authority, the Office of Chief Prosecutor and Presiding Officer.

77. On May 5, 2004, acting in accordance with MCO No. 1, Petitioner's defense counsel submitted two written requests to the Appointing Authority, one for assistance in obtaining access to witnesses and other detainees, and the other for depositions of certain high-ranking former officials.

78. By memorandum dated May 7, 2004, not copied to but subsequently obtained by Petitioner's counsel, the Appointing Authority forwarded both requests to the Chief Prosecutor for "review and action," with the instruction to "prepare an appropriate response for the Legal Advisor [to the Appointing Authority]'s review and signature." (The Appointing Authority subsequently informed defense counsel that authority for both issues reside with the Presiding Officer, not the Appointing Authority -- precisely as recommended by the Prosecutor.)

79. At the same time the Appointing Authority has been passing the buck down to the Presiding Officer (through the Prosecutor's Office), the Presiding Officer, on his own motion, has referred to the Appointing Authority no fewer than five "interlocutory questions" concerning "commission law," notwithstanding the fact that the President's Military Order makes the Commission itself "the triers of both fact and law." 66 Fed. Reg. 57,833 § 4(c)(2).

80. Stated simply, Commission law is being made up on the fly, with Mr. al Qosi along for the ride. The net result is that defense counsel, let alone Petitioner himself, has no idea what law or procedures are to be applied.

81. Equally inexcusable, Commission procedures erect no bar to evidence that all legitimate courts reject out of hand. Under MCO No. 1, any and all evidence is admissible so long as it "would have probative value to a reasonable person" -- whatever that means. MCO No. 1 § 6(D)(1). Included, of course, are statements coerced from Petitioner during the more than two years he was subjected to continuous interrogation without access to counsel, as well as statements coerced from other detainees.

82. Usable too are written statements of any kind -- sworn or unsworn, hearsay or direct -- without regard to a witness' availability. *Id.* § 6(D)(3). Indeed, in Mr. al Qosi's case, Respondents have already indicated to defense counsel that they intend to deny Petitioner his right to confront his accusers. The Prosecutor has stated that he expects a key Respondent witness to testify out-of-court, and that Petitioner will have no opportunity for cross-examination.

83. Even more, on information and belief, the Prosecutors have built their case against Mr. al Qosi based on statements extracted from persons who were formerly detainees at Guantanamo Bay, but who have since been released and thus are no longer available for cross-examination.

84. The Military Commission "appeals" procedure is a similar charade. MCO No. 1 conspicuously affords no avenue for review of Commission actions in federal court. Rather, the first review will be conducted by the very Appointing Authority who appointed the Commission members and approved the charges in the first place. *Id.* § 6(H)(3).

85. The second review will be by a "Review Panel" consisting of four members already appointed by Respondent Rumsfeld, two of whom were on the panel

that crafted the Commission trial procedures they are going to be asked to review. *See id.* § 6(H)(4). A third has publicly stated that "the September 11 terrorists and detainees, whether apprehended in the United States or abroad, are protected neither under our criminal-justice system nor under the international law of War," while the fourth is a close friend of Respondent Rumsfeld. *See* Stephen J. Fortunato, Jr., *A Court of Cronies*, In These Times (Jun. 28, 2004) *available at* http://www.inthesetimes.com/site/main/article/a_court_of_cronies.

86. Third and fourth level reviews will be conducted by Respondents Rumsfeld and Bush. Only Respondent Bush has the authority to enter a final decision on Petitioner's fate. MCO No. 1 § 6(H)(5)-(6).

87. Throughout, Mr. al Qosi's accusers are thus also his "appellate court."

88. Finally, even if the woeful inadequacies of the Commission process could be overcome, and the Military Commission itself were to find Petitioner not guilty, any such acquittal could still be undone. At any stage in the review process, including final review by the President, the reviewers can send the case back for further proceedings – including a finding of guilty -- if they dislike the outcome below in any way. *See generally id.* § 6(H).

**The Combat Status Review Tribunals**

89. In June 2004, even as the wheels of the Military Commission process were beginning to roll over Petitioner, the Supreme Court issued its decisions in *Rasul v. Bush*, *supra*, and *Hamdi et al. v. Rumsfeld et al.*, 542 U.S. __, 124 S.Ct. 2633 (2004), forcing Respondents to accept the truth they had tried so hard to bury -- that even the Guantanamo detainees, like all people, have rights.

90. They thus hastily announced the creation of Combatant Status Review Tribunals ("CSRTs"), nominally for the purpose of determining whether the individuals detained at Guantanamo Bay, including those, like Petitioner, already charged and determined eligible for trial, were properly classified as "enemy combatants" in the first place.

91. As part of this make-it-up-as-you-go-along process, Respondents purport to provide each detainee an opportunity to contest his designation as an "enemy combatant." At least on paper, each is also afforded an opportunity to have a "Personal Representative" attend the proceeding with them. Memo. of the Sec'y of the Navy (July 29, 2004) (attached hereto at Tab F.)

92. The CSRT procedures fall woefully short of Constitutional, statutory and international minimums, however. In the first place, they come inexcusably late. At the time they were announced (much less held), Mr. al Qosi had already been detained by Respondents for over two years based on nothing more than the Executive's unsubstantiated say-so.

93. Moreover, even taking the CSRTs on their own terms, they are legally inadequate. Among their more notorious features are:

(a) Contrary to Army Regulation 190-8 (under which the military is required to show by a preponderance of the evidence that a detainee is not entitled to POW status), the CSRT rules put the burden of proof on the detainee and create a "rebuttable presumption" that the detainee is an enemy combatant;

(b) The military may appeal a ruling favorable to the detainee;

(c) The CSRT does not even permit a finding that the detainee is a "POW," but instead purports to determine only whether or not a detainee is an "enemy combatant" -- a designation unknown in the modern laws of war;

(d) The detainee is not free to choose his "Personal Representative;"

(e) The military retains discretion to change the rules at any time; and

(f) The Tribunals are not comprised of "neutral decision-maker[s]" but rather are comprised of military officers from the various branches of service.

94. Within days of the announcement of the CSRT process, Lt. Col. Shaffer wrote Respondent England requesting that she be notified of the scheduling of the CSRT for Mr. al Qosi; that all contact regarding his CSRT be made through counsel; and that counsel be allowed to appear as Petitioner's Personal Representative before the CSRT. Memo. from Lt. Col. S. Shaffer to the Sec'y of the Navy (July 15, 2004) (attached hereto at Tab G.)

95. Petitioner's counsel also requested that any and all information to be used in the determination of Petitioner's status be produced promptly. In her request, counsel emphasized the obvious: whether Petitioner had been properly designated an "enemy combatant" is inextricably tied to the issue of whether he can properly be tried by the Military Commission. *See id.*

96. On September 20, 2004, the Convening Authority for the CSRT denied counsel's request to be Mr. al Qosi's "Personal Representative" before the CSRT. According to the Convening Authority, Respondent Rumsfeld determined that the CSRT is a "non-adversarial administrative process in which legal representation is inappropriate . . . ." Memo. from the Convening Auth. to Lt. Col. S. Shaffer (Sept. 20, 2004) (attached hereto at Tab H.)

97. That same week, a military official identifying himself as Petitioner's "Personal Representative" for the CSRT appeared in Petitioner's cell. Mr. al Qosi requested that his military counsel participate in the meeting and represent him before the

CSRT. His "Personal Representative" told him this was not possible. Petitioner then requested copies of any documents concerning his status to be considered by the CSRT. The "Personal Representative" told him that he had no right to see any such documents. Petitioner repeated his request that his counsel be permitted to participate in the meeting and represent him before the CSRT. He was told again, "It won't happen."

98. Mr. al Qosi did not refuse to participate in the CSRT.

99. Upon information and belief, on September 23, 2004, without the participation of Petitioner or his counsel, without even notice to counsel that the CSRT for Petitioner was taking place, the CSRT ostensibly determined that Petitioner was correctly designated an "enemy combatant."

100. Not coincidentally, Lt. Col. Shaffer was barred even from traveling to Guantanamo during the week the CSRT proceeding took place, though at the time she had no knowledge why.

101. Neither Petitioner nor his military counsel have any knowledge of the factual basis of the CSRT's determination that Mr. al Qosi is an "enemy combatant."

102. As of the date of this Petition, having been rubber stamped an "enemy combatant," Mr. al Qosi remains in Respondents' custody awaiting trial by Military Commission, which trial is currently scheduled to begin on February 8, 2005.

## CLAIMS FOR RELIEF

### COUNT I

### RESPONDENTS MAY NOT TRY PETITIONER BEFORE AN INVALIDLY CONSTITUTED MILITARY COMMISSION

103. Petitioner re-alleges and incorporates by reference paragraphs 1 through 102 above.

104. The Military Commission poised to try Mr. al Qosi is invalid, and the grant of jurisdiction to it is overboard and unlawful for at least the following reasons:

**A. The Commission Lacks Jurisdiction Because It Has Not Been Authorized By Congress**

105. The Supreme Court has held that "[w]hen the President acts in absence of . . . a congressional grant . . . of authority, he can only rely upon his own independent powers." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637, 72 S. Ct. 863, 871 (1952) (Jackson, J., concurring); *see also Hamdi*, 124 S. Ct. at 2650. He has no power to establish Military Commissions.

106. Under Article I, Section 8, clauses 9 and 10 of the Constitution, which vest Congress with the power "[t]o constitute Tribunals inferior to the Supreme Court" and "[t]o define and punish . . . offences against the Law of Nations," Congress alone has the power to authorize the establishment of Military Commissions.

107. Congress has not authorized the creation of Military Commissions to try individuals captured during the Afghan war, much less those, like Petitioner, captured outside of Afghanistan, not during active hostilities, but as part of an open-ended "war on terror." The AUMF cannot be read to confer such authority.

108. Accordingly, Respondents' detention of Petitioner for trial by the Commission is improper, unlawful and invalid as an *ultra vires* exercise of authority. It

exceeds the President's powers under Article II and thus violates separation of powers principles.

**B. The Appointing Authority Has No Power To Appoint A Military Commission**

109. Because Congress has not authorized the creation of Military Commissions to try alleged "enemy combatants" detained at Guantanamo, the only arguable basis for their creation is the power to convene general courts-martial. Only the President, the Secretary of Defense (or the Secretaries of the individual branches of the armed forces) or a "commanding officer" to whom the Secretary has delegated authority may convene a general court-martial. *See* 10 U.S.C. § 822.

110. In this case, Respondent Rumsfeld purports to have delegated authority to Respondent Altenburg to appoint the members of the Military Commissions convened to try Guantanamo detainees.

111. Yet, Respondent Altenburg is a civilian, not a commissioned officer, and thus lacks the power to exercise military jurisdiction in any form.

**C. The Commission Lacks Jurisdiction To Try Individuals Detained At Guantanamo Bay**

112. Military Commissions represent an extraordinary departure from our customary systems of justice that are justified, if at all, only by the exigencies of war. As such, they have no jurisdiction to try individuals far from the "locality of actual war." *See Ex parte Milligan*, 4 Wall. 2 (1866).

113. The Commission that proposes to try Petitioner is situated far outside any zone of conflict or occupation in either the Afghan conflict or the broader "war on terror." As such, the Commission has no authority to try Petitioner, and Respondents must be ordered to drop their prosecution of Mr. al Qosi immediately.

### D. The Creation Of Military Commissions Violates Treaty Law Binding On The United States

114. Article 3(1)(d) of Geneva III prohibits the contracting parties from "passing. . . sentences . . . without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Geneva III, art. 3(1)(d).

115. Similarly, Article 14.1 of the International Covenant on Civil and Political Rights ("ICCPR"), 999 U.N.T.S. 171, which the United States has also ratified, requires that every tribunal hearing criminal (or civil) cases must be "established by law." ICCPR, art. 14.1.

116. The central purpose of these requirements is the same -- to guard against the exercise of unbridled executive power by requiring that tribunals be established not by fiat but *via* customary institutional processes.

117. In the case of Geneva III, this rule finds expression in the notion that tribunals must be "regularly constituted," not, as here, spun out of whole cloth in response to the whims of the Executive.

118. In the case of the ICCPR, the same principle finds expression in the rule that courts must be established by "laws" duly adopted by a country's legislative body.

119. Respondent's creative rule-making with respect to the Military Commissions does not and cannot meet these binding standards. The Commissions are illegitimate and illegal and must be stopped from conducting unauthorized trials.

## COUNT II

## THE MILITARY COMMISSION DOES NOT HAVE JURISDICTION TO TRY PETITIONER FOR THE NON-EXISTENT "WAR CRIME" OF CONSPIRACY

120. Petitioner re-alleges and incorporates by reference paragraphs 1 through 119 above.

121. The Military Commission convened to try Mr. al Qosi does not have the power to hear or adjudicate the single count of "conspiracy" with which he is charged.

122. As the Supreme Court held in *Reid* v. *Covert*:

> The jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8 [granting Congress the power to "define and punish . . . Offences against the Law of Nations"], and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.

354 U.S. 1, 21, 77 S. Ct. 1222, 1233 (1957).

123. Under Article 21 of the Uniform Code of Military Justice, Military Commissions only have jurisdiction to try individuals charged with violation of the "law of war" or other crimes specifically authorized by Congress. *See* 10 U.S.C. § 812.

124. MCO No. 1 recognizes the rule and specifically incorporates it. Under Paragraph 3(B) of MCO No. 1, the Military Commissions only "have jurisdiction over violations of the laws of war and all other offenses triable by military commission." MCO No. 1 § 3(B).

125. Aside from violations of the law of war, the only other offenses Congress has made triable by military commissions are spying and aiding the enemy, neither of which have been (or could be) alleged against Petitioner in this case. 10 U.S.C. §§ 904, 906.

126. The offense with which Mr. al Qosi has been charged -- "conspiracy" -- is not a violation of the laws of war.

127. Because civil law countries do not recognize a crime of conspiracy, generally conspiracy has never been part of the international laws of war. Aside from two very narrow exceptions that do not apply here[1], no international convention has ever recognized conspiracy as a crime that violates the laws of war. This includes the Geneva Conventions, as well as those setting up the international criminal tribunals in Yugoslavia and Rwanda, and the International Criminal Court. Indeed, conspiracy has specifically been rejected as a violation of the laws of war by prior military tribunals, including most notably the Nuremburg tribunals that followed the Second World War.

128. Since conspiracy is not an offense against the laws of war, and does not sound in any other grant of Congressional authority to military commissions, the Military Commission in this case lacks jurisdiction to try and/or punish Petitioner. Accordingly, Respondents must be ordered to drop their pending prosecution of Mr. al Qosi immediately.

**COUNT III**

**RESPONDENTS MAY NOT DETAIN PETITIONER FOR AN OFFENSE THAT HAS BEEN CREATED BY RESPONDENTS AFTER THE FACT**

129. Petitioner alleges and incorporates by reference paragraphs 1 through 128 above.

130. Respondents are attempting to try Petitioner for a crime that they invented long after the alleged "offense" was committed.

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[1] The two narrow exceptions are conspiracy to commit aggressive war and genocide.

131. As just stated, "conspiracy" has never been recognized as an offense under the laws of war, or any other field of international law. It was in effect created by the President's Military Order, MCO No. 1, and Military Commission Instruction No. 2, after the alleged acts of Petitioner described in the Charge.

**A. The Executive Cannot Define Crimes**

132. Congress, not the Executive, has the authority to legislate under Article I of the Constitution. This expressly includes the power "[t]o define and punish . . . Offences against the Law of Nations" of which the laws of war are a part.

133. Absent Congressional authorization, the Executive lacks the power to define specific offenses. If the President or his subordinates attempt to do so, as here, their actions are *ultra vires* and violate the principle of separation of powers. Accordingly, Petitioner may not be detained or tried based on a newly-created offense established and defined solely by the Executive.

**B. Crimes Cannot Be Defined After The Fact**

134. In addition, any charges brought before the Commission must constitute offenses under the laws of war as they existed at the time the alleged conduct was committed. Applying laws created after the conduct has occurred violates the *ex post facto* clause of the Constitution, Article 1, Section 9, clause 3.

135. Since the Charge does not allege any offense against Petitioner under the laws of war as they existed at the time he allegedly committed these acts, Petitioner cannot constitutionally be detained and tried for conspiracy.

## COUNT IV

## RESPONDENTS HAVE DENIED PETITIONER THE RIGHT TO A SPEEDY TRIAL

136. Petitioner re-alleges and incorporates by reference paragraphs 1 though 135 above.

### A. Petitioner Was Entitled To A Speedy Trial Under The Sixth Amendment

137. The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." U.S. Const., amend. VI.

138. Because it applies in "all criminal prosecutions" to all "accuseds" regardless of their nationality, Mr. al Qosi has the same right to a speedy trial as any citizen of the United States.

139. Respondents' detention of Petitioner without trial for nearly three years (including over 27 months without even being charged) violates this basic right.

### B. Petitioner Was Entitled To A Speedy Trial Under The UCMJ

140. Even beyond Petitioner's constitutional right to a speedy trial, he is also entitled to a prompt trial under the UCMJ.

141. The President's Military Order purports to be based, in part, on Article 36 of the UCMJ which confers on the President authority to prescribe procedures governing courts-martial and military commissions. 10 U.S.C. § 836. Article 36 mandates that procedures adopted for trials by courts-martial and military commissions "may not be contrary to or inconsistent with [the UCMJ]." *Id.*

142. Petitioner is a person subject to the UCMJ by virtue of the President's Military Order and MCO No. 1, as well as Article 2 of the UCMJ itself which provides

that "persons within an area leased by or otherwise reserved or acquired for the use of the United States" and under the control of any of the various branches of the military are subject to the UCMJ. 10 U.S.C. § 802(a)(12).

143. The President's Military Order and MCO No. 1 contravene the UCMJ in numerous respects, including not least Article 10 thereof which provides that any confinement of an accused must be terminated unless charges are instituted promptly and a speedy trial afforded. 10 U.S.C. § 810.

144. Specifically, Article 10 provides:

> [w]hen 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 dismiss the charges and release him.

*Id.*

145. The types of delays to which Petitioner has been subjected are intolerable under any circumstances. Mr. al Qosi was in the custody of the United States for 27 months before he was even charged with the fictitious "war crime" of conspiracy. Even after charging him, it still took Respondents another eight months to inform him of the charge. And Petitioner's trial is not even contemplated until February 2005, more than three full years after he was first brought to Guantanamo.

146. Respondents cannot justify the inordinate delay in charging Petitioner, informing him of those charges and subjecting him to trial. There is no excuse for their failure to act.

147. Since they did not take "immediate steps . . . to inform" Mr. al Qosi "of the specific wrong of which he is accused and try him," Respondents now have a clear

and nondiscretionary duty under the UCMJ to "release him" from his confinement. 10 U.S.C. § 810.

### C. Petitioner Was Entitled To A Speedy Trial Under United States Treaty Obligations

148. In addition to violating Mr. al Qosi's Constitutional and statutory rights, Petitioner's lengthy pre-trial confinement also violates United States treaty obligations.

149. Article 103 of Geneva III provides that:

> [j]udicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. *In no circumstances shall this confinement exceed three months.*

Geneva III, art. 103 (emphasis added).

150. Quite obviously, Respondents have detained Mr. al Qosi for well over the three months permitted in Geneva III -- indeed, it has been over *33 months*, more than ten times the permissible period. Respondents thus have a clear and nondiscretionary duty to release Petitioner immediately.

151. Even were one to accept Respondent's unprecedented argument that Mr. al Qosi is not entitled to presumptive POW status under Geneva III, the Geneva Conventions would still not sanction the outrageous delay that has occurred. The Fourth Geneva Convention governing the treatment of civilians in wartime require that all persons must be "promptly informed" of any charges against them and brought to trial "as rapidly as possible." Geneva IV, art. 71.

152. Beyond the Geneva Conventions, the ICCPR also requires "promptness" (a term which is interpreted quite strictly) at all procedural stages leading to criminal

proceedings: persons arrested must be informed "promptly" of any charges, arts. 9.2 & 14.3(a); they must be brought "promptly" before a judge or judicial officer, art. 9.3; and they are entitled to trial "within a reasonable time" and "without undue delay." Arts. 9.3 & 14.3(c). Moreover, everyone deprived of liberty -- not just those arrested on criminal charges -- is entitled to bring proceedings before a court, so that the court may decide "without delay" on the lawfulness of the detention. Art. 9.4.

153. Under no view of the facts have Respondents met these binding obligations to Petitioner.

**COUNT V**

**THE MILITARY COMMISSION'S PROCEDURES VIOLATE PETITIONER'S RIGHTS UNDER THE CONSTITUTION, STATUTES AND TREATIES OF THE UNITED STATES**

154. Petitioner re-alleges and incorporates by reference paragraphs 1 through 153 above.

155. Even if the Commission had jurisdiction belatedly to try Petitioner as an "enemy combatant" for the non-existent war crime of "conspiracy," Petitioner's continued detention to stand trial before the Military Commission would still be unlawful. The Commission's pre-trial, trial and post-trial procedures violate the Constitution, statutes, and treaties of the United States.

**A. <u>The Military Commissions Do Not Afford Petitioner Due Process</u>**

156. The Fifth Amendment to United States Constitution applies to all "persons" without regard to their nationality, and promises that none will be denied life or liberty without the due process of law. U.S. Const., amend. V. Mr. al Qosi is entitled to the due process of law no less than United States citizens.

157. The MCOs violate Petitioner's fundamental Due Process rights.

158. Not only do they fail to afford Petitioner a full and fair trial before an impartial tribunal, there is no right even to appeal to a neutral decision maker. Petitioner's accusers have intolerably stacked the deck. First they appoint the judge and jury, then they appoint the Review Panel, and then they arrogate to themselves direct responsibility for final review and disposition, just in case they do not like the outcome below.

159. Such proceedings before an *ad hoc* tribunal of non-neutral decision makers, all of whom are beholden to the very people who are accusing Petitioner of wrongdoing in the first place simply cannot satisfy our fundamental notions of due process.

160. Equally unacceptable, the MCOs permit decisions as to guilt or innocence to be based on unreliable evidence of the worst sort -- unsworn allegations derived from coerced confessions with no right of confrontation.

161. Courts throughout the land, including regularly constituted military courts-martial, have consistently held that hearsay evidence that does not satisfy any of the exceptions to the hearsay rule, cannot be admitted in criminal proceedings without running afoul of due process.

162. Accordingly, Mr. al Qosi is entitled to such relief as is necessary to put an stop to the sham trial to which Respondents threaten to expose him.

**B. Petitioner Has Been And Will Be Compelled To Bear Witness Against Himself**

163. The Fifth Amendment also provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const., amend. V.

164. As set forth above, Respondents have subjected Mr. al Qosi to cruel, inhumane and coercive treatment, all for the purpose of extracting self-incriminating statements from him.

165. The Military Commissions rules of "evidence" not only allow all such statements to be introduced, they all but require it. Section 6(D)(1) of MCO No. 1 states that any evidence which would have probative value to a reasonable person "shall" be admitted as evidence. MCO No. 1 § 6(D)(1).

166. In fact, the Prosecutor has indicated to Col. Shaffer that he intends to use typed summaries of interviews conducted through translators taken from Mr. al Qosi during his prolonged incarceration against him.

167. Even apart from the violation of Mr. al Qosi's free-standing Fifth Amendment right not to be compelled to bear witness against himself, the use of self-incriminating statements extracted from Mr. al Qosi under coercion further compounds and underscores the violation of his Fifth Amendment due process rights.

168. The violation of Petitioner's Fifth Amendment rights could not be more plain, and the Military Commission proceedings must be stopped for this reason alone.

**C. <u>Petitioner Is Threatened With Double Jeopardy</u>**

169. The Fifth Amendment states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., amend. V.

170. Yet, the Military Commission procedures threaten to do exactly that. As detailed above, MCO No. 1 provides that the Appointing Authority, the Review Panel, Respondent Rumsfeld and Respondent Bush will all have an opportunity to review the decision of the Military Commission. *See* MCO No. 1 § 6(H).

171. At any stage of review, no matter the outcome(s) below, the reviewer has the ability to remand the case for "further proceedings." Thus, even if the Military Commission, which is charged with making all decisions of fact and law, were to return a finding of "not guilty," it remains open for any of the reviewing entities to reject that finding and order that Petitioner "be twice put in jeopardy."

172. Beyond the violation of Mr. al Qosi's independent right not to be twice put in jeopardy, the fact that Mr. al Qosi is at risk of being tried repeatedly for the same crime if Respondents do not like the initial outcomes inexcusably exacerbates the violation of his Fifth Amendment due process rights by adding yet another level of fundamental unfairness to a process that is already layered too thick.

173. The American justice system will not tolerate such travesties; the Commission proceedings must be stopped.

**D. The Military Commission Procedures Violate The Confrontation Clause**

174. As stated above, the Sixth Amendment to the United States Constitution applies in criminal proceedings to all "accuseds" regardless of alienage. Mr. al Qosi is thus entitled to its protections no less than an American citizen.

175. Among the protections the Sixth Amendment provides is the right "to be confronted with the witnesses against him." U.S. Constitution, Amend. VI. The Military Commission procedures deny Petitioner this right.

176. Just eight months ago, in *Crawford* v. *Washington*, 124 S. Ct. 1354 (2004), the Supreme Court held that testimonial out-of-court statements – including affidavits, custodial examinations, prior testimony and statements taken by police officers in the course of interrogation – are barred from use against an accused in criminal

prosecutions unless the witness is unavailable *and* the defendant has had a prior opportunity to cross-examine, *regardless of whether such statements are deemed reliable by the court*. *Id.* at 1369 (The Confrontation Clause "commands not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.")

177. Military Commission procedures stand in stark contrast. According to Section 6(D)(3) of MCO No. 1, "the Commission may consider any other evidence including, but not limited to, … sworn or unsworn written statements …," regardless of whether or not the witness in question is unavailable, and regardless of whether or not the defense has ever had an opportunity to subject the witness to the "crucible of cross-examination." MCO No. 1 § 6(D)(3).

178. The procedures thus fall far short of satisfying Petitioner's rights under the Confrontation Clause.

179. Quite apart from the violation of Mr. al Qosi's rights under the Confrontation Clause, Mr. al Qosi's inability to confront the witnesses against him highlights yet again Respondents' disregard for Mr. al Qosi's entitlement to the due process of law.

**E. <u>Petitioner Has Been Denied The Assistance Of Counsel</u>**

180. The Sixth Amendment also provides that all accuseds, including Mr. al Qosi, have the right "to have the Assistance of Counsel for his defence." U.S. Const., amend. VI.

181. Respondents have denied Petitioner this right in innumerable respects, many (but by no means all) of which have been set forth above.

182. Among the more malodorous violations are the facts that Respondents refused Mr. al Qosi access to a lawyer for some 27 months after he was first detained; that he was subjected to coercive interrogation, indeed torture, throughout the same period he was denied representation by an attorney; and that he request to have counsel participate in his CSRT was so flagrantly denied.

183. As was similarly the case with Mr. al Qosi's rights not to be compelled to bear witness against himself, not to be twice put in jeopardy and to confront the witnesses against him, Respondents denial of Petitioner's Sixth Amendment right to the effective assistance of counsel, beyond being actionable in its own right, also reiterates a fact which scarcely needs any further iteration: the entire Military Commission process is so stacked against him that, taken as a whole, it violates Mr. al Qosi's right to the due process of law guaranteed by the Fifth Amendment to our Constitution.

**F. <u>The Military Commission Procedures Contravene The UCMJ</u>**

184. As discussed, Article 36 of the UCMJ entitles Petitioner to the full measure of trial rights Congress provided in the UCMJ. *See* 10 U.S.C. § 836. Indeed, the President's Military Order implicitly recognizes this fact when it cites Article 36 as authority on which it purports to be based. *See* 66 FED. REG. 57,833, Preamble.

185. Much like the Constitution, the UCMJ prohibits compulsory self-incrimination, art. 31; prohibits biased tribunals, art. 37; affords all defendants the right to defense counsel, art. 38; precludes double jeopardy, art. 44, and generally provides for procedural rights that are denied wholesale before the Military Commission.

186. To the extent the President's Military Order and the MCOs presume to derogate from these core statutory rights, they violate the UCMJ and exceed the Executive's authority.

187. The Military Commission proceedings thus violate the statutes of the United States and must be stopped immediately.

**G. The Military Commission Procedures Violate U.S. Treaty Law**

188. Just as they violate the Constitution and laws of the United States, so too do the proposed Military Commission procedures violate our treaty obligations.

189. Binding international law, like domestic law, prevents criminal defendants from being compelled to testify against themselves or being compelled to confess guilt. *See, e.g.*, ICCPR, art. 14.3(g) (""[n]ot to be compelled to testify against [one] self or to confess guilt."); Convention Against Torture ("CAT"), 1465 U.N.T.S. 85, art. 15 (requiring Parties "to ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence"); Geneva III, art. 99 ("No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.")

190. Treaties to which the United States is a party also mandate the effective assistance of counsel in all criminal proceedings. *See, e.g.*, ICCPR, art. 14.3(b) (all persons shall "have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing"); *id.*, art. 14.3(d) (everyone has the right to "be tried in his presence, and to defend himself in person or through legal assistance of his own choosing."); Geneva III, art. 99 (No prisoner of war may be convicted without having had … the assistance of a qualified advocate or counsel"); *id.*, art. 105 (counsel for a POW may "freely visit the accused and interview him in private.").

191. Treaty law also embodies provisions akin to the Confrontation Clause of the United States Constitution. Under Article 14.3(e) of the ICCPR, for example, every

criminal defendant has the non-derogable right to "examine, or have examined, the witnesses against him." ICCPR, art. 14.3(e).

192. The ICCPR guarantees everyone a "fair and public hearing by a competent, independent and impartial tribunal established by law." ICCPR, art. 14.1. By convening a biased tribunal before which Petitioner will effectively be compelled to testify against himself, denied the ability to confront his accusers and denied the effective assistance of counsel, Respondents have made a mockery of our commitment to the international rule of law.

## COUNT VI

## PETITIONER'S CONTINUED DETENTION AND PLANNED TRIAL BEFORE A MILITARY COMMISSION VIOLATES PETITIONER'S RIGHT TO EQUAL PROTECTION

193. Petitioner re-alleges and incorporates by reference paragraphs 1 through 192 above.

### A. Petitioner's Detention Violates The Equal Protection Clause

194. The Fourteenth Amendment to the United States Constitution, made applicable to the Federal Government by the doctrine of reverse incorporation, guarantees all "persons" the "equal protection of the laws." U.S. Const., amend. XIV. The Equal Protection Clause applies to Mr. al Qosi no less than a citizen of the United States.

195. The President's Military Order and the MCOs violate Petitioner's equal protection rights. By their terms, they apply *only* to non-citizens; petitioner is being held for trial by a Military Commission and denied fundamental procedural protections only because of his alienage. 66 FED. REG. 57,833 § 2(a); *see* MCO No. 1 § 3(A).

196. The Supreme Court has held that any discrimination against aliens not involving governmental employees is subject to strict scrutiny. Here, Respondents

cannot show a compelling governmental reason, advanced through the least restrictive means, for denying non-citizens access to the fundamental protections of due process that are guaranteed to all U.S. citizens (including, *inter alia*, indictment, evidentiary rules ensuring reliability and fairness, a system consistent with previously prescribed rules enforced by impartial courts, a jury trial presided over by an independent judge not answerable to the prosecutor, and the right to an appeal before a tribunal independent of the prosecuting authority).

197. While the Respondent may have an obvious and compelling interest in differentiating between citizens and aliens in areas such as immigration, it has no such latitude with respect to criminal prosecutions.

198. Respondents have violated Mr. al Qosi's equal protection rights in still another respect -- by treating him differently than other similarly situated detainees who just happen to be citizens of countries allied with the United States.

199. For example, upon information and belief, other alien Guantanamo detainees who have the good fortune of being citizens of U.S. allies, particularly countries actively assisting the United States in the "war on terror," have received preferential treatment, including enjoying better conditions of detention and early release.

200. There is no basis in law for the preferential treatment of some alien detainees but not others.

201. Thus, because the President's Military Order and the MCOs have been applied in an unequal manner to detainees of different nationalities, they violate Petitioner's right to equal protection of the law.

**B. Petitioner's Detention Violates 42 U.S.C. § 1981**

202. Petitioner's detention for trial by a Military Commission also violates 42 U.S.C. § 1981, which guarantees all persons an equal right to give evidence, to receive equal benefit of all laws and proceedings for the security of persons, and to receive like punishment.

203. Petitioner is being unlawfully detained for purposes of trial by the Commission solely because he is a non-citizen. A citizen who committed the very same acts as those alleged against Petitioner could not be detained under the President's Military Order and held for trial before the Commission. Accordingly, Respondents have detained Petitioner for trial before the Commission in violation of his right to equal protection of the laws of the United States.

**C. Petitioner's Detention Also Violates His Equal Protection Rights Under United States Treaty Obligations.**

204. Respondents' discriminating treatment of Mr. al Qosi also violates his rights to the equal protection of the law under binding treaty obligations assumed by the United States.

205. Geneva III, for example, grants foreign prisoners of war charged with crimes the right to trial before the "same courts" using the "same procedures" as apply to soldiers of the Detaining Power. Geneva III, art. 102. By subjecting Petitioner to trial before an *ad hoc* Military Commission designed to deal only with foreign detainees, Respondents are in flagrant breach of this undertaking.

206. Similarly, Article 2.1 of the ICCPR requires States Parties to recognize the rights guaranteed therein "without distinction of any kind." ICCPR, art. 2.1. Article 26 adds: "All persons are equal before the law and are entitled without any discrimination to

the equal protection of the law." *Id.*, art. 26. For the same reasons that Mr. al Qosi's treatment violates the Equal Protection Clause of the United States Constitution and Geneva III, it also falls short of the international, binding standards set forth in the ICCPR.

**COUNT VII**

**THE HASTILY CONVENED "COMBATANT STATUS REVIEW TRIBUNALS" VIOLATE PETIONER'S CONSTITUTIONAL AND TREATY-BASED RIGHTS**

207. Petitioner re-alleges and incorporates by reference paragraphs 1 through 206 above.

208. Respondents have no authority to detain Petitioner as an "enemy combatant." Respondents' actions constitute a violation of Petitioner's constitutional right to Due Process, and of the rights accorded persons seized by the military in times of armed conflict as defined by the Third and Fourth Geneva Conventions.

**A. Under *Hamdi*, The Due Process Clause Requires A Neutral Tribunal With Significant Procedural Protections To Determine Whether Petitioner May Lawfully Be Held As An Enemy Combatant**

209. In its *Hamdi* decision, the Supreme Court held that persons detained as so-called enemy combatants in the "war on terror" must "receive notification of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker." 124 S. Ct. at 2648.

210. The CSRT process and procedures that yielded a finding that Petitioner is an "enemy combatant" violated Petitioner's Due Process rights in at least the following respects:

(a) The CSRT was not convened before a neutral decision maker;

(b) It placed the burden of proof on Petitioner to show that his detention was unfounded;

(c) Mr. al Qosi had no right to Counsel, or even to a "Personal Representative" of his own choosing, even though military defense counsel had already been assigned to him in contemplation of the Military Commission proceedings against him;

(d) Petitioner was not given copies of or access to the evidence to be used against him;

(e) The CSRT applied a novel, *ad hoc* definition of "enemy combatant";

(f) Respondents have arrogated to themselves the power to arbitrarily rescind or change the CSRT process and procedures.

211. Accordingly, the CSRTs must be declared unconstitutional, Petitioner's designation as an "enemy combatant" vacated and Mr. al Qosi released immediately.

**B. <u>The Geneva Conventions And Army Regulations Require A Determination By A Fair Tribunal</u>**

212. Under Article 5 of Geneva III, Petitioner is entitled to a "competent tribunal" to determine whether he can be held as an enemy combatant. Geneva III, art. 5. The same procedural deficiencies that render the CSRT proceedings inadequate for purposes of due process also render the CSRT deficient under the Third Geneva Convention.

213. Nor can Respondents remedy their unlawful treatment of Mr. al Qosi at this late date. Article 5 of Geneva III provides that "[s]hould any doubt arise as to whether persons" are entitled to POW status, they "shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." *Id.*

214. By holding him for well over two years in deplorable conditions wholly inconsistent with the provisions of Geneva III, Respondents have violated their obligations under that international treaty, as implemented in the Army's own

regulations. *See* Army Regulation 190-8. The belated CSRT process cannot undo these failings.

**COUNT VIII**

**THE ABUSE, MISTREATMENT, AND RELATED INTERROGATION OF PETITIONER CONSTITUTES SHOCKING AND OFFENSIVE CONDUCT IN VIOLATION OF THE CONSTITUTION AND TREATIES OF THE UNITED STATES**

215. Petitioner re-alleges and incorporates by reference paragraphs 1 through 214 above.

216. Respondents' torture and cruel mistreatment of Mr. al Qosi from his detention in Pakistan to his transfer to and incarceration in Guantanamo not only violate Petitioner's Fifth Amendment right to remain silent and his Sixth Amendment right to counsel (with respect to his own statements), but also so shock the conscience and fall so far below the minimum acceptable level of governmental behavior that it violates Petitioner's Fifth Amendment right to the due process of law.

217. Whether the maltreatment is psychological or physical, the law is plain that our Government may not abuse individual human beings, no matter the excuse. *See, e.g.*, *United States* v. *Russell*, 411 U.S. 423, 431-32 (1973) (acknowledging that there could exist "a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the Respondent from invoking judicial processes to obtain a conviction").

218. Respondents may not excuse their behavior by citing "national security" concerns. There is, in fact, no greater threat to the security of our nation, to the sanctity of our institutions, than when the Executive arrogates to itself the privilege of deciding when it will and will not observe constraints imposed by law.

219. Respondents' unpardonable treatment of Petitioner not only falls short of domestic constitutional standards. It also violates our laws, including the UCMJ, Army Regulation 190-8, and the APA, as well as our binding treaty obligations, including Geneva III, Geneva IV, the CAT, and the ICCPR.

220. The only remedy capable of vindicating Petitioner's rights is the grant of a writ of habeas corpus and/or mandamus, dismissal of the Military Commission charges against Petitioner, and an order requiring Petitioner's release.

**COUNT IX**

**RESPONDENTS' ENTIRE COURSE OF CONDUCT VIOLATES THE ALIEN TORT CLAIMS ACT**

221. The Alien Tort Claims Act ("ATCA") provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

222. The ATCA is not simply a jurisdictional statute. It also creates an independent cause of action for the most grave violations of international law and the treaties of the United States.

223. Respondents' entire course of conduct as set forth in this Petition, from their flagrant disregard of the laws of war governing the treatment of persons detained during wartime to their inexcusable mistreatment and torture of Mr. al Qosi, all stands in naked violation of the law of nations and of numerous binding treaties obligations the United States has voluntarily assumed.

224. Accordingly, a Writ, declaration, or other order is warranted stating that Respondents have violated the ATCA, compelling them to cease and desist from all such

violations immediately, and requiring them to return Mr. al Qosi to his wife and daughters without further delay.

**PRAYER FOR RELIEF**

WHEREFORE, Petitioner prays that this Court grant him the following relief:

225. Issue a Writ of Mandamus and/or Habeas Corpus, or other order that compels Respondents not to use the President's Military Order and/or the Military Commission Orders and Instructions to detain Petitioner, or adjudicate the charge against Petitioner, or conduct any proceedings related to such charge, because those Orders and instructions violate the U.S. Constitution, U.S. law, and U.S. treaty obligations, both facially and as applied to Petitioner and are therefore *ultra vires* and illegal;

226. Issue an Order declaring unconstitutional and invalid and enjoining any and all Commission proceedings and/or findings against Petitioner;

227. Enter an Order declaring the Combatant Status Review Tribunal's finding that Petitioner is an enemy combatant is unconstitutional and invalid;

228. After notice and hearing, determine and declare that continued detention of Petitioner violates the Constitution, laws, treaties, and regulations of the United States, the Geneva Conventions and binding commitments under international law; that the PMO is unconstitutional; that Petitioner has been denied a speedy trial; and that Respondents lack any jurisdiction over Petitioner;

229. After notice and hearing, issue a writ of mandamus that directs Respondents to release Petitioner immediately;

230. Grant a writ of habeas corpus on behalf of Petitioner ordering his immediate release;

231. Enter an Order that the Court shall retain jurisdiction over this matter to permit Petitioner to respond to arguments advanced by Respondents on all matters related to his continued detention;

232. Grant such other and further relief on behalf of Petitioner and against Respondents as this Court deems just and proper.

Respectfully submitted,

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FILED WITH
COURT SECURITY OFFICER
8/17/05 D Campbell
DATE

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| DAVID M. HICKS,<br><br>Petitioner,<br><br>v.<br><br>GEORGE W. BUSH, President of the United States; DONALD RUMSFELD, United States Secretary of Defense; GORDON R. ENGLAND, Secretary of the United States Navy; JOHN D. ALTENBURG, JR., Appointing Authority for Military Commissions, Department of Defense; Brigadier General JAY HOOD, Commander, Joint Task Force, Guantanamo Bay, Cuba, and Colonel BRICE A. GYURISKO, Commander, Joint Detention Operations Group, Joint Task, Guantanamo Bay, Cuba<br><br>Respondents, all sued in their individual and official capacities. | ) | Civ. Act. No. 1:02-cv-00299-CKK<br><br>Judge Kollar-Kotelly |

**REVISED BRIEF IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS AND IN SUPPORT OF PETITIONER DAVID M. HICKS'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

August 17, 2005

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## PETITIONER DAVID M. HICKS'S REVISED MOTION FOR PARTIAL SUMMARY JUDGMENT

Petitioner David M. Hicks, an Australian national who has been unlawfully detained by Respondents at Guantanamo Bay for nearly four years, respectfully submits this Revised Brief in Support of his Motion for Partial Summary Judgment on his Second Amended Petition for Writ of Habeas Corpus and Complaint for Injunctive, Declaratory, and Other Relief. Hicks requests that the Court find illegal the operation of a military commission seeking to try him for newly-invented military crimes (such as conspiracy).[1]

Hicks is entitled to judgment as a matter of law, because the military commission lacks the authority to try him. First, the substantive "crimes" with which Hicks is charged are not criminal violations at all, much less violations of the law of war within the jurisdiction of military commissions. Second, the commission is not the impartial tribunal required under the Due Process Clause. Third, the executive order establishing the commission does not apply to citizens accused of similar "crimes" to those alleged against Hicks, such as Yasser Hamdi, John Walker Lindh, or Jose Padilla, and thus is unlawfully discriminatory in violation of the Equal Protection Clause. Fourth, the military commission is invalidly constituted under statutory, regulatory and constitutional law. Finally, the government's failure to try Hicks for years after his capture violates his right to a speedy trial.

None of these arguments is affected by the D.C. Circuit's recent decision in *Hamdan v. Rumsfeld*, 415 F.3d 33, 2005 WL 1653046 (D.C. Cir. July 2005), which resolved three different substantive issues: (1) whether the President was authorized by Congress to establish military

[1] Hicks seeks summary judgment that the military commission seeking to try him for war crimes are invalid but does not seek summary judgment concerning the issue of whether he can be held as an enemy combatant. The government filed a motion to dismiss on that issue, which was rejected by Judge Green, whose decision is now on appeal.

commissions; (2) whether the Geneva Conventions are self-executing and require confrontation of witnesses; and (3) whether all of the procedural requirements applicable to courts-martial under the Uniform Code of Military Justice (UCMJ) must also be applied to military commissions.[2] In fact, in two critical respects, Hicks's argument has been strengthened in the intervening months since he filed his initial summary judgment motion. To begin with, *Hamdan* itself answers the primary contention the government made in response to Mr. Hicks's summary judgment motion -- that this Court should abstain from resolving Hicks's challenges to the commission proceedings until after they have been completed. Under *Hamdan*, this Court must consider ahead of time challenges to the authority of military commissions to try Mr. Hicks at all, *see Hamdan*, 2005 WL 1653046, at *1, *7, a category into which all of Mr. Hicks's challenges fall.

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[2] Hicks also raised these issues in his initial summary judgment filing and believes the D.C. Circuit decided these issues incorrectly for the reasons set forth therein. *See* Docket #102, at 31-37 (absence of presidential authority to establish commission), 60-71 (applicability and requirements of Geneva conventions), and 48-51 (general applicability of the UCMJ). Here, however, he merely preserves these issues as agreed in the status conference on August 5, 2005. In addition, Mr. Hicks notes that the petitioner in *Hamdan* asserted only the general applicability of the UCMJ to military commissions. In deciding *Hamdan*, the D.C. Circuit acknowledged that certain sections of the UCMJ expressly apply to military commissions as well as courts martial and other military tribunals. *Hamdan*, 2005 WL 1653046, at *8. Chief among these UCMJ provisions expressly covering military commissions are Articles 49 and 50. 10 U.S.C. § 849(d) (setting stringent conditions for the introduction of deposition testimony before "any military court or military commission"); *id.* § 850(a) (strictly limiting the conditions under which testimony previously presented to a court of inquiry may subsequently be used before "a court martial or military commission"). The nation's highest military court has long recognized Articles 49 and 50 as embodying the right to confrontation in trials before military tribunals. *See United States v. Clay*, 1 U.S.C.M.A. 74, 77 (1951) (recognizing that, in enacting the UCMJ, "Congress granted to an accused the [right] . . . to be confronted by witnesses testifying against him."); *United States v. Davis*, 19 U.S.C.M.A. 217, 224 (1970) (recognizing that Article 49 embodies a military right of confrontation); *United States v. Sippel*, 4 U.S.C.M.A. 50, 56 (1954) (recognizing that Article 50 requires that an accused be "afforded an opportunity to confront the witness whose testimony is sought to be admitted"). Unlike the petitioner in *Hamdan*, Mr. Hicks has alleged specific violations of his right to confrontation. However, recognizing that these issues may not be considered ripe for decision by the civil courts *see Hamdan*, 2005 WL 1653046, at *7, Mr. Hicks seeks only to preserve these arguments so that they may be raised in subsequent proceedings.



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In addition, since Hicks filed his initial summary judgment brief, Judge Green has rejected the government's primary substantive response to several of Mr. Hicks's arguments. Along with his challenge to military commissions, Hicks has challenged the authority of the government to hold him as a so-called enemy combatant based on the Combatant Status Review Tribunal ("CSRT") the government set up to make that determination. Judge Green determined that Mr. Hicks is protected by the Constitution and that the CSRTs do not comport with Due Process. The rejection of Respondents' claim that Mr. Hicks lacks constitutional rights equally dooms Respondents' defense of military commissions, as they have no basis to claim that the commissions, as presently constituted, comport with the Constitution. Indeed, in critical respects they are worse than CSRTs, as they are being used as a basis of a *criminal* prosecution.

Respondents have invoked the "war on terror" to justify the egregious violations of Hicks's rights that will occur through use of the military commission structure. But as the Supreme Court recently explained in *Hamdi v. Rumsfeld*, "[i]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." 124 S. Ct. 2633, 2648 (2004). This admonition applies with additional force to the instant situation: *Hamdi* concerned the detention of an individual only during the course of formal hostilities; here, Respondents seek to imprison Hicks for life -- affording him no trial in an Article III court for a violation of domestic law, *see, e.g.*, 28 U.S.C. § 2339A (criminalizing the provision of material support to terrorists), but instead, a trial by an invalid military commission for fictional "war crimes." The charges against Hicks are based on allegations that he fought against the United States as a foot soldier in Afghanistan -- allegations that, even if true, do not constitute a crime under the law of war or under any statute over which the

commission has jurisdiction. The Court should not permit Respondents to fabricate criminal law after the fact. Nor should it sanction a commission that violates the basic safeguards against a wrongful conviction. The very individuals who are prosecuting the "war on terror" -- and who dreamed up the specious charges against Mr. Hicks -- will adjudicate those charges: the commission's members are appointed by a designate of the Secretary of Defense, review of its proceedings will be by other designates of the Secretary of Defense, and ultimate review will be by the Secretary and/or the President. Such a partial tribunal offers no chance for a fair trial that would comport with Due Process.

There is no genuine issue of material fact to prevent a determination that the military commission is unlawful.

## STATEMENT OF UNDISPUTED FACTS

In the aftermath of the terrorist attacks on American targets on September 11, 2001, Respondent President Bush announced that the United States was engaged in a "war on terror." On or about October 7, 2001, the United States commenced air strikes against Taliban and "al Qaeda" targets within Afghanistan, followed with ground operations on October 19, 2001. *See Rasul v. Bush*, 124 S. Ct. 2686, 2690 (2004). The United States was supported by the Northern Alliance, a group of armed and organized Afghan opponents of the Taliban. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). Also contributing to the campaign against the Taliban were military delegations from other nations (the "Coalition Forces").

During the campaign, the Northern Alliance took into custody a number of persons allegedly associated with the Taliban and/or al Qaeda. Resp. Br. at 8. Among those prisoners was Petitioner David M. Hicks, an Australian national. *Id.* At the time of his apprehension,

Hicks was not engaged in combat against the United States or any of its allies. Hicks Supp. Aff. ¶ 2 (Ex. 1). Hicks never fired a shot against anyone in Afghanistan. *Id.*

Within ninety days of the commencement of military strikes, the United States, the Northern Alliance, and the Coalition Forces defeated the Taliban. The Northern Alliance then transferred custody of Hicks to the United States. *Id.* ¶ 3. Hicks was confined for several weeks on U.S. Navy vessels, where he was extensively questioned by military or intelligence personnel. *Id.* ¶ 4.

In January 2002, Hicks was transported by U.S. aircraft to Guantanamo Bay, and was placed in Camp X-Ray, a special facility reserved for alien detainees denominated "enemy combatants." *Id.* ¶ 5. Hicks was subjected to intensive and continuous interrogation while at Guantanamo. Hicks Aff. ¶¶ 3-27 (Ex. 2). The coercive and abusive interrogation methods employed against Hicks and other Guantanamo detainees, constitute torture in violation of various provisions of international law. *See id.*; *see also* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Article 1 & 2, opened for signature February 4, 1985, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85; *see also Khouzan v. Ashcroft*, 361 F.3d 161, 168-69 (2d Cir. 2004). Hicks was not brought before a competent tribunal to determine his status, as required by Article 10 of the UCMJ, Article 5 of the Geneva Convention (III), and Army Reg. 190-8 § 1-6. Hicks Aff.

In July 2003, Respondents declared Hicks eligible for "trial" before a military commission on criminal charges punishable by life imprisonment. Hicks Aff. ¶ 26 (Ex. 2). The military commission in question was established by Presidential Military Order on November 13, 2001. *See* Presidential Military Order, 66 Fed. Reg. 57833 (Nov. 13, 2001) ("PMO") (Ex. 3).



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After issuance of the PMO, the General Counsel of the Department of Defense ("DOD") established by order the "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism." *See* Gen. Counsel, Dep't of Defense, Military Commission Order No. 1 ("MCO No. 1") (March 21, 2002) (Ex. 4). This order established that that the Executive Branch would serve as prosecutor, judge, jury and reviewing court. Pursuant to the order, the Secretary of Defense designates an Appointing Authority, who in turn appoints individuals to serve on the commissions. *See id.* ¶¶ 2, 4(A)(1). The commission decides questions of both law and fact, although only the presiding officer is required to have legal experience. PMO ¶ 4(c)(2) (Ex. 3); MCO No. 1, ¶ 4(A)(3), (4) (Ex. 4). A review panel appointed by the Secretary of Defense, and then the Secretary himself or the President, reviews the determinations of the commission. MCO No. 1, ¶ 6(H)(4). Only non-citizens are to be tried before the commissions. *See* PMO generally. Unsworn testimony and confessions obtained through torture "shall" be admitted at the commissions' "trials," limited only by the general rule that they be of probative value to a reasonable person. MCO No. 1, ¶ 6(D)(1), (3).

For nearly two years after he was first detained -- and for five months after he was designated eligible for "trial" before the commission -- Respondents failed to afford Hicks legal representation. Hicks Supp. Aff. ¶ 6 (Ex. 1). In response to repeated entreaties for visits and communication by Hicks's family and their retained Australian counsel, the Australian government responded: "Your request for Mr. Hicks's family to have access to him was referred to the United States authorities. The United States has advised that, at this stage, no family access will be allowed any of the detainees held at Guantanamo Bay." Letter from Robert Cornall, Australian Attorney General's Department (Feb. 8, 2002). On November 28, 2003, Major Michael D. Mori of the United States Marine Corps was, at last, formally detailed to serve



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as Hicks's military defense counsel.[3] Subsequently, Joshua L. Dratel, Esq., was approved as Hicks's Civilian Defense Counsel, and Stephen Kenny of Australia was approved as his Foreign Attorney Consultant. Resp. Br. at 9; Mori Aff. ¶¶ 2, 10 (Ex. 5).

After Hicks was finally allowed visits by counsel, yet another six months elapsed before any official account was given for his detention: on June 10, 2004, Hicks was charged with the following "offenses":

> *Count One* -- Conspiracy to commit the following offenses: attacking civilians attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.
>
> *Count Two* -- Attempted Murder by an Unprivileged Belligerent.
>
> *Count Three* --Aiding the Enemy.

Charge Sheet ¶¶ 19-22 (Ex. 7). These "offenses" are not part of the laws of war, *see* Bassiouni Aff. ¶ 5 (Ex. 8); they were defined for the first time in an order issued by the Department of Defense on April 30, 2003. *See* MCO No. 2, ¶ 6 (Ex. 9).

The government has alleged facts in support of these spurious charges amounting to nothing more than that Hicks was part of an organization fighting against United States troops. There is no allegation that Hicks participated in any attacks on civilians, planned any such attacks, or even had advance knowledge of any such attacks. *See* Charge Sheet. The government does not even allege that Hicks personally killed, injured, fired upon, or directed fire

[3] Major Mori was flown in from his post in Hawaii the week of July 14, 2003, in anticipation of his assignment to Hicks's case. *See* Mori Aff. ¶ 6; *see also* Mem. from Dep't of Defense, Office of the Chief Defense Counsel, to ... Maj. Mori (July 23, 2004), (detailing Maj. Mori to represent Hicks) (Ex. 6). Nevertheless, Maj. Mori's representation of Hicks was not formalized for another four and a half months. *See* Mori Aff. ¶¶ 10-11 (Ex. 5).



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upon, any U.S. or Coalition forces or the Northern Alliance forces.[4] *See* Charge Sheet. In fact, he did not. Hicks Supp. Aff. ¶ 2 (Ex. 1). In short, there is no basis for Hicks's trial before a military commission.

Hicks's attorneys appeared before the commission on August 25, 2004 to determine a schedule for further proceedings, and to present the indictment. Dept. of Defense, Release No. 826-04 (Australian citizen is the second commissions case) (Aug. 25, 2004) *available at* http://www.defenselink.mil/releases/2004/nr20040825-1169.html. At that appearance, Hicks pleaded not guilty to all charges. *Id.* Hicks's "trial" before the commission was scheduled for January 2005. *Id.* On September 17, 2004, Respondents convened a Combatant Status Review Tribunal ("CSRT") which purported to determine whether Hicks could be held as an enemy combatant. The CSRT did not evaluate whether Hicks was a privileged combatant entitled to prisoner of war status or an unprivileged combatant.[5] Hicks did not participate in the CSRT because of the inadequacy of CSRT procedures, because he was not permitted to speak to his legal counsel regarding the CSRT, and because his un-counseled testimony potentially could have been used against him in the criminal proceedings before the commission. The week of Hicks's CSRT hearing, a member of Hicks's commission defense team was forbidden to enter Guantanamo Bay to meet with Hicks. Hicks Supp. Aff. ¶ 10 (Ex. 1).

The instant action was commenced with Hicks's petition for writ of habeas corpus on February 19, 2002. *See* DOCKET # 1. On August 31, 2004, Hicks filed a motion for leave to

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[4] As recently as November 2004, during a conference with all parties and the Presiding Officer, the prosecution conceded that they do not intend to offer any evidence during the military commission that Mr. Hicks fired a weapon at any person in Afghanistan.

[5] Briefing on the CSRT proceeded on a different schedule, and Judge Green ultimately found the CSRTs to be fundamentally flawed, a decision that is on appeal. That appeal does not control this motion. Regardless of whether David Hicks may be detained as an enemy combatant for the course of the war, he may not be tried by the commission for "war crimes" punishable by life imprisionment for the reasons detailed herein.



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file a Second Amended Petition for Writ of Habeas Corpus and Complaint for Injunctive, Declaratory, and Other Relief, which was subsequently granted. *See* DOCKET # 77 ("Second Am. Pet."). He challenged both the authority of Respondents to hold him as an enemy combatant and their authority to try him before a military commission. *Id.*

On January 31, 2005, Judge Green determined that the CSRTs used to evaluate whether Hicks and ten other detainees were enemy combatants were unlawful. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (DDC 2005). Judge Green held that the detainees have Due Process rights. She further concluded that the CSRTs failed to provide the detainees with Due Process because they denied the detainees both access to the classified information used against them and an attorney who could review the classified information. Moreover, she explained, the CSRTs relied on statements allegedly obtained through torture or coercion without even a thorough inquiry into their reliability. *Id.* Respondents appealed Judge Green's January 31, 2005 Order.

On November 8, 2004, in a separate action concerning the legality of commission proceedings against a different detainee, Judge James Robertson issued a memorandum opinion and order that the procedures for trying Guantanamo detainees for alleged war crimes by military commission were unlawful for failing to comply with the requirements for courts martial set forth in the UCMJ or with the Geneva Conventions. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004). Although those arguments do not form the predominant basis of Hicks's challenge to military commissions here, because they invalidated the commission process, this Court subsequently issued a decision holding the present motion (challenging the commission proceedings against Hicks) in abeyance until after the appeal in *Hamdan*, Docket # 143, 170.

That appeal resulted in reversal of Judge Robertson's decision. *Hamdan v. Rumsfeld*, 415 F.3d 33, 2005 WL 1653046 (D.C. Cir. July 15, 2005).

After the D.C. Circuit's decision in *Hamdan* and representations from the government that proceedings against Mr. Hicks were likely to resume in September, this court lifted the stay and entered a briefing schedule on Hicks's and Respondents' cross-motions for summary judgment. Because no genuine issue of material fact exists in this case with respect to the legality of the military commission proceeding against Hicks, this Court should grant partial summary judgment to Hicks on his challenge to the commission process.

## JURISDICTION

This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1361 (mandamus) and 28 U.S.C. § 1331 (federal question) as well as 28 U.S.C. § 2241 (habeas corpus).

## STANDARD OF REVIEW

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). To defeat a motion for summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288 (1968)). The moving party is "entitled to a judgment as a matter of law" when the nonmoving party "has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof." *Celotex Corp.*, 477 U.S. at 323.



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## ARGUMENT

### I. THE COMMISSION LACKS SUBJECT MATTER JURISDICTION TO HEAR THE OFFENSES WITH WHICH HICKS HAS BEEN CHARGED.

The military commission before which Hicks is scheduled to be "tried" lacks the jurisdiction to hear or to adjudicate the charges against him. As a plurality of the Supreme Court held in *Reid v. Covert*, military commissions possess only "a very limited and extraordinary jurisdiction ... intended to be only a narrow exception to the normal and preferred method of trial in courts of law." 354 U.S. 1, 21 (1957). The charges against Hicks clearly fall outside those limits; indeed, the Executive Branch fabricated the charges out of whole cloth and applied them retroactively to Hicks.

Because Congress understood the extraordinary nature of military commissions, it limited the jurisdiction of even properly constituted commissions to adjudication of only two kinds of charges: (1) those that Congress has expressly authorized them to adjudicate, and (2) those that are recognized as crimes under the traditional law of war. [6] Article 21 of the UCMJ, on which Respondent President Bush relied in enacting the PMO which established military commissions,[7] thus specifies that military commissions shall not have jurisdiction over offenses other than those "that *by statute* or *by the law of war* may be tried by military commissions." 10 U.S.C. § 821 (emphasis added). The Executive Branch acknowledges these limits in MCO No. 1, which reiterates them, *see* MCO No. 1 § 3(B); and Respondents acknowledge these limitations here.

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[6] We show in Part IV that the military commissions here were not properly constituted and thus have no jurisdiction to try even these two kinds of charges.

[7] *See DOJ Oversight: Preserving our Freedoms while Defending Against Terrorism: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (Nov. 28, 2001) (statement of Hon. William Barr, former U.S. Attorney General), *available at* http://judiciary.senate.gov/ hearing.cfm?id=126.



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Respondents' Brief (DOCKET # 88) at 26-28 [hereinafter Resp. Br.][8]; *see also Ex parte Quirin*, 317 U.S. 1, 29 (1942) (the first inquiry for a court 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.")

The charges against Hicks do not fall within the purview of any valid military commission. Hicks is charged with three offenses: conspiracy, attempted murder by an unprivileged belligerent, and aiding the enemy. *See* Charge Sheet, ¶¶ 19 - 22 (Ex. 7). None of these three charges is subject to review by a military tribunal: none has been expressly delegated to military commissions by Congress, and none has been recognized under the law of war. In addition, to the extent these charges concern Mr. Hicks's alleged connection with al Qaeda, rather than the war against the Taliban, they do not concern a "war" within the meaning of international law at all.

**A. Overview of the Sources and Purpose of the Law of War.**

As a preliminary matter, a summary of the sources and purposes of the law of war is in order.

The law of war is one part of international law. The law of war was originally a system of "common law" based on "*universal* agreement and practice." *Quirin*, 317 U.S. at 30 (emphasis added). When the practice of military forces "attains a degree of regularity and is accompanied by the general conviction among nations that behavior in conformity with the

[8] While both Petitioner and Respondents are filing new briefs in response to this Court's Order, we nonetheless refer throughout to Respondents' prior brief and reply brief to best address Respondents' position as we currently understand it. *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 ("Resp. Br.") (DOCKET #88); Response to Petitoner's Br. in Opp. to Resp's Mot. to Dismiss and in Support of Pet. David M. Hicks' Cross-Motion for Partial Summ. J. at 13-16 ("Reply Br.") (DOCKET #102).



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practice is obligatory, it can be said to have become a rule of customary law binding on all nations." UNITED STATES NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, MCWP 5-12.1/NWP 1-14M ¶ 5.41 (1995) [hereinafter, "LAW OF NAVAL OPERATIONS"], *available at* http://www.cpf.navy.mil///%201-14/.htm. Beginning in the late 19th Century, much of the law of war has been set forth in international conventions and treaties. *See id.* ¶ 5.4. Chief among those treaties are the four Geneva Conventions. The international bodies that interpret and apply those conventions (such as international war crimes tribunals), further develop the law of war. For example, the statutes, rules of procedures and decisions reached by the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the International Criminal Tribunal in Rwanda ("ICTR"), and the International Criminal Court ("ICC"), contribute to the body of jurisprudence known as the law of war. The teachings of scholars also are considered a source of authority to identify the content of the law of war. Schmitt Aff. ¶ 4, Ex. 2; Bassiouni Aff. ¶ 6 (Ex. 8).

Not all violations of the law of war are war crimes. Those that are "war crimes" consist of "grave breaches of the Geneva Conventions of 12 August 1949" and "other serious violations of the laws and customs [of international and internal armed conflict] ... within the established framework of international law."[9] *See* 1998 Rome Statute of the International Criminal Court, art. 8(b), U.N. Doc. A/CONF. 183/9 * (1998), *reprinted in* 37 I.L.M. 999 (1998) [hereinafter, "Rome Stat."] (defining "War Crimes" as grave breaches of the 1949 Geneva Conventions and "other serious violations of the laws and customs applicable in international armed conflict,

[9] Moreover, Congress has recently defined the law of war more narrowly than international law would have it. In the War Crimes Act, Congress defined "war crimes" to consist of "a grave breach" of one of three sources of law: the 1949 Geneva Convention; specific Articles of the Hague Convention; and the 1996 amendments to the Geneva Convention. 18 U.S.C. § 2441 Respondents do not and cannot show that Petitioner violated any of these conventions. For that reason alone, the commission has no jurisdiction.



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within the established framework of international law"). Finally, war crimes should not be confused with crimes as defined by other bodies of law in the international system -- such as crimes against humanity (*e.g.*, genocide), or crimes against the peace. Schmitt Aff. ¶¶ 2, 3, 25 & n.33 (Ex. 10); *see also* Rome Stat. art. 5, 6 & 7; Bassiouni Aff. ¶¶ 8-9 (Ex. 8). While these international crimes can be committed during armed conflict or peace time, war crimes can only be committed during an armed conflict that is regulated by the laws of war. While these other bodies of law are general in nature, the law of war is a subset of international criminal law with a very specific purpose: to provide rules for war in order to civilize it, not to eliminate it.

**1. The law of war only applies to war and thus does not apply to the conflict with al Qaeda.**

The law of war only applies to war. Only the Afghanistan war, not the "war on terror," constitutes an armed conflict under which the *law of war* would govern. *See* Schmitt Aff. ¶¶ 11, 21 (Ex. 10); Cassesse Aff. at 2 (Ex. 11).

The two types of war under international law are international armed conflicts, under Common Article 2 to the Geneva Conventions, and civil wars, under Common Article 3. Schmitt Aff. ¶¶ 5-6 (Ex. 10). The conflict with al Qaeda does not fall within either category. Indeed, the D.C. Circuit found that the Geneva Conventions do not apply to the conflict with al Qaeda precisely because it is not an international conflict nor an armed conflict not of an international character. *Hamdan*, 2005 WL 1653046, at *6-*7. Indeed, as the Handbook of the U.S. Judge Advocate General's School explains, any other sort of conflict would "not trigger the application of the traditional law of war regimes because of a lack of the legally requisite armed conflict needed to trigger such regimes."[10] The Deskbook of the Judge Advocate's School

[10] *Operational Law Handbook, International and Operational Law Department*, The Judge Advocate General's School, 51 (2003) ("Operational Law Handbook").



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includes a graphic showing just that.[11] As Professor Cassesse explains, "[t]he only war in which the United States was involved that would give rise to application of the laws of war was the war in Afghanistan, which began on 7 October 2001." Cassesse Aff. at 3 (Ex. 11).

U.S. military doctrine has a term to describe the broad range of military operations that fall outside the traditional definition of "armed conflict"; Military Operations Other Than War (MOOTW). Such operations are covered not by the law of war, but by the following bodies of law: fundamental human rights law, domestic laws of the nation in which the conflict occurs, or any international law conventions, should they be triggered, but they are not covered by the law of war. Significantly, combating terrorism is a MOOTW. *See Operational Law Handbook* at 52-55 (2003); Department of the Army, Field Manual 100-5, Operations chapters 2 and 13 (14 June 1993) (Combating terrorism is included as an operation other than war).[12] The subjective intent of the belligerents is irrelevant."[13] The international laws of war cannot be triggered by a unilateral pronouncement of a head of state, such as the U.S. President, where the objective international law criteria for a war are not met. *See* Schmitt Aff. ¶ 21 (Ex. 10)

Respondents have asserted in the past that Mr. Hicks is being held as a member of or affiliated with al Qaeda.[14] If that is why Mr. Hicks is being held (and most of the allegations in the charge sheet pertain solely to Mr. Hicks's alleged affiliation with al Qaeda before the war with Afghanistan even began) and if the conflict with al Qaeda is separate from the conflict with

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[11] Spectrum Conflict Graphic, Appendix A, Chapter 3, Law of War Workshop Deskbook, International and Operational Law Department, The Judge Advocate School (2000) *available at* http://www.au.af.mil/au/awc/awcgate/law/low-workbook.pdf. (Ex. 12).

[12] The military defines combating terrorism (both anti-terrorism and counter-terrorism operations) as a MOOTW. *See* Joint Publication 3-07, "Joint Doctrine for Military Operations Other Than War", 16 June 1995, Chapter 3.

[13] *Law of War Workshop Deskbook, International and Operational Law Department*, The Judge Advocate School (2000) p. 29 *available at* http://www.au.af.mil/au/awc/awcgate/law/low-workbook.pdf.

[14] *See* Respondents' Factual Return to Petition For Writ of Habeas Corpus by Petitioner David M. Hicks at 11 (DOCKET # 83); *see also* Charge Sheet (Ex. 7).



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Afghanistan, as the D.C. Circuit held, *see Hamdan*, 2005 WL 1653046, at *7 ("the Presidents' decision to treat our conflict with the Taliban separately from our conflict with al Qaeda [as] the sort of political-military decision constitutionally committed to him."), then none of the charges against Mr. Hicks is based on the law of war and none can provide a basis for commission jurisdiction. The laws of war do not regulate the conduct of either side in the conflict with al Qaeda.

**2. The law of war does not criminalize participation in war.**

The law of war did regulate the conflict with Afghanistan. As in any armed conflict, however, the law of war did not criminalize participation in the hostilities. Rather, it sought "to mitigate the effects of war, first in that it limits the choice of means and methods of conducting military operations, and secondly, in that it obliges the belligerents to spare persons who do not or no longer participate in hostile actions." JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW, CASES & MATERIALS 806 (2d ed. 2000) (citations omitted). Thus, for example, the law of war limits attacks on combatants who are "*hors de combat*," or "out of combat," either because they have surrendered, because they are sick or wounded, or because they are shipwrecked.[15] The law of war also limits the methods of warfare, for example by prohibiting methods resulting in unnecessary suffering or superfluous injury, and the use of specific weapons such as poison or

[15] *See, e.g.*, Hague Convention IV Respecting The Laws And Customs Of War On Land, Regulations Annexed, Oct. 18, 1907, art. 23 [hereinafter HIVR] (combatants who have surrendered); Protocol Additional to the Geneva Convention 12 Aug. 1949, and Relating to the Protection of Veterans of International Armed Conflicts, June 8, 1977 art. 41, 1125 U.N.T.S. 53 [hereinafter Geneva Protocol I] (sick or wounded combatants); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 12 [hereinafter Geneva Convention (I)] (same); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 12 [hereinafter Geneva Convention (II)] (same); Geneva Protocol I, arts. 10, 42 (same); Geneva Convention (II), art. 12 (shipwrecked combatants); Geneva Protocol I, art. 10 (same).



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blinding lasers.[16] Similarly, the law of war limits attacks on civilians who have not directly participated in hostilities. *See* Geneva Protocol I, art. 51. *But the law of war does not make it illegal simply to participate in a war.* Nor does it govern activities outside the context of a war.

As we will see in the following sections, two of the charges against Mr. Hicks – aiding the enemy and attempted murder by an unprivileged belligerent – represent an effort to criminalize participation in the armed conflict in Afghanistan. The other charge – conspiracy – is an attempt to import an American crime into the law of war even though the international community has expressly rejected that crime. Bassiouni Aff. ¶ 10 (Ex. 8). Importantly, the Executive Branch recognized this when it listed the war crimes over which military commissions would have jurisdiction in MCI No. 2. This instruction divides offenses into three distinct groups: War Crimes; Other Offenses Triable by Military Commission; and Other Forms of Liability and related Offenses. MCI No. 2 § 6(A), (B), (C). The "War Crimes" section of MCI No. 2 defines offenses that qualify as violations of the law of war triable before the commissions, such as willful killing of protected persons, pillaging, and torture. But the crimes with which Mr. Hicks is charged -- conspiracy, attempted murder by an unprivileged belligerent, and aiding the enemy -- are nowhere mentioned in the "War Crimes" section. Rather, they fall under the "Other Offenses Triable by Military Commission," and the "Other Forms Of Liability" sections. This being so, according to MCI No. 2 itself, no offense with which Mr. Hicks is charged qualifies as a violation of the law of war. Therefore, since none of these offenses has been delegated to the

[16] *See, e.g.*, St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, Dec. 11, 1868, 1 AM. J. INT'L. L. 95 (methods resulting in superfluous injury); HIVR art 23 (same); Geneva Protocol I, art. 35 (same); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (with Protocols I, II and III), 10 October 1980, 19 I.L.M. 1523, Protocol IV, 13 October 1995, 35 I.L.M. 1218, Amended Protocol II, 3 May 1996, 35 I.L.M. 1209 (specific weapons).



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authority of military commissions by Congress, none is within the jurisdiction of the commission.

### B. The Commission Lacks Jurisdiction to Try Hicks for "Aiding the Enemy."

One of the three charges that Respondents bring against Hicks is the charge of "aiding the enemy," which presupposes that Mr. Hicks had an obligation of loyalty to the United States. Charge Sheet ¶ 22 (Ex. 7). But there is no crime of "aiding the enemy" under the law of war; nor does the domestic crime of aiding the enemy, under Article 104 of the Uniform Code of Military Justice, apply to Australian citizens, such as Mr. Hicks.

#### 1. There is no crime of "aiding the enemy" under the law of war.

Although they have charged Mr. Hicks with aiding the enemy, Respondents have never contended that "aiding the enemy" constitutes a violation of the law of war. That is for good reason. Aiding the enemy is not a grave breach, or any breach, of the Geneva Conventions, nor is it found in any convention or treaty regulating land warfare. The claim that Mr. Hicks aided the enemy amounts to the claim that he joined a unit participating in combat against the United States in Afghanistan – a foreign country that the United States had invaded (albeit after the 9/11 attacks). But as we have seen, this is not illegal under the laws of war. As explained above, the law of war leaves an individual free to participate in hostilities and regulates only the means and methods used in combat. Prohibition of participation in combat or aid to those who participate in combat is a matter for domestic law (e.g. laws relating to treason by civilians, or to military discipline of its armed forces), and not the law of war.

Indeed, not a single international treaty lists "aiding the enemy" as a violation of the law of war. Nor is such a theory supported by other sources. As discussed above, *see supra* Part I.A, even the instructions setting up "crimes" to be tried by the commission, MCI No. 2, does not list



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aiding the enemy as a violation of the law of war. Indeed, the very notion that aiding the enemy could be a violation of the law of war is an absurdity: the law of war is intended to establish neutral rules that apply equally to both sides in combat. *See supra* Part I.A. Thus, from the perspective of the law of war, there is no "enemy." Surely Respondents do not believe that American soldiers could have been tried by the Taliban government of Afghanistan for "aiding the enemy" simply for fighting against the Taliban. Yet that would be the consequence of the view that a country could try all opposing soldiers for "aiding the enemy."

**2. Mr. Hicks has not been charged with a statutory crime of aiding the enemy.**

In addition to the law of war, statutory authorization is one of the two bases of commission jurisdiction. But it too provides no basis of jurisdiction over the charge of aiding the enemy against Mr. Hicks. Although "aiding the enemy" is one of two offenses over which Congress has expressly conferred jurisdiction to military commissions (the other being espionage),[17] Mr. Hicks has not been charged with this statutory crime, which is part of the Uniform Code of Military Justice ("UCMJ"). The charge sheet makes no reference to the statute. Moreover, the statutory definition of aiding the enemy under the UCMJ is different than the new definition in the military commission instructions setting up the commission. For example, the military commission instruction requires that the conduct take place in association with armed conflict, but that is not required under the UCMJ. The two also use different definitions of "enemy." *Compare* DoD MCI No. 2, § 5 (Ex. 9); *with* Manual for Courts-Martial, Part IV, ¶ 23.c(1)(b); *see also United States v. Monday*, 36 C.M.R. 711, 713 (U.S. Army Rev. Bd. 1966) (referencing Manual for Courts-Martial to provide definition of "enemy" for UCMJ

[17] UCMJ art. 104, 10 U.S.C. § 904 (West 2004); *see also* UCMJ art. 106, 10 § U.S.C. 906 (charge of espionage may be tried by military commissions).





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provision). Presumably, then the military commission instruction is based on the ostensible authority of the law of war. But, as we have seen, the law of war contains no such crime.

### 3. No statute authorizes charging non-citizens, such as Mr. Hicks, with aiding the enemy.

Even aside from defects in the charge, no act of Congress authorizes a military commission to try opposing soldiers, like Mr. Hicks is alleged to be, as criminals for aiding the enemy – or even makes such opposition criminal at all. Under the Uniform Code of Military Justice, the key element in determining who can be prosecuted for aiding the enemy is that the accused owed a duty of allegiance to the United States. Absent such a duty, it is not illegal under the aiding the enemy statute for an individual to *be* an enemy of the United States, much less to aid the enemy. For example, the Iraqis who fought the United States attacks in 2003 did not violate United States criminal law.

Similarly, Hicks, an Australian national unaffiliated with the U.S. military, had no obligation to the United States that would make his alleged aid to the enemies of the United States a charge subject to adjudication by military commissions. Allegiance is demonstrated either by the fact that the accused was "a citizen at the time of the alleged crime," *Gillars v. United States*, 182 F.2d 962, 981 (D.C. Cir. 1950), the accused was present in United States territory and thus acquired a duty of temporary allegiance, or by the fact that he or she was a member of the U.S. armed forces. *Id.* Indeed, there is no reported case where a non-U.S. citizen has been convicted for committing the offense of aiding the enemy based on conduct outside the territorial jurisdiction of the United States.

Respondents acknowledge that only someone with a duty of allegiance can be charged with "aiding the enemy," but suggest that allegiance to a United States ally is sufficient. *See* Resp. Br. at 31; MCI No. 2 § 6(B)(5)(b)(3), (Ex. 9) (stating that the accused must only "owe





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allegiance or some duty to the United States of America or to an ally or coalition partner").[18] They cite not a single source supporting this radically expanded notion of allegiance.[19] And it is outrageous to suggest that the United States can try an Australian citizen for aiding enemies of the United States -- just as outrageous as if Australia were to bring such a charge against an American citizen. Surely, if any nation may charge Hicks with aiding the enemy, it is Australia and no other.

And Australia does not even view Mr. Hicks's actions as criminal![20] Thus, Respondent's attempt to create a duty to the United States by virtue of a duty to a United States ally falters for the additional reason that Mr. Hicks has not even violated any duty he had to Australia.[21] The

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[18] Respondents subsequently retreated from the clear language of MCI No. 2 and have alternatively suggested that the requirement of allegiance "does not *appear* to pertain to an unlawful belligerent, as Hicks is alleged to be." Resp. Reply Br. at 18. The tentativeness of the government's claim entirely undermines the view that this could be a basis of *criminal* liability. The government's attempt to bootstrap its separate charge of unlawful belligerency into a violation of the "aiding the enemy" statute cannot stand both because (i) unlawful belligerency is not itself a crime, as discussed below, and (ii) nothing suggests that Congress had the international law concept of unprivileged belligerency in mind in passing a statute that is, after all, not even about belligerents but rather about individuals (whether or not they are belligerents) who aid enemies (whether or not they are belligerents).

[19] The American offense of "aiding the enemy" has its origins in Articles 27 and 28 of the Articles of War of 1775, predating the American crime of treason. Only those "belonging to the continental army" could commit the offense. Articles 27 & 28, American Articles of War 1775. After the Revolutionary War, these offenses of "aiding the enemy" and "treason" were enacted by the first Congress of the United States on 30 April 1790. This Act, 1 Stat. 112, provided that "if any person or person, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, ... such person or persons shall be adjudged guilty of treason ..." *See Chandler v. United States*, 171 F.2d 921, 930 (1st Cir. 1948). These provisions are considered to be "conceptual forefather[s] of Article War 81 and Article 104 of the [UCMJ]." *See United States v. Olson*, 7 U.S.C.M.A. 460, 466-67 (1957).

[20] The Australian government has clearly stated that it does not deem any of Hicks's alleged actions to be illegal. In an Australian Senate Estimate hearing on February 16, 2004, the Assistant Secretary, Security Law and Justice Branch of the Australian Attorney General's office explained: "The government has consistently said that, on the basis of the evidence available to prosecuting authorities, there are no grounds to prosecute Mr. Hicks ... under any laws in Australia that were current at the time of [his] activities." Senate, Legal and Constitutional Legislation Committee, Estimates, Canberra, Australia (Feb. 16, 2004).

[21] The Australian equivalent of our "aiding the enemy" law is embodied in Section 24 of the Australian *Crimes Act* 1914 making it criminal to assist "a proclaimed enemy of a proclaimed country." Crimes



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charge that Hicks aided the enemy thus does not make out a criminal violation at all, much less one subject to the jurisdiction of the military commission.

### C. The Commission Lacks Jurisdiction to Try Hicks for Attempted Murder "While He Did Not Enjoy Combatant Immunity."

Respondents have also charged Hicks with "attempt[ing] to murder divers [sic] persons by directing small arms fire, explosives, and other means intended to kill American, British, Canadian, Australian, Afghan, and other Coalition forces, while he did not enjoy combatant immunity and such conduct taking place in the context of and associated with armed conflict." Charge Sheet ¶ 21 (Ex. 7). In essence, this is no different than the preceding charge – it attempts to punish Mr. Hicks for allegedly engaging in combat with allied forces. If combat amounts to attempted murder, then all soldiers could be punished as murderers. This is not a basis for commission jurisdiction.

#### 1. The charge against Hicks for attempted murder "while he did not enjoy combatant immunity" is invalid under the law of war.

As discussed above, the law of war does not criminalize participation in war. *See supra* Part I.A. Respondents do not contend otherwise. They argue, however, that Hicks's alleged participation in war constituted attempted murder because Hicks was an "unprivileged belligerent."[22] Resp. Br. at 30. This is clearly incorrect because unprivileged belligerency - if Mr. Hicks even is an unprivileged belligerent - is not a war crime.[23]

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Act, 1914, § 24AA (Austl.). No such proclamation existed at the time of the alleged offenses. The absurdity of a United States prosecution of an Australian citizen, whose allegiance lies to Australia, for aiding the enemy is only increased by the fact that Australia does not view him to have breached that duty of allegiance.

[22] The test for combatant immunity is the same as determining the entitlement to POW status under the applicable principles of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter, "Geneva Convention (III)"].

[23] The government's own allegations, if true, show that Hicks was a privileged belligerent. There is only one government allegation against Hicks that involves belligerency or combat -- that he was guarding a



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The government's assertion that unprivileged belligerency constitutes a war crime over which military commissions have jurisdiction is premised on a complete misunderstanding of the law of war. In defining war crimes, the law of war is not concerned with the status of the actor but on the type of conduct. Attacking civilians or using poisoned gas, for example, violates the law of war whether the attacker is a privileged or unprivileged belligerent. Conversely, however, participating in combat is not a violation of the law of war regardless of the status of the combatant.

The concept of "privileged" combatants under the law of war has two purposes. First, a privileged combatant is entitled to be treated as a POW when captured. Second, a privileged combatant *may not be prosecuted for domestic crimes* relating to combat activities of even those states with subject matter and personal jurisdiction over him. Schmitt Aff. ¶ 38 (Ex. 10). For example, U.S. soldiers in Iraq have a privilege against prosecution for combat-related deaths under any nation's domestic law. In contrast, civilians (and other unprivileged belligerents) who have violated a domestic law of a state with subject matter and personal jurisdiction can be prosecuted pursuant to the domestic laws of that state. But while the law of war does not protect unprivileged belligerents from domestic prosecution for participation in hostilities, *the law of war does not itself make such actions criminal.* As Professor and former Judge Advocate Schmitt explains, "Simply put, it is not a violation of the law of armed conflict to kill a

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Taliban tank. Under the law of war, members of the armed forces, as well as members of militias or volunteer corps that form part of the armed forces, are privileged belligerents. *See* Geneva Convention (III) art. 4(A)(1), (2), (6). (In addition to members of the armed forces, privileged belligerents include members of militias who are under responsible command, who carry arms openly, have a distinctive sign recognizable at a distance," and who are part of a force that operates in accord with the law of war.) The government's allegation that Hicks was guarding a Taliban tank (i.e., a tank of the recognized government of Afghanistan, a sovereign nation) on its face shows that Hicks's alleged participation in combat was as part of the Afghan armed forces and thus was not unprivileged.



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combatant, even when the individual doing so lacks the combatant privilege to use force." Schmitt Aff. ¶ 39 (Ex. 10).[24]

For example, members of the French Resistance entering combat were unprivileged belligerents, but were not war criminals, as they would have been under the government's theory. Similarly, a Polish civilian who planned and participated in an attack on German troops after the invasion of Poland in World War II would have been an unprivileged belligerent but would not have violated the law of war. Because the Polish citizen would have lacked combatant immunity, he potentially could have been criminally liable under Polish law (or German law if there was jurisdiction). But as far as the law of war is concerned, the only consequences of the Polish citizen's actions would have been that German troops could attack him without themselves violating the law of war. *See* Geneva Protocol I, art. 51.3. The Pole would not have been a war criminal. *See* Derek Jinks, *The Declining Status of POW Status*, 45 HARV. INT'L L.J. 367, 438 (2004) ("[I]t is inapposite to characterize as 'criminal' the otherwise lawful warlike acts of civilians who take up arms to defend their country against an enemy to whom they owe no allegiance as a formal or sociological matter.").

The distinction between belligerent acts that are unprivileged and acts that constitute crimes under the law of war is well established, and is a critical limit on the jurisdiction of military commissions, leaving domestic crimes to be tried in Article III courts. As Professor

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[24] *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 234 (2004); Richard. R. Baxter, *So-called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs*, 1952 BRIT. Y.B. INT'L L. 323, *reprinted in* MIL. L. REV. (Bicentennial Issue) 487 (1975). It is imperative to distinguish the commissions set up by the PMO from military tribunals established in areas of occupation pursuant to the Geneva Convention (IV) arts. 64-66. In an occupied territory, a military commission could try an "unprivileged" belligerent applying the domestic law of that country or appropriately promulgated laws of the occupancy (or martial law). *Compare* Convention Relative to the Protections of Civilian Persons in Time of War, Aug. 12, 1949, arts. 64-66, 75 U.N.T.S. No. 973 [hereinafter, "Geneva Convention (IV)"] *with* PMO. This situation does not present itself here.

Yoram Dinstein explains, the law of war "merely takes off a mantle of immunity from the defendant, who is therefore accessible to penal charges for any offense committed against the domestic legal system."[25]

Similarly, a recent working paper of Harvard's Humanitarian Law Research Initiative states that while unprivileged belligerents may be prosecuted under domestic law, international law

> does not criminalize direct participation in hostilities per se.... Any interpretation that would result in the conclusion that mere participation in hostilities by civilians could be subject to the principle of universal jurisdiction [based on a serious violation of international human rights law] ["IHL"] would be highly contested, as no provision of IHL treaty law enables such an interpretation.[26]

The sources the government has cited are not to the contrary. *See* Resp. Br. at 30. The Geneva Convention indicates only that unprivileged belligerents are not entitled to POW status. Similarly, the Law of Land Warfare Manual states only that unprivileged belligerents are not immune from prosecution and trial – presumably under domestic law Neither remotely suggests that unprivileged belligerents have violated the law of war. Indeed, contrary to the reading Respondents give to the Law of Land Warfare Manual, a U.S. military handbook makes clear that in the view of the U.S. armed forces, unprivileged belligerents can only be tried under domestic law:

> Unprivileged belligerents may include spies, saboteurs, or civilians who are participating in the hostilities or who otherwise engage in unauthorized attacks or other combatant acts. Unprivileged belligerents are not entitled to prisoner of war status, and may be prosecuted under the *domestic law* of the captor.

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[25] Dinstein, *supra* note 14, at 31; *see also* Myres S. McDougal & Florentino P. Felciano, Law and Minimum World Public Order 712 (1961).

[26] Jean-Francois Queguiner, *Working Paper: Direct Participation in Hostilities under International Humanitarian Law* 10-11 (Nov. 2003), *available at* http://www.ihlresearch.org///. pdf.



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U.S. ARMY, JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 17 (2005) (emphasis added).

Finally, Respondents' prior citation of *Quirin* is inapposite. *Quirin* did not hold that an individual could be tried under the law of war simply for unprivileged belligerency. *Quirin* held only that ***spies*** -- "those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property" -- could be tried by military commissions. *Quirin*, 317 U.S. at 35. It explicitly limited its holding to those "particular acts," *id.* at 45-46, after pointing to a long history of commission proceedings against spies. This is a far cry from the offense listed in MCI No. 2 as "murder by an unprivileged belligerent." Critically, spying was one of two statutorily defined domestic crimes over which Congress had expressly conferred jurisdiction on military commissions. *See id.* at 27 (citing 10 U.S.C. §§ 1471-1593). Thus, a domestic statute provided a lawful basis for commission jurisdiction in *Quirin*. The law of war could not have done so because spying is uniformly viewed as lawful under the law of war.[27]

To be sure, the *Quirin* Court blurred the distinction between the law of war and domestic law.[28] But because domestic law clearly provided authority for trial of spies before military

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[27] The contemporary Army Field Manual explained, in a section aptly entitled "Employment of Spies Lawful," that spies are not punished as violators of the law of war. DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 77 (1956) [hereinafter LAW OF LAND WARFARE]; *see also* DINSTEIN, *supra* note at 14, at 213; *see generally* Baxter, *supra* note 14, at 487.

[28] The *Quirin* Court's suggestion that spying violates the law of war has been criticized by none other than the current Law of War Chair in the Office of General Counsel for the United States Secretary of Defense, W. Hays Parks:

> [T]he Court failed to note ¶ 203 of Field Manual 27-10, *Rules of Land Warfare* (1940), which states that spies are not punished as "violators of the law of war." Rather, the Court erred in stating that "the absence of uniform . . . renders the offender liable to trial for violation of the laws [sic] of war." *Ex parte Quirin*, 317 US at 35–36 n12.... The Hague Convention IV ... (a treaty to which the United States was a party during

commissions, this distinction was immaterial to the Court's holding. The same would not be true here. Because there is no domestic statute conferring jurisdiction on military commissions to try individuals for a purported crime of unlawful belligerency, a decision that such a charge makes out a violation of the law of war would confer jurisdiction on the commission when there otherwise would be none. And, as we have seen, such a decision would be incorrect under the recognized sources of authority for the law of war.

Today, it is even clearer than it was at the time of *Quirin* that a person who participates in combat – even if not privileged – is not guilty of "attempted murder" under the law of war. As respondents recognize, the law of war is a system of "common law" based on "universal agreement and practice." *Quirin*, 317 U.S. at 30. Indeed, in its reply brief on enemy combatants in the district court, the government explained that "[c]ustomary international law is constantly evolving," EC Reply at 43, and that "[c]ustomary international law results from a general, consistent, and widely accepted practice of states, followed out of a sense of legal obligation and not merely because the practice may be politically desirable, morally required or just a good idea."

Since Quirin, nations have completely re-written the Geneva Conventions and its' Additional Protocols; established the ICTY, the ICTR, and the ICC, each of which has

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> World War II), ... states that "[a] spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage." Were absence of uniform a violation of the law of war, criminal liability would remain even after a soldier returned safely to his own lines.

W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L 493, 510 n.31 (2003). As noted by the Dutch Special Court of Cassation in the 1949 *Flesche* case, "espionage...is a recognized means of warfare and therefore is neither an international delinquency on the part of the State employing the spy nor a war crime proper on the part of the individual concerned." *In re Flesche*, 16 Ann. Dig. & Rep. of Pub. Int'l L. Cases 266, 272 (Neth. Spec. Ct. of Cassation 1949).



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jurisdiction over crimes under the laws of war and each of which sets out what those crimes are. These are now the foundational conventions underpinning the laws of war, and it is just such conventions that the Supreme Court looked to in both *Yamashita*, and *Eisentrager* to see if a valid law of war violation had been alleged.[29] None of those authorities define participation in hostilities by an unprivileged belligerent as a law of war violation. Indeed, in their earlier filings, Respondents were been unable to cite any international criminal law statute, convention, treaty or case, in which participating in combat against an individual who was himself a combatant was deemed to be a war crime. It is thus clear that there is not today a "general, consistent and widely accepted practice," EC Reply at 43, finding unprivileged belligerency to be a war crime, as would be necessary for military commissions to have jurisdiction. Indeed, at a seminar on Direct Participation in Hostilities conducted by the International Committee of the Red Cross with a wide range of experts, "[n]o one contested that direct participation in hostilities by a civilian could not be considered a war crime." International Committee of the Red Cross, Direct Participation in Hostilities under International Humanitarian Law 9 (2003) (*available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5TALL8/$File/Direct%20participation%20in%20hostilities-Sept%202003.pdf).

[29] *In re Yamashita*, 327 U.S. 1, 13-16 (1946) (noting that "[n]either Congressional action nor military orders constituting the Commission authorized it to place Petitioner on trial unless the charge preferred against him is a violation of the law of war," and looking to the Hague Conventions and the Genera Red Cross Convention of 1929 to determine that the law of war supported both the substantive charges against General Yamashita and the "command responsibility" theory under which he was held liable); *Johnson v. Eisentrager*, 339 U.S. 763, 787-88 n.13 (1950) (looking to the Fourth Hague Convention of 1907 to determine whether the act charged was a violation of the law of war).



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### 2. No act of Congress delegates authority for prosecuting "attempted murder" of combatants to a military commission.

There is no other basis for commission jurisdiction. As discussed in the preceding subsection of this brief, unprivileged belligerency is not one of the two crimes over which Congress has expressly conferred jurisdiction on military commissions.

## D. The Commission Lacks Jurisdiction to Try Hicks for "Conspiracy."

Finally, Respondents seek to subject Hicks to "trial" by the commission for "conspiracy," Charge Sheet ¶ 19 (Ex. 7). This charge also falls outside the jurisdiction of military commissions.

### 1. Conspiracy is not a crime under the law of war.

Because the government is unable to bring any charges that Hicks himself committed any war crimes, the government attempts to make Hicks guilty by association. The government charges that Hicks is criminally liable for allegedly joining a group that had the purpose of violating the laws of war by, among other things, attacking civilians and civilian objects. The government does not allege that Hicks himself shared the purpose of attacking civilians, that he planned any attacks against civilians or civilian objects, that he participated in any such attacks, much less that he was a leader of such attacks. Instead, the government charges Hicks with the crime of conspiracy based on the American view that he can be held liable for joining a group that has a criminal purpose so long as someone in the group commits an overt act towards fulfillment of that purpose.

But conspiracy is not recognized as a substantive, independent crime under the law of war. Conspiracy is not a serious (or any) breach of the Geneva Convention; nor is it a breach of customary international law. Legal scholars, one important source of the law of war, regularly write that there is no doctrine of conspiracy in the law of war. *See, e.g.*, ANTONIO CASSESE,





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INTERNATIONAL CRIMINAL LAW 191 (2003); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 646 (2000); GERHARD WERLE, VÖLKERSTRAFRECHT 165 (2003); Schmitt Aff. ¶¶ 22-26; (Ex. 10); Bassiouni Aff. ¶¶ 5, 7-10 (Ex. 8). As Professor Cassesse, former President of the International Criminal Tribunal for the former Yugoslavia and current Chairman of the United Nations International Commission of Inquiry into Genocide in Darfur, explains: "the conspiracy offense listed in MCI No. 2 and charged against Mr. Hicks is not a valid offense under international criminal law." Cassesse Aff. at 1 (Ex. 11).

International legal history conclusively proves the point. Before World War II, there was no concept of conspiracy in international criminal law at all, much less in the law of war. There is no conspiracy charge whatsoever in Article 23 of the Hague Convention IV, for example, which provides a laundry list of criminal violations but does not list conspiracy. *See* HIVR art. 23; Bassiouni Aff. ¶ 7 (Ex. 8). This is because conspiracy is not recognized in civil law systems (as opposed to common law systems). Schmitt Aff. ¶ 22 (Ex. 10); Bassiouni Aff. ¶ 10 (Ex. 8) .

After World War II, Americans attempted to introduce the notion of conspiracy as part of their plan of war-crime prosecution. Stanislaw Pomorski, *Conspiracy and Criminal Organization*, *in* THE NUREMBERG TRIAL AND INTERNATIONAL LAW 213, 216-17 (George Ginsburgs & V.N. Kudriavisev eds., 1990). Because the concept of conspiracy is not part of civil law, much of the international community resisted this attempt. *Id.* at 218; Bassiouni Aff. ¶ 10 (Ex. 8). Ultimately, the term conspiracy appeared only in the definition of the first of the three crimes within the jurisdiction of the International Military Tribunal at Nuremburg, crimes against the peace (specifically, the crimes of "planning, preparation, initiation or waging of a war of aggression"), not crimes of war or crimes against humanity. *See* Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, 59 Stat. 1544, 82 U.N.T.S. 279. The Tribunal explained





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that "the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war."[30] This point was reinforced in the trials conducted by the United States-constituted Nuremberg Military Tribunal pursuant to Allied Control Council Law No. 10 (1945): "[T]he Tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offense." *United States v. Pohl*, No. 4 (Nuremberg Mil. Tribunal II Nov. 3, 1947), *reprinted in* TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 958, 961 (1950), *available at* http://www.marzal.org/archive/nmt/05/NMT05-T0961.htm; *see also* Bassiouni Aff. ¶ 8 (Ex. 8).[31]

In the sixty years since Nuremberg, the crime of conspiracy has remained an extremely limited concept even in the more general international criminal law, and it has simply never been applied to the laws of war. The sole references to conspiracy in international criminal law conventions since Nuremberg have appeared in connection to genocide (a crime against humanity), not the law of war. Bassiouni Aff. ¶ 7. There is no conspiracy charge at all in any of the four Geneva Conventions despite a long list of substantive crimes in each convention. *See* Geneva Convention (I), art. 50; Geneva Convention (II), art. 51; Geneva Convention (III), art.

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[30] Thus, contrary to the view of Respondents, Resp. Br. at 30 n.30, the Tribunal did reject conspiracy to commit war crimes as a valid charge and expressly distinguished them from crimes against peace. *The Nurnberg Trial*, 6 F.R.D. 69, 111 (Int'l Mil. Tribunal 1946). The Tribunal thereby rejected the argument that a non-specific reference included in the last sentence of the Charter, which, in defining the substantive crimes, created liability for conspiracy to commit war crimes. Indictment at III, *The Nurnberg Trial*, 6 F.R.D. 69 (Int'l Mil. Tribunal 1946), *available at* http://www.yale.edu/lawweb/avalon/imt/proc/count1.htm.

[31] The government has quoted Justice Jackson's view of the negotiations leading up to the Nuremberg proceedings. But Justice Jackson recognized that his view of the agreement "seems not to have conveyed to the mind of the judges. . .for, while the legal concept of conspiracy was accepted by the Tribunal, it was given a very limited construction in the judgment." Robert H. Jackson, *Report to the International Conference on Military Tribunals*, Preface at 4 (1949). Indeed, the Tribunal held that there was no crime of conspiracy under the law of war. Subsequent international conventions make clear that it is the Tribunal's view of the law of war, not Justice Jackson's that has prevailed.

130; Geneva Convention (IV), art. 147.[32] And the conventions establishing the International Criminal Tribunals in Yugoslavia and Rwanda list conspiracy as a substantive crime only with respect to genocide. *See* United Nations, Statute of the ICTY, art. 4(3)(b), S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 2, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1203; Statute of the ICTR, art. 2(3)(b), S.C. Res. 955, U.N.SCOR, 49th Sess., 34534d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (same); Bassiouni Aff. ¶ 9 (Ex. 8).[33] Indeed, of the 281 conventions applicable to 28 categories of international crimes, only five contain a reference to conspiracy. *See* Bassiouni Aff. ¶ 7. Moreover, the international community has recently withdrawn whatever recognition it previously gave to liability for conspiracy. The Rome Statute -- the most recent multilateral statement of international law on conspiracy -- mentions neither the word conspiracy, nor the concept of an agreement to commit a crime. The omission was deliberate. The concept of conspiracy appeared in initial drafts of the statute, but all references to conspiracy were removed during negotiations.[34]

Thus, it is clear that "conspiracy" is not a recognized crime in the law of war.[35] Indeed, as we have seen, the government itself does not list "conspiracy" as a substantive crime in MCI

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[32] Significantly, the U.S. War Crimes Act of 1996, 18 U.S.C. § 2441 (2000), which incorporates into our criminal code grave breaches of the Geneva Convention, also does not mention conspiracy although other crimes in Title 18, unrelated to war crimes, including torture (§ 2340A(c)) and terrorism (§ 2332(b)), do so.

[33] The major treaties on terrorism are not part of the law of war. But they also do not mention conspiracy. *See* International Convention for the Suppression of the Financing of Terrorism, Jan. 10, 2000, art. 2, S. Treaty Doc. No. 106-49, 39 I.L.M. 270; International Convention for the Suppression of Terrorist Bombings, Jan. 12, 1998, S. Treaty Doc. No. 106-6, 37 I.L.M. 249.

[34] Richard Barrett & Laura Little, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals*, 88 MINN. L.REV. 30, 80 (2003) (citing Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. GAOR, 51st Session, Supp. No. 22A, at 94-95, U.N. Doc. A/51/22 (1996)); *see also* 1 Virginia Morris & Michael P. Scharf, *An Insider's guide to the International Criminal Tribunal for the former Yugoslavia* 96 (1995) ("there is no generally applicable provision recognizing conspiracy as a separate and distinct crime" in the statute creating the ICTY).

[35] Conspiracy is also conspicuously absent from most countries' domestic criminal laws. Of the 192 states in the world, 148 do not have the crime of conspiracy. *See Bassiouni* Aff. ¶ 10 (Ex. 8).



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No. 2, the instructions the Executive Branch established purporting to delineate the law of war violations with which detainees can be charged. *See* MCI No. 2 § 6(A), (B) (Ex. 9); *In re Yamashita*, 327 U.S. 1, 10 (1946) (evaluating whether the commander's order establishing the commission "conformed with the established policy of the Government and to higher military commands authorizing his action").

Respondents nonetheless have previously asserted that conspiracy has long been recognized as a substantive offense under the law of war. But the authorities they cited do not show this. The Winthrop Treatise refers to conspiracy during the Civil War as a crime that could be tried by military commissions only because the courts were closed -- in other words, a domestic crime, not a crime *triable as a violation of the laws of war.*[36] *Mudd v. Caldera*, 134 F. Supp. 2d 138 (D.D.C. 2001), involved a defendant convicted of "of aiding and abetting as an accessory" to the assassination of President Lincoln for providing shelter, medicine and a method of escape to John Wilkes Booth -- thus, the substantive crime appeared to have been assassination with the term "conspiracy" loosely used as a theory of individual responsibility, *see infra* Part I.D.2, that actually consisted of aiding and abetting, a recognized theory of individual responsibility. *See id.* at 140. Moreover, because that case occurred in the context of the army's decision not to change the individual's military records, it involved deferential review, that is not warranted here. Finally, *Colespaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956), contains absolutely no discussion as to whether conspiracy violates the law of war or the source for such a proposition.

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[36] 2 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 839 & n.5 (2d ed. 1920). Winthrop notes that some conspiracy trials were also in part trials based on violations of the laws of war, but he provides no indication that there were any commission proceedings based on a charge that conspiracy itself constituted a substantive violation of the laws of war.

Certainly, these few domestic sources, involving convictions 50 or 150 years ago, cannot establish the "*universal* agreement and practice" necessary to show a violation of the law of war as it exists today. *Quirin*, 317 U.S. at 30. In the last 60 years, statutes establishing international criminal tribunals have never made conspiracy to violate the laws of war an offense and have twice (at Nuremberg and at Rome) explicitly rejected proposals to do so.[37] Thus, the charge of conspiracy against Hicks does not serve as a valid source of commission jurisdiction.

**2. Theories of Individual Responsibility for Group Crimes Do Not Provide a Basis for Commission Jurisdiction Over the Conspiracy Charge.**

While MCI No. 2 properly does not list conspiracy as a substantive crime, it does list conspiracy as a theory of individual responsibility. This provides no support for the charge against Mr. Hicks.

A theory of individual responsibility under international law is one in which an individual charged with a particular substantive crime can be held responsible for that crime. For example, both the ICTY and the ICTR have used "joint criminal enterprise," "aiding and abetting," or "command responsibility" as theories to establish an individual's responsibility for a crime perpetrated by a group. *See, e.g.*, *Prosecutor v. Kvocka*, Judgment, Case No. IT-98-30/1,(ICTY Trial Chamber Nov. 2, 2001); *Kayishema and Ruzindana*, ICTR-95-1-T, ¶¶ 203-205 (ICTY Trial Chamber May 21, 1999). Thus, an individual could be charged with a particular substantive

[37] The *Krstic* and *Furndzija* decisions that respondents previously cited do not change this. They involved charges of genocide, murder, and torture, not conspiracy. *Prosecutor v. Krstic*, Case No. IT-98-33-T, ¶ 3 (ICTY Trial Chamber Aug. 2, 2001); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, ¶ 119 (ICTY Appeals Chamber July 21, 2000). Moreover, even the theory of individual responsibility by which Krstic and Furndzija were held liable was not conspiracy, but rather "joint criminal enterprise." *Krstic* ¶ 611; *Furundzija* ¶ 119; *see also Prosecutor v. Milutinovic*, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction, Case No. IT-99-37-AR72 ¶ 26 (ICTY Appeals Chamber, May 21, 2003) (stating that "[c]riminal liability pursuant to a joint criminal enterprise is not a liability for. . .conspiring to commit crimes."). These cases certainly do not undermine Petitioners showing that conspiracy is not even a recognized theory of individual responsibility under the law of war, much less a substantive crime.



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offense -- such as use of poison gas – and then held liable as, for example, a member of a joint criminal enterprise that perpetrated that crime. *But he could not be charged with the non-existent substantive crime of "joint criminal enterprise."* This is very different than the American concept of conspiracy in which an individual can be charged with (and found guilty of) both the underlying offense and a separate substantive crime of conspiracy. Hence, Respondents' attempt to charge Hicks with a substantive crime of conspiracy is inconsistent with their own description of conspiracy in MCI No.2, which recognizes that conspiracy is not a substantive crime under the law of war.

In fact, even MCI No. 2 overstates the place of conspiracy in the law of war. Conspiracy is not even a recognized theory of individual responsibility in the law of war. While each of the international criminal conventions lists theories of individual responsibility, none lists conspiracy. *See* ICTY at art. 7; ICTR at art. 6; Barrett & Little at 37.

Finally, it is worth noting that even had Respondents charged Mr. Hicks with a substantive crime and invoked one of the legitimate theories of individual responsibility under the law of war to establish liability, such a charge would fail. The theories of individual responsibility under the law of war, such as the theory of joint criminal enterprise, extend liability only to persons who know of the specific crime and who directly participate in the perpetration of that crime and only after the crime is carried out.[38] Similarly, even in the two very narrow instances in international law (not the law of war) in which conspiracy has been recognized as criminal -- conspiracy to wage an aggressive war and conspiracy to commit

[38] For example, the statute establishing the ICC states that an individual can be held guilty of a crime based on his participation as a member of the criminal enterprise, but only if he "contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose," and either has the "aim of furthering the criminal activity or criminal purpose of the group" or has "knowledge of the intention of the group to commit the crime." *See* Rome Stat., art. 25(3)(d)(i), (ii).

genocide -- liability has extended only to group leaders who planned the crime.[39] There is no allegation that Mr. Hicks was such a leader, or, indeed, anything more than a foot soldier. For this reason, too, the charge of conspiracy against Mr. Hicks does not provide a basis for commission jurisdiction.

More fundamentally, however, Respondents are not attempting to use conspiracy as a theory of individual responsibility to establish his liability for a separate substantive crime. They are attempting to establish a stand alone crime of conspiracy. But no stand alone crime of group liability exists under the law of war.

### 3. The purported objects of the alleged conspiracy do not violate the law of war.

The conspiracy charge fails to confer jurisdiction on military commissions for another reason as well: none the alleged objects of the conspiracy violate the laws of war. Two alleged objects of the conspiracy -- murder by an unprivileged belligerent and destruction of property by

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[39] For example, the ICTY and ICTR have concluded that a defendant to a charge of conspiracy to commit genocide must have "the intent to commit genocide, that is to destroy, in whole or in part, a national, ethnic, racial or religious group, as such," and must have been integrally involved in the planning and execution of specific acts of genocide. *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13 A, Judgment and Sentence at 192 (27 Jan. 2000) (emphasis added); *see also Prosecutor v. Eliezer Niyitegeka*, Case No. ICTR-96-14-T, Judgment and Sentence (16 May 2003). *See also* Statute of the Special Court for Sierra Leone, art. 1 (limiting the court's jurisdiction to those "who bear the *greatest responsibility* for serious violations of international humanitarian law."). Conspiracy to wage aggressive war -- a crime against the peace at Nuremberg, *see supra* pp. 24-25 -- likewise consisted of demanding criteria. *See* IMT Nuremberg Transcript Vol. 1, p. 225 (establishing that conspiracy to wage aggressive war required proof personal guilt on the part of an individual defendant, a concrete plan of war that was actually carried out, and knowing participation by defendant that was not too far removed from the time of decision and action). The eight persons convicted at Nuremberg of conspiracy to wage aggressive war were all Nazi leaders -- Goering, Ribbentrop, Keitel, Jodl, Rosenberg, Raeder, Hess, and von Neurath. These individuals were also convicted of the substantive crime of waging an aggressive war, and were integrally involved in the planning and execution of the aggressive war that actually took place. *See* IMT Nuremberg Transcript Vol. 1, p. 225. Finally, the limited crime of conspiracy under international criminal law requires an agreement. *See Prosecutor v. Juvenal Kajelijeli*, Case No. ICTR-98-44A, Judgment 787 (1 Dec. 2003) ("[T]he evidence must show that an agreement has been reached. The mere showing of a negotiation in process will not do.") Indeed, even under domestic standards, conspiracy is a specific intent crime. *State v. Bond*, 713 A.2d 906, 913 (Conn. App. Ct. 1998).

an unprivileged belligerent -- do not violate the laws of war. *See supra* Part I.C. The third alleged object of the conspiracy, terrorism, is not a crime tied to war and thus not a war crime that confers jurisdiction on military commissions. *See* Schmitt Aff. ¶¶ 28-30 (Ex. 10).

In its prior briefs in this case, the government did not show that unprivileged belligerency or terrorism objects of the conspiracy qualify as war crimes. In response Hicks's challenge, Respondents argued only that "al Qaeda's attacks on American civilian targets were obviously law of war violations." Resp. Reply Br. at 20. In that regard, the other two alleged objects of the conspiracy, attacking civilians and civilian objects, are the only ones that potentially could be war crimes. *See* Schmitt Aff. ¶ 27.

But Respondents do not allege that Hicks had *any* connection to these attacks. Moreover, attacking civilians and civilian objects during peacetime, while punishable as acts of terrorism, are not violations of the laws of *war*. Respondents do not allege that Hicks -- or, for that matter, any alleged member of al Qaeda -- attacked civilians during the Afghanistan war, which began on October 7, 2001. As has been shown above, *see supra* Part I.A.1, only the Afghanistan war, not the "war on terror," constitutes an international armed conflict under which the *law of war* would govern. *See* Schmitt Aff. ¶¶ 11, 21 (Ex. 10); Cassesse Aff. at ¶ 2 (Ex. 11).

Thus, even if conspiracy could be a violation of the laws of war, the objects about which Hicks is accused of having conspired are not. Indeed, because the conflict with al Qaeda is not one to which the laws of war apply, none of the charges against Hicks related to that conflict give rise to commission jurisdiction.

**4. No act of Congress delegates authority for prosecuting conspiracy to a military commission.**

As noted in section I(D) of this brief, *supra*, Congress has not invested military commissions with the authority to adjudicate charges of conspiracy. Because conspiracy also





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does not violate the law of war, the charge of conspiracy pending against Hicks is beyond the jurisdiction of the commission.

**E. Hicks May Not Be Tried For Offenses Created *Ex Post Facto*.**

Not only are they beyond the Commission's jurisdiction, the charges against Petitioners are also not crimes in the first instance. The Executive defined them for the first time in MCI No. 2, which was promulgated on June 21, 2003. This violates the fundamental prohibition against *ex post facto* laws, *see* U.S. Const. art. I, § 9, cl. 3, as well as the principle of separation of powers, according to which only Congress has the power to legislate, including the power "[t]o define and punish. . .Offences against the Law of Nations." *Id.* art. I, § 8.

These fundamental principles strongly counsel against interpreting the law of war to apply expansively to categories beyond which it has previously been applied. It must be remembered that this is a *criminal* prosecution. "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself." *United States v. Wilterberger*, 18 U.S. 76, 95 (1820) (Marshall, C.J.); *see also United States v. Thompson*, 504 U.S. 505, 518 (1992) ("[It] is proper. . . to apply the rule of lenity and resolve the ambiguity in [the accused's] favor.") (citing *Crandon v. United States*, 494 U.S. 152, 168 (1990); *Commissioner v. Acker*, 361 U.S. 87, 91 (1959)). Thus, even were this Court to conclude that there is some ambiguity as to whether the law of war, or an act of Congress, subjects Hicks to the commission's jurisdiction on the charges which Respondents have brought, the Court is obligated to resolve that ambiguity in Hicks's favor and declare the charges beyond the purview of the commission.

This does not mean that the government cannot prosecute terrorists. What it does mean is that the government cannot make up charges intended to bring a defendant within the narrow jurisdiction of military commissions. It must either charge the defendant with a domestic crime

prosecutable in U.S. courts, charge an actual violation of the law of war before a military commission, or determine that the defendant has committed no crime at all and thus must be released -- or held as an enemy combatant (if proven to be such) only for the duration of hostilities.

## II. THE STRUCTURE OF THE MILITARY COMMISSIONS VIOLATES THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS.

Respondents cannot proceed to try Mr. Hicks because the basic structure of the military commissions set up for this purpose precludes an impartial evaluation of guilt or innocence or an impartial review of any such determination. The military commission structure is thus flatly inconsistent with the due process of law guaranteed by the Fifth Amendment.[40]

In their prior briefs in this case, Respondents made no attempt to argue that the commission structure ensured impartial adjudication or somehow otherwise comported with Due Process. Instead, they argued that Mr. Hicks is not entitled to invoke any constitutional rights, and that they are free to try Mr. Hicks and other detainees using whatever procedures they choose. The Respondents' view appears to be that Mr. Hicks is entitled to no procedural protections but those they deign to give him. Under this theory, they could execute Mr. Hicks or any other detainee held in Guantanamo without according any process at all.

However, the Respondents' view - that the Due Process Clause does not apply to detainees - is clearly incorrect and for that reason already has rejected in another part of Mr. Hicks's case, in which the Court applied the logic of the Supreme Court's decision in *Rasul*. *See In re Guantanamo Detainees Case,* 355 F. Supp. 2d 443, 453-64 (D.D.C. 2005).

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[40] Such a trial would also result in gross violations of Mr. Hicks's rights under the UCMJ and the Geneva Conventions. *See supra* FN2.

Now that it has been decided Mr. Hicks is protected by the Constitution, it is clear that the commission proceedings cannot continue without violating due process. In *Hamdi*, the Supreme Court held that such a Due Process challenge should be analyzed under the *Mathews v. Eldridge* balancing test, a decision followed by Judge Green in her evaluation of the CSRTs. *Id.* at __; *Hamdi*, 124 S. Ct. 2633, 2646 (2004). Under this test, the current structure of the commission trials cannot stand. Mr. Hicks's most basic interest, his interest in lifelong liberty, will be at stake in his commission proceedings. These proceedings will fail to provide even the most basic safeguards against wrongful convictions: an impartial fact-finder and interpreter of law; an adequate, impartial review process; and a guarantee that evidence adduced bears the most basic hallmarks of reliability and acceptability -- condoning admission even of evidence obtained through torture. Finally, the government's purported competing interests cannot outweigh the extreme risks to Mr. Hicks as the government has no interest in a wrongful conviction.

In what follows, we first discuss the clear applicability of due process to Mr. Hicks in light of Judge Green's opinion, and then discuss how Mr. Hicks's claim satisfies each of the requirements for a successful challenge.

### A. This Court Has Already Found That The Due Process Clause Is Applicable to Mr. Hicks's Case.

In their previous filings in this case, Respondents did not assert the commission procedures will accord Mr. Hicks any actual due process of law. Instead, they asserted that he has no constitutional rights at all, Resp. Br. at 36, and thus that, presumably, they are free to treat him completely arbitrarily in a proceeding in which his lifelong liberty is at stake. But this remarkable proposition has now decided against the government in this very case. In addition to Mr. Hicks's challenges as to the structure of the military commission trials that this Court is

currently considering, Mr. Hicks's habeas claims originally challenged the process designed to determine whether he is an enemy combatant. This Court consolidated Mr. Hicks's enemy combatant challenge with the habeas petitions of several other Guantanamo detainees, and these challenges were considered by Judge Joyce Hens Green, who rejected the very view Respondents assert here. *See In re Guantanamo Detainees Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005).

Judge Green held unambiguously that Hicks had a "valid claim[] under the Fifth Amendment to the United States Constitution," *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 445, and noted further that this conclusion followed directly from the Supreme Court's opinion in *Rasul*. *Id.* at 453-65. The Rasul majority rejected the premise underlying Respondents' argument that detainees have no due process rights, explaining that this argument "has no application . . . with respect to persons detained within the territorial jurisdiction of the United States" and that Guantanamo is within territorial jurisdiction of the United States under the terms of the lease from Cuba. *Rasul*, 124 S. Ct. at 2696. Justice Kennedy likewise noted that "Guantanamo Bay is in every practical respect a United States territory[;] . . . the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." *Id.* at 2700 (Kennedy, J., concurring). Although *Rasul* concerned the classification of Guantanamo for the purposes of the habeas statute, the conclusion that Guantanamo Bay is "in every practical respect a United States territory" necessarily renders the Constitution applicable as well. Consequently, Judge Green held, *Rasul* required "this Court to recognize the special nature of Guantanamo Bay and, in accordance with *Ralpho v. Bell*, to treat it as the equivalent of sovereign U.S. territory where fundamental constitutional rights exist." *In re Guantanamo Detainees*, 355 F. Supp. 2d at 462-63; *see also*

*Rasul*, 124 S. Ct. at 2698 n.15 ("Petitioners' allegations . . . unquestionably describe custody in violation of the Constitution or laws or treaties of the United States.") (internal quotation omitted); *In re Guantanamo Detainees*, 355 F. Supp. 2d at 463 (describing this footnote as "the strongest basis for recognizing that the detainees have fundamental rights to due process").

Judge Green's decision that Mr. Hicks has Due Process rights not only eliminates Respondents' argument that such rights are not applicable at Guantanamo; it equally eliminates Respondents' related argument that such rights are inapplicable to individuals who have no voluntary contacts with the United States. That argument boils down to the assertion that the government is completely unrestrained by constitutional, domestic, or international law in its treatment of a non-citizen transported to territory over which it "exercises 'complete jurisdiction and control,'" *id.* at 462 as long as this is done against the will of its captive. Fortunately for Hicks, and indeed for all non-citizens, this has never been the law: "it is settled that 'there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law.'" *Ralpho v. Bell*, 569 F.2d 607, 618-619 (D.C. Cir. 1977) (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 669 n.5 (1974). "Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). Judge Green thus properly concluded that Mr. Hicks and other detainees who were involuntarily transported to Guantanamo have constitutional rights.

As a result of Judge Green's decision, Respondents cannot try Petitioner in any manner they choose. They must comply with the Constitution. And under the Constitution, the structure the military commissions and its corresponding procedures are flagrantly unlawful. For these

reasons, and for the reasons laid out in Judge Green's opinion, this Court should affirm that Mr. Hicks has a constitutional right to due process that Respondents must respect in all proceedings.

### B. The Commissions Violate The Due Process Of Law Guaranteed By The Fifth Amendment To The U.S. Constitution.

In light of Judge Green's opinion in Mr. Hicks's case, the Court should find that the military commissions violate Mr. Hicks's constitutional rights.

In *Hamdi*, the Supreme Court held that the calculus to be used in determining whether an alleged enemy combatant was being denied due process of law is the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *See Hamdi*, 124 S. Ct. at 2633. Under the *Mathews* test, to determine whether a violation of due process has occurred, the Court must balance three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews*, 424 U.S. at 335.[41]

Judge Green found that the resolution of a due process challenge by a detainee in the context of a military commission proceeding requires review of these three *Mathews* factors. *In re Guantanamo Detainees*, 355 F. Supp. 2d at 465. The structure of the commissions here clearly fail this test.

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[41] In cases involving internal "regulations, procedures and remedies related to military discipline," the Supreme Court rejected the *Mathews* balancing test, instead adopting a more deferential standard to review due process claims. *Weiss*, 510 U.S. 163, 177 (1994) (quoting *Chappell v. Wallace*, 462 U.S. 296, 301 (1983)). Given the nature of these proceedings and the *Hamdi* precedent, this deferential standard is clearly not applicable here. *Hamdi*, 124 S.Ct. at 2651.

### 1. The private interest at stake in this case -- Hicks's physical liberty -- is the most fundamental of all.

In *Hamdi*, the Supreme Court recognized that the freedom from physical detention by governmental powers "is the most elemental of liberty interests." 124 S. Ct. at 2646. The Court explained that the fact of detention weighed more heavily in the *Mathews* balancing test than any other factor. *Id.* at 2646-47 ("[n]or is the weight on this side of the *Mathews* scale offset by the circumstances of war or the accusation of treasonous behavior, for '[i]t is clear that commitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection.'")(quoting *Jones v. United States,* 463 U.S. 354, 361 (1983)); *see also id.* at 2647; *In re Guantanamo Detainees*, 355 F. Supp. 2d at 466 ("the liberty interests of the detainees cannot be minimized for purposes of applying the *Mathews v. Eldridge* balancing test by the government's allegations that they are in fact terrorists or are affiliated with terrorist organizations").

Judge Green invalidated the CSRT procedures in part because enemy combatants held for the length of the applicable armed combat potentially could be imprisoned for life. Judge Green, relying on *Hamdi*, said that "the potential length of the incarceration is highly relevant to the weighing of the individual interests at stake." *In re Guantanamo Detainees*, 355 F. Supp. 2d at 465. She found that short of the death penalty, life imprisonment "is the ultimate deprivation of liberty." *Id.* Hicks's interest here is even greater, because the risk of life imprisonment as a result of a military commission sentencing is more certain than as a result of the indefinite length of armed combat. A guilty sentence for Mr. Hicks could subject him to life imprisonment even if the combat ostensibly justifying detention of enemy combatants comes to an end. The need for due process, already great in the context of detention for the course of the combat, is even



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more significant when the government seeks to put its defeated enemies on trial to impose punishments that will last even after the combat is over.

**2. The shortcomings that exist in the commission procedures are so egregious as to provide an enormous risk of an erroneous deprivation of Mr. Hicks's liberty interest.**

In light of the extreme liberty interest at stake in Mr. Hicks's case, carefully scrutiny of the military commission procedures reveals that "the risk of erroneous deprivation of a detainee's liberty interest is unacceptably high." *Hamdi*, 124 S. Ct. at 2648. The Constitution provides specific rights to criminal defendants -- e.g., trial by jury, access to legal counsel, confrontation of witnesses, and freedom from self-incrimination. While all of these specific guarantees may not apply fully in a commission setting, the Constitution's explicit establishment of these rights nonetheless underscores the importance of structural protections in a criminal proceeding. Rather than using the existing structure of the courts-martial system, Respondents have chosen to set up a new system that falls far short of even these basic protections, underscoring just how deficient the commissions are.[42] Even members of the military's prosecution team have expressed serious concern that the current structure of the commission proceedings is "rigged" by the government.[43] The current structure of these military

[42] In addition to the procedures established in the Military Commission Orders issued by the Secretary of Defense beginning on March 21, 2002, it appears that many other aspects of commission procedure will be made up on an ad hoc basis, with the early "trials," including Hicks's own, serving as experiments as to how the later ones will be conducted. The almost-certain disarray will only be magnified because the commission rules have no known analog: the commissions will follow neither judicial rules, nor the rules for court martial proceedings, nor the rules for international military proceedings. That commission members will work in a standardless vacuum was evident even at the initial preliminary hearings, where members were completely flummoxed by questions such as whether a detainee could represent himself, or by what standard a member could be dismissed for cause. John Hendren, *Trial and Errors at Guantanamo: Military Tribunal's First Week Trying Suspects Is Marked by Confusion and Inexperience*, L.A. TIMES, Aug. 29, 2004, at A1, 2004 WL 55934140.

[43] Neil A. Lewis, *2 Prosecutors Faulted Trials for Detainees*, N.Y. Times, Aug. 1, 2005, at A1; *see also* Redacted Carr-Borch Emails (Ex. 13 ).

commissions provides far fewer protections than the courts-martial system and is altogether inconsistent with due process.

**a. The commission process is not impartial.**

The Supreme Court has said that "a fair trial in a fair tribunal is a basis requirement of due process," and that "a necessary component of a fair trial is an impartial judge." *Weiss v. United States*, 510 U.S. 163, 178 (1994), and the structure of the military commissions lacks the judicial independence that "helps to ensure judicial impartiality." *Id.* at 179. Instead, this structure fuses together the legislative, executive and judicial functions in a single body, undermining our constitutionalism and with it the rule of law. As noted above, the problems are so egregious that two senior military prosecutors have complained that the trial system was secretly arranged to improve the chance of conviction and to deprive defendants of material that could prove their innocence.[44]

Commission members, including the presiding officer of the commission, are chosen by the Appointing Authority, *see* MCO No. 1 § 4(A)(1), (4) (Ex. 4), who is the designate of the Secretary of Defense. The Secretary of Defense and his handpicked Appointing Authority therefore exert unfettered control over the Commission proceedings and outcome by selecting and supervising the presiding officer and the commission members. The Appointing Authority also approves and refers charges to the commission on behalf of the Executive Branch, *see id.* § 6(A)(2), and approves plea agreements, *see id.* § 6(A)(4). In other words, commission members are chosen by the very same entity that has a strong interest in the result. Commission members are appointed for two years and can be removed by the Appointing Authority with "good cause,"

[44] *See* Lewis, *2 Prosecutors Faulted*, *supra*, at A1; Redacted Carr-Borch E-mails (Ex. 13).



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giving him the power to hire and fire the commission members. *Id.* § 4(A)(3). Significantly, the accused has no peremptory challenges against commission members.

The impermissible partiality of the commission extends to issues of law. The presiding officer is the only member of the commission who is required to have legal experience, *see id.* § 4(A)(3), (4), leaving laypersons to founder through complex legal questions with little guidance. Other legal decisions, including all case-dispositive questions and defense motions, will be made on an interlocutory basis by the Appointing Authority himself. *See id.* § 4(A)(5)(d). Allowing the Appointing Authority to decide questions of law further conflates the distinction between prosecutorial and judicial functions.

The partiality of the military commissions is inconsistent with the very notion of a fair trial. As the Supreme Court has stated: "It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt, and adjudge the punishment by one of its own agents." *Wong Wing v. United States*, 163 U.S. 228, 237 (1896). The same is true of the Executive.

In *Weiss v. United States*, the Court analyzed the impartiality of the courts-martial structure and its composition. The Court held that a more deferential standard of review was applicable to the courts-martial process as a result of Congress' constitutional power over military discipline, than the *Mathews* test it held applicable to detainees in *Hamdi*. 510 U.S. at 177. Under this more deferential standard, the Court held that the failure of the courts-martial system to provide a fixed term of office for judges did not render it unconstitutional. But the Court emphasized this was so only because the courts martial system by virtue of the UCMJ, and corresponding regulations, insulated military judges from the effects of command influence, and sufficiently preserved judicial impartiality so as to satisfy the Due Process Clause. *Id.* at 179.

None of the structural safeguards that *Weiss* held as critical to save the courts-martial system from invalidation by the Due Process Clause exist with respect to the military commissions. In the courts-martial system, the judge is chosen from an extant and limited pool of judges, who are members of an independent judiciary that is outside of the chain of command. 10 U.S.C. § 826(a). The judge is selected according to prescribed regulations from a pool of judges meeting qualifications dictated by statute. *See* 10 U.S.C. § 826(a), (b), (c); *see also Weiss v. United States*, 510 U.S. 163, 172 (1994). Thus, unlike the commission system, in the courts-martial system the judge cannot be picked by the Executive based on his likely views in the particular case. And, unlike the members of military commissions who can be dismissed by the Appointing Authority and who, in their non-commission jobs, may also be subject to the influence and control by the Administration, military judges are outside the influence of the chain of command. 510 U.S. at 180; *see also* 10 U.S.C. § 837 (protecting military judges from being "censure[d], reprimand[ed], or admonish[ed] ... with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of ... his functions in the conduct of the proceeding," a provision that explicitly applies only to courts-martial, not military commissions.) Rather, military judges in courts-martial proceedings are under the control of Judge Advocates General, "who have no interest in the outcome of a particular court-martial." *Weiss*, 510 U.S. at 180. Finally, the Court of Military Appeals, composed of civilian judges serving a fixed term of 15 years, ensures that the Judge Advocate General's office does not decertify or transfer a military judges based on his findings in a courts-martial proceeding. *Id.* at 181. No corresponding protection exists to protect commission members from improper evaluation by the Appointing Authority.

Although *Weiss* involved only a challenge to military judges, regulations also help facilitate impartiality of other members of courts-martial in a manner that does not exist for commission members. Whereas courts-martial members are selected pursuant to structural safeguards referencing their age, education, training, experience, length of service, and judicial temperament, *see* 10 U.S.C. § 825(d)(2), the Appointing Authority's discretion to select members of the military commission is unconstrained, *see* MCO § 4(A)(3). Similarly, while courts-martial procedures protect against the selection of members with a potential bias in the case, *see* 10 U.S.C. § 825(d)(2), no regulations prohibit the Appointing Authority from selecting accusers or prosecution witnesses as commission members. *See* MCO § 4(A)(3). Importantly, the UCMJ allows a defendant to exercise peremptory challenges against the members of the courts-martial who try the facts. *See id.* § 841. Further, unlike the commission structure, if the defendant in a court-martial proceeding prefers, he can choose to have his case heard by the judge alone. *Weiss*, 510 U.S. at 180.

Without any justification whatsoever, the Executive Branch has refused to provide the same impartial tribunals for the commission process -- creating an extremely high risk of a wrongful conviction.

The dangers of a wrongful conviction from this partial tribunal are further increased by the fact that conviction requires only a two-thirds vote, unlike the three-quarters vote required by the UCMJ for any confinement greater than ten years. *Compare* PMO § (4)(c)(6)-(7) (Ex. 3); *with* 10 U.S.C. § 852(a)(1), (b)(1)-(2). Moreover, the commission now only has three members (thus, requiring only two votes for conviction),[45] whereas the lawful minimum for a general

[45] Here, Petitioner challenged four of five original commission members for cause. The Appointing Officer granted the two challenges that were unopposed but denied the two opposed challenges. The Appointing Officer did not replace the stricken members. Since conviction requires a 2/3 vote, reducing

courts-martial is a panel of five members (thus requiring at least four votes for conviction). 10 U.S.C. § 816(1)(a). This decrease in the number of members greatly increases the risk of partiality.

**b. The commission does not provide for an adequate review process.**

The lack of judicial independence in military commissions extends to the review process. Instead, as noted, the Appointing Authority will decide all interlocutory issues, *see* MCO No. 1 (Ex. 4) § 4(A)(5)(d) and will conduct the first review of the decision of the military commission after its conclusion to ensure that its proceedings were "administratively complete." MCO No. 1 § 6(H)(3). The Appointing Authority thus serves as an accuser, investigating officer, appointer of judge/jury, and reviewer of the proceedings.[46]

The commission review process after the initial review by the Appointing Authority is equally illegitimate. The Defense Department has established a review panel consisting of four members appointed by the Secretary of Defense. Although these members have served in important legal roles, they have not been chosen for their impartiality. Two members who have been appointed to the review panel served as appointees on the very panel that crafted the trial procedures. *See* Stephen J. Fortunato, Jr., *A Court of Cronies*, IN THESE TIMES (June 28, 2004), *available at* http://www.inthesetimes.com/site/main/article/a_court_of_cronies. One of the members of the panel has stated in a recent opinion-editorial: "It is clear that the September 11

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the commission from 5 members to 3 requires the same number of members for acquital (two) but requires two less for conviction (two instead of four as existed before any were stricken). Thus, the decision to strike two members and no others has harmed Petitioner.

[46] That Deputy Secretary of Defense Paul Wolfowitz, who undisputedly is a member of President Bush's and Secretary Rumsfeld's inner circle of advisors on military and foreign affairs, served for close to a year as the Appointing Authority highlights that, far from independent, the appointments in the military commission process can be highly political. *See* Military Commission Order No. 2 (June 21, 2003) (Rumsfeld appointing Wolfowitz as Appointing Authority); Military Commission Order No. 5 (Mar. 15, 2004) (Wolfowitz's designation as Appointing Authority revoked).

terrorists and detainees, whether apprehended in the United States or abroad, are protected neither under our criminal-justice system nor under the international law of War." *See id.* And a fourth member is a close friend of the Secretary of Defense. *See id.*[47] The Review Panel is thus hardly impartial.[48]

Moreover, while the review panel will issue an opinion in all cases, only at its discretion will it review written submissions by the defense and hear oral arguments. *See* MCI No. 9 § 4(C)(4) (Dec. 26, 2003), *available at* http://www.fas.org/irp/doddir/dod/.pdf. And because the review panel must issue its ruling within 30 days of receipt of the case, *see* MCO No. 1 § 6(H)(4), defense counsel will have almost no time to prepare an appeal and have it included in the review panel's deliberations. Members of the review panel are appointed for a term not exceeding two years, and can be removed for "good cause." MCI No. 9 § 4(B)(2). Thus, the review panel structure presents only a façade of judicial review without providing any genuine opportunity for defense counsel to present claims of error and to have them fairly adjudicated.

Final review of the commission decision is by the Secretary of Defense himself, or by the President. *See* MCO No. 1 § 6(H)(5), (6). There is no procedure for direct appeal to federal court. A trial before commission members appointed by officials who have made these judgments and reviewed by these officials themselves, is hardly the neutral justice for which America has long stood. The Supreme Court has long held that "[a] situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other

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[47] The *Weiss* Court specifically recognized that the petitioners did not allege that the judges in their cases were or appeared to be biased. Although the Court did not specifically state that this allegation would have changed their analysis, the Court did make clear that bias on the part of members of a military court is a violation of the due process protections of the defendant.

[48] *See also* Vaughn Second Index of Documents Withheld at 48-49 (Ex.14) (noting that review panel member who advised DoD on setting up military commission process was also briefed by Chief Prosecutor on "prosecution effort and strategy" in July 2003).

judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him." *Tumey v. Ohio*, 273 U.S. 510, 522 (1926). It is the "general rule" that "officials acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided." *Id.* Both the Secretary of Defense and the President, have already decided that Hicks is an enemy combatant who has committed these crimes.[49] These same individuals are also Hicks's accusers, and "[h]aving been a part of [the accusatory process] a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *In re Murchison*, 349 U.S. 133, 137 (1954). Nor can they be disinterested in appointing those who will serve in judicial roles in a case where they have served as accusers.

The defects in the structure of the military commissions are even more apparent when contrasted with Congressional requirements for the structure of review in courts-martial proceedings under the UCMJ. Review of a guilty finding in a courts-martial case is conducted by a judge advocate who has not "acted in the same case as an accuser, investigating officer, member of the court, military judge, or counsel or has otherwise acted on behalf of the prosecution or defense." 10 U.S.C. § 864. An appeal of a guilty conviction then goes to the Court of Criminal Appeals consisting of a three judge panel conforming to uniform rules of procedure, *see* 10 U.S.C. § 866, and, subsequently, to the Court of Appeals for the Armed

[49] The impermissible partiality of the entire commission process is illustrated by the fact that the executive branch has already decided that Hicks is guilty of the "offense" of unprivileged belligerency. *See* Dep't of Defense Order No. 651-04, a (July 7, 2004), Second Am. Pet. Ex. 8 ("Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense."); Remarks by Respondent Sec'y of Defense Donald Rumsfeld to Greater Miami Chamber of Commerce (Feb. 13, 2004), *available at* www.defenselink.mil ("[T]he people in U.S. custody are ... enemy combatants and terrorists who are being detained for acts of war against our country.").

Forces, *see id.* § 867.[50] Review by both the Court of Criminal Appeals and the Court of Appeals for the Armed Forces is governed by comprehensive procedural rules ensuring impartial and independent consideration. *See generally* Crim. App. Rules of Practice & Procedure; C.A.A.F. Rules of Practice & Procedure. For example, the Court of Military Appeals is composed of civilian judges who serve for fixed terms of 15 years, evidencing their impartiality. While *Weiss* did not involve a challenge to the independence of appellate judges in the courts-martial system, it did emphasize the relative independence of those judges as one basis for holding the trial system acceptable. 510 U.S. at 181 ("The entire system, finally, is overseen by the Court of Military Appeals, which is composed entirely of civilian judges who serve for fixed terms of 15 years). Moreover, direct Article III review is also possible by the United States Supreme Court. *See* 10 U.S.C. § 867a. The striking contrast between the structure of these two systems highlights the inadequacy of the commissions and further demonstrates that the commissions violate Mr. Hicks's right to due process of law.

**c. The commission will rely on unreliable evidence obtained through torture and unsworn statements, and thereby increase the risk of error.**

The commission process has further structural problems which render it biased and partial because the Respondents have authorized the commission to accept evidence of torture and unsworn statements that do not meet the standards for acceptability and reliability long established in both criminal and civil proceedings.[51] In effect, the commissions are set up to allow the same people who extract information from detainees by harmful and unreliable means

[50] Serious cases, such as those in which the sentence extends to death, dismissal, or confinement exceeding one year, are sent to the Court of Criminal Appeals, *see* 10 U.S.C. § 866(b), but even those less serious cases not reviewed by the Court of Criminal Appeals are examined by the office of the Judge Advocate General. *See* 10 U.S.C. § 869(a).

[51] Commission procedures permit the admission of evidence merely if it "would have probative value to a reasonable person." MCO § 6(D)(1).

such as torture and unsworn statements to hear this evidence at trial and weigh this evidence in adjudicating the guilt or innocence of the accused.

Beyond the inconsistency of this evidence under the *Weiss* analysis, Judge Green clearly said that, "due process prohibits the government's use of involuntary statements obtained through torture or other mistreatment." *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 472; *see also id.* at 472-74 (reviewing allegations of torture). The inclusion of this evidence and consideration by the same people who improperly elicited it, is therefore a violation of detainees' due process rights.

This violation is assured in Mr. Hicks's case because he has long been a specific target of custodial physical, mental and emotional abuse.[52] Significant interrogation of Mr. Hicks has also been conducted in the absence of legal counsel: despite Hicks's repeated requests to be appointed counsel and the availability of military defense counsel to be detailed, Respondents refused to assign or allow Mr. Hicks counsel until November 28, 2003, nearly two years after he was detained. *See* Resp. Br. at 8-9.

In contrast, Congress forbid the extraction of incriminating statements through compulsion in the courts-martial process, and provided that "[n]o statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial." 10 U.S.C. § 831(d). These protections are designed to ensure the integrity and accuracy of the judicial

[52] Hicks's interrogation is described in his accompanying supplemental Affidavit and his declaration in support of Amended Complaint and Application for Injunctive Relief at paras. 3-27. *See also* Fergus Shiel, *Ex-detainees allege Habib and Hicks abused*, THE AGE, Aug. 5, 2004, *available at* http://www.theage.com.au/////.html; *Govt. to examine Hicks abuse claims*, AUST. BROAD. CORP. NEWS ONLINE, *available at* http://www.abc.net.au/news/newsitems/ s1107601.html (May 13, 2004).

process.[53] In their absence, the structure of the commission is impermissibly impartial and a violation of due process under *Weiss*.

In sum, the military commission process contains none of the structural protections which the Supreme Court in *Weiss* found necessary to ensure due process for Mr. Hicks. Each of the procedures the government would dispense with in the commissions have been deemed essential to ensure an impartial trial and thereby, reasonable assurance against erroneous convictions. The absence of independent triers of fact and interpreters of law, and the use of unreliable evidence obtained through coercion or unsworn statements are inconsistent with the most basic requirements of a fair trial. The Supreme Court has found the structure of the courts-martial process constitutional only because "by insulating military judges from the effects of command influence, [they] sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause." *Weiss*, 510 U.S. at 179. The structure of the military commissions contains no similar insulation, and thereby grossly violates Mr. Hicks's due process rights.

### 3. Respondents cannot present an interest that outweighs the liberty interest at stake for Mr. Hicks.

Given the importance of the liberty interest at stake in this case, and the numerous risks of erroneous results, the government must provide an extremely weighty justification for use of the rules proposed in MCO No. 1 to conduct commission proceedings. Here, the government's interest does not approach that level.

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[53] With respect to integrity, the Supreme Court has explained, "[C]onfessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand ... because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system." *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961). As for accuracy, the Court has emphasized that "[i]nvoluntary or compelled statements ... are of dubious reliability and are therefore inadmissible for any purpose." *Withrow v. Williams*, 507 U.S. 680, 703 (1993).

In *Hamdi,* the Court recognized a substantial governmental interest in "ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States." *Hamdi*, 124 S. Ct. at 2647. Judge Green also recognized that the government has a "significant interest in safeguarding national security," and that it must do so "by ensuring that those have brought harm upon U.S. interests are not permitted to do so again." *In re Guantanamo Detainees*, 355 F. Supp. 2d at 466.

Even considering a broad governmental interest in protecting the nation against terrorism that interest simply is not implicated here to the same degree as Mr. Hicks's ultimate liberty interest in facing life imprisonment. If a given detainee is in fact guilty of a crime, then a fair tribunal should convict and sentence him accordingly. If, however, a detainee is subjected to a structure that is impartial in composition, procedure and review, as here, then the detainee's liberty interest is severely compromised. In a criminal prosecution, where Hicks's lifelong liberty is at stake, the government has no interest sufficient to justify a trial before a biased decision-maker based on unreliable evidence with no guarantee of impartial review. The military commission procedures thus, do not comport with the requirements of the Due Process Clause under the applicable *Mathews* test - or for that matter any test. To allow the Respondents to try Mr. Hicks by this process would virtually ensure an erroneous conviction by which Mr. Hicks risks life imprisonment.

## III. THE NOVEMBER 13, 2001 EXECUTIVE ORDER IMPERMISSIBLY DISCRIMINATES BETWEEN CITIZENS AND NON-CITIZENS IN VIOLATION OF THE FIFTH AMENDMENT AND 42 U.S.C. § 1981.

The PMO establishing military commissions also must be invalidated because it expressly discriminates against non-citizens. Under the terms of this Order, "non-citizens" are subject to trials before the Commission. In stark contrast, a United States citizen who is alleged



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to be an unlawful combatant and to have committed the same acts can only be prosecuted in a federal court, guaranteeing him the full protections of our Constitution and judicial system. This blatant discrimination violates the equal protection guarantees of both the Fifth Amendment and 42 U.S.C. § 1981. *See Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (stressing that "the central aim of our entire judicial system . . . [is that] all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court") (internal quotations omitted); *see also Tate v. United States*, 359 F.2d 245, 250 (D.C. Cir. 1966) (same). This discrimination has no justification whatsoever and thus cannot survive even the rational basis review accorded to all forms of differential treatment, much less the strict scrutiny accorded to differential treatment of non-citizens in criminal proceedings.

### A. The Order Has No Rational Basis.

Respondents have argued that laws that differentiate based on alienage are subject to rational basis review. Resp. Br. at 37. But even if rational basis review were appropriate, and it is not, *see infra*, the PMO could not survive because no rational explanation exists as to why military commissions must be used to try Hicks, but not to try John Walker Lindh,[54] Yaswer Hamdi, Jose Padilla or other American citizens. Respondents *ipse dixit* that "it cannot seriously be argued that the President's action . . .lacks a rational basis," Resp. Br. at 38, is not such an explanation. Nor is the President's finding that it was "necessary" to establish military commissions, Resp. Br. at 36 -- a finding that does not differentiate citizens and non-citizens. The same problem exists with Respondents assertion that executive power over enemy aliens is

[54] Like Mr. Hicks, Mr. Lindh was charged with fighting against the United States in Afghanistan. *Lindh*, 212 F. Supp. 2d at 568. Indeed, Mr. Hicks's charge sheet specifically alleges that he traveled to Konduz, Afghanistan in November 2001, where "he joined others, including John Walker Lindh, who were engaged in combat against Coalition forces." Charge Sheet ¶ 20(m) (Ex. 7). Yet, because Lindh is a United States citizen, the government brought his indictment in federal court, allowing him all of the procedural protections that accompany such a federal criminal proceeding.



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important. Resp. Reply Br. at 27.[55] This not a rational justification for trying non-citizen enemy aliens under procedures inferior to those used for citizens who commit the same acts. Finally, respondents argument that non-citizens are entitled to fewer rights than citizens is merely a reiteration of their rejected view that Hicks has no constitutional rights at all. Once it is clear that non-citizens in Guantanomo are entitled to the protection of the Fifth Amendment, including, of course, the Equal Protection Clause, this assertion provides no basis for trying non-citizens under procedures inferior to those used for citizens. *See supra* Part II.A; *see also Plyler v. Doe*, 457 U.S. 202, 214 (1982) (noting that Fourteenth Amendment's phrase "person within its jurisdiction" "sought expressly to ensure that the equal protection of the laws was provided to the alien population") (citing Cong. Globe, 39th Cong., 1st Sess. 1033 (1866)); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The fourteenth amendment to the constitution is not confined to the protection of citizens. . . . [Its] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.").

The Executive Branch itself appears to disbelieve there is any reason for differential treatment of citizens and non-citizens. Throughout the post-September 11 period, the Executive branch has argued repeatedly that U.S. citizens can be as dangerous as non-citizens and that the President and the military must have the power to detain and prosecute U.S. citizens who engage in hostile acts against our government anywhere in the world. *See, e.g.*, *Hamdi*, 124 S. Ct. at 2640-41 ("A citizen, no less than an alien, can be 'part of or supporting forces hostile to the

[55] Respondents general argument for deference to the Executive cannot excuse them from an obligation to act with a rational basis. Whatever level of deference is due, the Equal Protection Clause requires, at a minimum, a rational basis for discrimination. Indeed, even Respondents acknowledge that under *Hamdi*, they do have a "blank check" in this regard. Resp. Reply Br. at 30-31. *See also* Resp. Br. at 37 ("Hicks's challenge would be subject to rational basis review.").

United States or coalition partners' and 'engaged in an armed conflict against the United States'").

Congress, too, does not appear to believe there is any reason to distinguish based on alienage. In the AUMF, 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") (emphasis added); *see also Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (No. 03-1027) (Reply brief for Petitioner at 17) ("The Authorization supports the President's use of force against any 'organization' or 'person' that 'he determines' aided the September 11 attacks, without suggesting any condition on that authority based on citizenship").

Finally, the assertion that there is a rational basis to distinguish based on citizenship is falsified by history. The Order under which Mr. Hicks is being prosecuted is an historical first in this country. There has never been a generally-applicable military commission order in the history of this Nation that authorized the trial of non-citizens before a military tribunal while expressly exempting U.S. citizens alleged to have committed the very same acts. This has been true from the first time commissions were used in the Mexican American War to the last, during World War II. *See, e.g.*, Louis Fisher, Congressional Research Service, *Military Tribunals: Historical Patterns and Lessons* 12 (quoting memoir stating that during Mexican American War "all offenders, Americans and Mexicans, were alike punished" under order establishing commissions); Glazier, 89 Va. L. Rev. at 2030 (same); *Ex parte Quirin*, 317 U.S. at 37 (finding that both citizens and non-citizens were subject to World War II military commissions).

Now, after nearly two centuries, the Executive branch, acting unilaterally, without Congress' input or approval, claims the need and legal authority to break from this unbroken



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historical tradition. It may be that the Executive branch believes that United States citizens would have rebelled against military commissions if they were subject to them. But a central purpose of the Equal Protection Clause is to ensure that government may not target unpopular groups without political power, and the Supreme Court has not hesitated to invalidate such discriminatory laws when they lack a rational basis. *See, e.g.*, *Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985) (mentally retarded); *Lawrence v. Texas*, 539 U.S. 558, 580-81 (2003) (O'Connor, J., concurring) (homosexuals); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (same); *Turner v. Fouche*, 396 U.S. 346 (1970) (recent immigrants to a state).

Here, the Supreme Court has already intimated that there is no rational basis, explaining "Nor can we see any reason for drawing such a line here." *Hamdi*, 124 S. Ct. at 2640. Indeed, there is no reason to sanction an unprecedented departure from the most fundamental traditions of fairness underlying our Nation's historic commitment to the rule of law.

**B. The PMO Is Subject to Strict Scrutiny.**

Even if there were some rational justification for the discriminatory treatment of non-citizens under the PMO -- and there is not -- the discriminatory treatment could not stand, as it is subject to strict scrutiny.

Strict scrutiny is applicable for any law that provides differential access to the courts. *See Tennessee v. Lane*, 539 U.S. 558, 580-81 (2004) (right of access to the courts "call[s] for a standard of judicial review at least as searching, and in some cases more searching, than the standard that applies to sex-based classifications"); *M.L.B. v. S.L.J.*, 519 U.S. 102, 125 (1996) (indigent complainant "endeavoring to defend against the State's destruction of her family bonds" may not be denied access to the appellate process). The Supreme Court has been particularly loath to "bolt the door to equal justice," where, as here, the most fundamental right

of all is at stake – the essential right of liberty from confinement. *Griffin*, 351 U.S. at 24. *See, e.g., Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966) ("it is ... fundamental that, once established, these avenues [of criminal appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts").

The rule is even more strict with respect to distinctions that provide fewer procedural protections to non-citizens in a criminal trial than are available to citizens. Over one hundred years ago, the Supreme Court made clear in *Wong Wing v. United States*, that while the federal government has wide latitude to regulate immigration, and may, in that capacity, differentiate between citizens and non-citizens, where the government "sees fit to . . . subject[] the persons of such aliens to infamous punishment," the ability to discriminate comes to an end: "even aliens shall not be held to answer for a capital or other infamous crime" without the protections afforded citizens under the Fifth Amendment. 163 U.S. 228, 237-38 (1896).[56] In *Wong Wing*, the government sought to deport four Chinese citizens for illegal presence in the United States, but first sentenced them to sixty days in jail. *Id.* at 239. The Court left the deportation order undisturbed, but emphatically invalidated the 60-day sentence because it had been imposed without the constitutional protections afforded to citizens charged with a criminal offense. *Id.* at 237-38.

The rule established in *Wong Wing* is categorical, established without any evaluation of the government's purported justification for the discrimination: the government shall not subject aliens to criminal procedures inferior to those used to try citizens. *Rodriguez-Silva v. INS*, 242 F.3d 243, 247-48 (5th Cir. 2001) (noting that although the federal government has wide latitude

[56] Significantly, the Court invalidated the jail time even though the government claimed that it had imposed the sentence for the *regulatory purpose* of deterring future illegal immigration, and not to punish. 163 U.S. at 234.

to set "criteria for the naturalization of aliens or for their admission to or exclusion or removal from the United States," it is settled under *Wong Wing* that "an alien may not be punished criminally without the same process of law that would be due a citizen of the United States."). Since *Wong Wing*, courts have repeatedly reaffirmed and expanded upon the principle that while the federal government may discriminate against non-citizens in the immigration areas with a rational justification, it may not punish non-citizens under different procedures. *See, e.g.*, *id.*; *Zadvydas v. Davis*, 533 U.S. 678, 694 (2001) (citing *Wong Wing* for the rule that, in the context of "punitive measures . . . all persons within the territory of the United States are entitled to the protection of the Constitution") (internal quotation and citation omitted); *see also Chan Gun v. United States*, 9 App. D.C. 290, 298 (D.C. Cir. 1896) (citing *Wong Wing* for the proposition that "[w]hen . . . the enactment goes beyond arrest and necessary detention for the purpose of deportation and undertakes also to punish the alien for his violation of the law, the judicial power will intervene and see that due provision shall have been made, to that extent, for a regular judicial trial as in all cases of crime").

Respondents contend that these cases do not apply to Hicks as he is not a lawful alien who voluntarily entered the United States. Resp. Reply Br. at 29, 30.[57] Whether a person resides in the United States and pays taxes may be relevant to an Equal Protection claim concerning welfare benefits, however, but it is not relevant when it comes to punishment. The

[57] At most, this is an argument that Guantanamo detainees are not entitled to constitutional protections at all, which has been refuted above. *See supra* Part II.A. It is not an argument that although the Equal Protection Clause applies, Hicks is somehow entitled to a lesser degree of protection under that Clause than the Chinese aliens in *Wong Wing*. Indeed, the primary case on which the government has relied demonstrates this. *Verdugo* held that the defendant alien had no Fourth Amendment protections against the U.S. government's search of his Mexican residence, *see, e.g.*, *Verdugo*, 494 U.S. at 271-72, but, as Justice Kennedy explained in his concurrence without opposition, once Verdugo had been brought involuntarily to the United States for trial, "[a]ll would agree . . . that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant." 494 U.S. at 278 (Kennedy, J., concurring).



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Chinese immigrants in *Wong Wing* were *illegal* immigrants whom the government was attempting to deport. The level of Equal Protection scrutiny for someone seized and involuntarily transferred to United States territory in Guantanomo should be at least as high as that for someone who chose to enter the United States illegally. Surely, the government does not contend, for example, that the saboteurs in *Quirin* who voluntarily entered the United States were entitled to a greater degree of Equal Protection scrutiny than is Mr. Hicks. *Cf. Mathews v. Diaz*, 426 U.S. 67, 77 (1975) (citing *Wong Wing* for the proposition that "[e]ven one whose presence in this country is unlawful, *involuntary*, or transitory is entitled to" the protection of the Fifth Amendment." (emphasis added ); *Plyler*, 457 U.S. at 210 (citing *Wong Wing* for proposition that even aliens whose presence in this country is unlawful are "persons" under the Fourteenth Amendment and therefore are guaranteed due process of law and are protected from invidious discrimination by Federal Government).[58] *See also supra* Part II.A.

Respondents also ignore *Wong Wing* and its progeny, as well as the more general cases on access to the courts, in their argument that the federal government has wide latitude to discriminate against non-citizens. Respondents rely primarily on a line of cases stating that the federal government has wide latitude to differentiate between aliens and citizens with respect to benefits based on its power to control immigration. But the federal government has no similar authority with respect to punishment.[59] As has been shown, the general rule is that any laws

[58] Respondents further try to distinguish *Wong Wing* by arguing that the accused there received summary punishment, whereas Hicks will be tried by a military commission. Resp. Br. at 29. But the *absolute* level of procedural protections Hicks receives is not the issue under the Equal Protection Clause; the relevant question is whether he receives the same level of protection as citizens charged with similar crimes. And there the answer is indisputably no, which is why Respondents must justify the distinction.

[59] Even outside the area of punishment, distinctions between aliens and citizens are generally subject to strict scrutiny. *See Graham v. Richardson*, 403 U.S. 365, 372 (1971); *In re Griffiths*, 413 U.S. 717 (1973) *Graham* and *Griffiths* concern distinctions drawn by states. The caselaw on which the government relies establishes a limited exception to the general rule that the federal government and states are treated



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establishing discriminatory access to the courts are subject to strict scrutiny, and this rule applies fully even to areas such as immigration, where deference is ordinarily high. *See Griffin,* 351 U.S. at 17 ("due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations"). *Wong Wing* itself makes this clear, as it was a case with significant implications for immigration, but that nonetheless barred discriminatory treatment. *Cf. Zadvydas v. Davis*, 533 U.S. 678, 690, 695 (2001) (although deference to Congress' judgment in the immigration area is generally applicable, even a non-criminal 'statute permitting indefinite detention of an alien would raise a serious constitutional problem."); *id.* at 704 (Scalia, J., dissenting) (accepting proposition that aliens under final order of deportation could not be punished without a judicial trial); *see generally Rasul*, 124 S. Ct. at 2696-97 (holding that aliens detained in Guantanamo must be afforded access to courts through habeas proceedings). The very cases on which the government has relied themselves invoke this principle. *See Harisiades v. Shaugnessy*, 342 U.S. 580, 586 n. 9 (1952) (citing *Wong Wing* for the proposition that "in criminal proceedings against [aliens, they] must be accorded the protections of the Fifth and Sixth Amendments").

Finally, the government's repeated appeal to deference based on national security is equally unavailing. This case concerns foreign affairs in only the loosest sense. The military commissions seek to *try* Hicks for alleged crimes; their goal is to convict and *punish* him, not to

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identically under the Equal Protection Clauses of the Fifth and Fourteenth Amendments, *Adrand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995). The exception is based on the federal government's interest in controlling immigration, which is a unique context because there is an inherent need to differentiate citizens and non-citizens. This interest is not shared by the states when they differentiate between aliens and citizens of other states. *Mathews v. Diaz*, 426 U.S. 67, 84-85 (1976). Thus, outside the context of immigration, the rule of strict scrutiny established *Graham* and *Griffiths* is applicable. It certainly applies to laws differentiating with respect to punishment, as *Wong Wing* makes clear.

restrain him during the course of a war or seek to engage in core conduct of foreign affairs. Any deference due the government is vitiated once the government begins a criminal prosecution.

As the Supreme Court recently stated, "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." *Hamdi*, 124 S. Ct. at 2648. There is thus no basis to relax the strict scrutiny generally applicable to laws providing discriminatory access to the courts. Indeed, courts have always rejected arguments "that cast Article III judges in the role of petty functionaries. . .required to enter as a court judgment an executive officer's decision but stripped of capacity to evaluate independently whether the executive decision is correct." *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 198 (D.C. Cir. 2001). As has been shown, there is no justification -- national security or otherwise -- to treat Mr. Hicks differently than American citizens accused of identical conduct, much less one that could survive strict scrutiny. The PMO establishing the military commissions is thus invalid under the Equal Protection Clause.[60]

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[60] For the same reasons, the Order's discriminatory treatment of non-citizens also violates 42 U.S.C. § 1981 (2004), which ensures all "persons" have the "equal benefit of all laws and proceedings" as have "citizens." This statute has long been understood to protect non-citizens against unequal treatment by both states and the federal government. *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410, 419 (1948); *Duane v. GEICO*, 37 F.3d 1036 (4th Cir. 1994) (same); *NAACP v. Levi*, 418 F. Supp. 1109, 1117 (D.D.C. 1976).

Respondents contention that a 1991 amendment narrowed Section 1981 is supported by some caselaw, but is wrong and has been rejected elsewhere. *See La Compania Ocho, Inc. v. U.S. Forest Service*, 874 F. Supp. 1242, 1251 (D.N.M. 1995). The amendment's language does not exclude protection from federal misconduct, and the four stated purposes of the 1991 Amendment all were to increase civil rights. *See* P.L. 102-166 (1991), Sec. 3(4). Given this, the amendment should not be read to work so radical an alteration of § 1981.

## IV. THE MILITARY COMMISSION IS INVALIDLY CONSTITUTED.

Even if the charges against Hicks were properly within its purview and the structure of the commission proceedings constitutional, the military commission that will "try" Hicks would still lack jurisdiction for three independent reasons.

### A. The Structure of the Commission's Decisionmaking Violates the President's Military Order.

The orders, regulations and instructions issued by the Secretary of Defense and Appointing Authority contravene the President's Military Order. That order requires that the commission sit as triers of law and fact. PMO (Ex. 3)[61] But Respondents Rumsfeld and Altenburg created new orders and regulations applicable to military commissions which contradict this requirement of the PMO by permitting the Appointing Authority and the Review Panel to decide issues of fact and law. This enhances the importance of those closest to the Executive in the decisionmaking process, increasing the problems emphasized in the Due Process section. *See supra* Part II.

Both Appointing Authority Regulation (AAR) No. 2 and Military Commission Order (MCO) No. 1 Section 4(A)(5)(d) provide that the Appointing Authority, not the Commission, will decide "all interlocutory questions, the disposition of which would effect the termination of proceedings with respect to a charge." Both AAR No. 2 and MCO No. 1, additionally permit the Presiding Officer to certify interlocutory questions as the Presiding Officer may deem appropriate.[62] Respondent Altenburg, in his role as the Appointing Authority, has already

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[61] *See* http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html.

[62] AAR No.2, Section 8(A) "INTERLOCUTORY QUESTIONS."

(A) *Required Certification of Interlocutory Questions.* In accordance with Section 4(a)(5)(d) of reference (c), the Presiding Officer shall certify al interlocutory questions, the disposition of which would effect the termination of the proceedings with respect to a charge, for decision by the Appointing Authority. *Available at* http://www.defenselink.mil/news/Nov2004/ d20041118reg2.pdf.

decided issues of fact and law relating to Mr. Hicks military commission. He has determined the appropriate legal standard for challenge for cause of a commission member as well as ruled whether to grant or deny Mr. Hicks' challenge for cause of the commission members he previously appointed.[63]

The divergence of the commission structure from that set forth in the PMO is grounds to conclude that the military commission is not properly constituted. In evaluating whether a military commission was properly constituted in *Yamashita*, the Supreme Court determined whether the commander's order establishing the commission "conformed [with] the established policy of the Government and to higher military commands authorizing his action."[64] The structure of the commission here does not conform with the higher commands that authorize it.

### B. The Commissions Violate Statutory Requirements for Involvement of a Judge Advocate General

The PMO, orders, regulations and instructions governing the conduct of military commission violate U.S. statutory requirements for military commissions, as there is no provision for involvement of the Judge Advocate General of the Army or Air Force in those commissions. 10 U.S.C. § 3037(c), directs that the "Judge Advocate General...shall receive, revise and have recorded the proceedings of courts of inquiry and military commissions."[65] But the Judge Advocate General has no role in these commissions, further diminishing their independence from the prosecutors. The involvement of the Judge Advocate General has led to

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*See* 8(B) of AAR No.2. (The Presiding Officer has previously submitted five interlocutory questions to the Appointing Authority.)

[63] Appointing Authority decision on the standard of challenges for good cause and his granting and denial of Hicks challenges. *See* http://www.defenselink.mil/news/Oct2004/ d20041021panel.pdf

[64] *In Re Yamashita*, 327 U.S. at 10.

[65] *See* 10 U.S.C. § 3037(c) (2005) for Army JAG. See 10 U.S.C. § 8037(c) (2005) for Air Force JAG.

the invalidation of commission convictions during the Civil War when the accused was not given a full and fair trial.[66]

### C. Military Commissions Cannot Sit in Guantanamo.

The military commission set to try Mr. Hicks is far removed from any relevant theater of operations. A military commission -- even one properly authorized by Congress -- has no jurisdiction except in (1) the zone of an actual armed conflict, (2) in an area within the command of the convening authority, or (3) within the occupied territory in which the convening authority commands. *See Ex Parte Milligan*, 71 U.S. 2, 80 (1866); 2 WINTHROP at 836. It has long been clear that "[t]he jurisdictional boundaries [of military commissions] are affected by the location and nature of the crime, [and] the location of the court that tries the offenders." Maj. Timothy C. MacDonnell, *Military Commissions and Courts-Martial*, ARMY LAW., Mar. 2002, at 19, 40. In *Milligan*, the Court unanimously struck down military tribunals created by President Lincoln to try Southern sympathizers in the North during the Civil War in areas where the civilian courts were functioning. The Court stated: "Martial rule can never exist where courts are open, and in the proper and unobstructed exercise of their jurisdiction," for the "Constitution of the United States 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." 71 U.S. at 76. The Court held, therefore, that the exercise of military jurisdiction must be "confined to the locality of actual war." *Id.* at 80.

Since *Milligan*, the Court has never authorized use of military commissions outside the zone of conflict or occupation; it has approved commissions only in the immediate area of the relevant conflict or in an area of occupation. *See, e.g.*, *Reid*, 354 U.S. at 35 n.63; *Madsen v.*

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[66] Neely, *The Fate of Liberty* 162-3 (1991).

*Kinsella*, 343 U.S. at 348;[67] *Johnson v. Eisentrager*, 339 U.S. 763, 766 (1950); *Yamashita*, 327 U.S. 1 (1946) (commission sat in an area of occupation and was appointed by the military commander of that area). *Quirin* is not to the contrary. *See* 317 U.S. 1 (1942). Although the military commissions in that case sat in Washington, D.C., at the time, the United States had been broken down into geographical areas with military defense commands, in an effort to defend against anticipated foreign invasion. *See* WWII Washington, DC Photos, (Ex. 15). During the proceedings, in response to a claim that the commission did not have jurisdiction, the Attorney General stressed the fact that the eastern seaboard "was declared to be under the control of the Army" based on the ongoing threat. The Supreme Court noted this fact as well. *Id.* at 22 n.1.[68]

The military commission that will try Hicks has not been created by an exercise of military jurisdiction based on authority of an occupying power. It is far removed from any theater of operations, and it is not based on conduct that occurred at Guantanamo Bay. For this reason, too, it has no jurisdiction.

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[67] Respondents, amazingly, rely on *Madsen*, while the Supreme Court has made it clear that the approval of commission procedures in that case was contingent on its highly particularized circumstances. The Court later stated: "*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." *Reid*, 354 U.S. at 35 n.63.

[68] The Attorney General baldly stated: "that certain area [the eastern seaboard] was declared to be under the control of the Army." and thus he argued that the military commission enjoyed jurisdiction.; *Nazi Saboteur Military Commission Session 1*, Transcript of Proceedings Before the Military Commission to Try Persons Charges with Offenses Against the Law of War and the Articles of War (July 8, 1942), *available at* http://www.soc.umn.edu/~samaha/ nazi_saboteurs/nazi01.htm. The Attorney General submitted as evidence "Public Proclamation No. 1 from the Commanding General of the Eastern Defense Command and First Army." It stated that : "Headquarters Eastern Defense Command and First Army . . . to the people within . . . the *District of Columbia* . . .that portion of the continental United States . . . has been established as the Eastern Defense Command *under my command* . . . [under Executive Order 9066] . . . I, Hugh A. Drum, Lieutenant General, U.S. Army . . . do hereby declare and proclaim that. . . as a matter of military necessity . . . *the District of Columbia [is] a Military Area.* . . . .Willful violation of any such restriction or order by and alien enemy . . . are cause for expulsion or prosecution." *Id.* at 82-88 (emphasis added).

### D. The Appointing Authority Lacked Authority to Appoint the Commission.

This military commission also has been appointed by an individual not empowered to do so. The Secretary of Defense has delegated authority to a civilian, Mr. John Altenburg, to appoint members of military commissions, but under the rules for courts-martial, a civilian cannot exercise such authority. 10 U.S.C. § 822; Manual for Courts-Martial, Part I, ¶ 2(a)(4) (2002); *id.* at pmbl. It has uniformly been the case through American history that only those authorized to appoint courts-martial have the power to appoint military commissions, as Winthrop's treatise explains. 2 WINTHROP, *supra* note 23, at 835. Thus, the Supreme Court explained in *Yamashita* that the reason General Styer was a competent authority to appoint the commission in question is that he was a commander "competent to appoint a general court-martial." 327 U.S. at 10. Mr. Altenburg is not competent to appoint a courts-martial and thus cannot appoint the members of military commissions.

The military commission established to try Mr. Hicks is thus inconsistent with the Presidential Military Order, with statutes, and with constitutional limitations on the locus of such commissions. For these reasons as well, it must be enjoined.

## V. RESPONDENTS HAVE DENIED HICKS THE RIGHT TO A SPEEDY TRIAL AS REQUIRED BY THE UCMJ AND THE UNITED STATES CONSTITUTION.

Respondents are also barred from prosecuting Hicks due to their flagrant violation of his right to a speedy trial as required by Article 10 of the UCMJ.

### A. Respondents Detained Hicks for Over 32 Months Without Trial.

Petitioner has been detained for nearly four years without trial. He was originally seized by the Northern Alliance in November 2001 and detained by the United States military in December 2001. *See* Second Am. Pet. at 2, ¶ 1. In January 2002, Hicks was transported to Guantanamo Bay, Cuba. Shortly thereafter Respondents began contemplating charges against

Mr. Hicks. *See* Hicks Aff. ¶ 3; Trial Balloon Worth Bursting, Milw. J. & Sentinel 14, Apr. 25, 2002. On July 3, 2003, Respondent President Bush announced that Hicks was subject to prosecution before military commissions. Respondents did not charge Hicks until June 10, 2004 -- 30 months after his original detention -- and he was not brought before Respondents' military commissions for hearing until August 2004 -- over 32 months after he was originally detained.

### B. Respondents' Actions Have Violated Hicks's Right to A Prompt Trial under the UCMJ.

This delay is inconsistent with Hicks's rights under the UCMJ. Article 10 of the UCMJ, unequivocally provides that any arrest or confinement of an accused must be terminated unless charges are promptly brought and made known to the accused, and speedy trial afforded for determination of guilt on such charges. It states, "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 dismiss the charges and release him." 10 U.S.C. § 810 (West 2004) (emphasis added). Hicks *is* unquestionably subject to this chapter because he is a "person[] within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands." 10 U.S.C. § 802(a)(12). Furthermore, the UMCJ applies because it governs the treatment and trial of prisoners of war. *See* 10 U.S.C. § 802(9).[69]

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[69] At a minimum, Hicks is entitled to presumptive treatment as a POW. *See* Geneva Convention (III), art. 5 ("Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."). For the purposes of determining whether Hicks is a POW, it is irrelevant that *Hamdan* found the Geneva Convention not to be self executing. The UCMJ specifies that prisoners of war are subject to the UCMJ's protections, and Article 5 of the Geneva Convention provides the definition of "prisoner of war."

The D.C. Circuit's recent decision in *Hamdan* does nothing to alter Article 10's application here. Unlike other sections of the UCMJ, Article 10 does not specify that its procedures are for courts-martial. This is therefore not one of those provisions in which the UCMJ "takes care to distinguish between 'courts-martial' and 'military commissions'" and apply its rules only to the former. *Hamdan*, 2005 WL 1653046, at *8 (D.C. Cir. 2005).

Under Article 10, it should be clear that the government has been guilty of an egregious speedy trial violation. Respondents simply have not been "reasonably diligent" in taking "immediate steps to try" Hicks. *See United States v. Kossman*, 38 M.J. 258, 262-63 (C.M.A. 1993). The clock for determining whether a detainee has been afforded the right to a speedy trial begins to run at the time of his detention. *See United States v. Earls*, 2003 CCA LEXIS 92 (A.F.C.C.A. Mar 24, 2003) (all time after confinement counts for speedy trial purposes); *United States v. Wiklinson*, 27 M.J. 645 (1988) (same); *United States v. Gouveia*, 467 U.S. 180, 190 (1984) ("[The] Sixth Amendment right [to a speedy trial] may attach before an indictment and as early as the time of 'arrest and holding to answer a criminal charge.'") (quoting *United States v. MacDonald*, 456 U.S. 1, 6-7 (1982)). Indeed, the very case cited by the government, *United States v. Cooper*, holds that Article 10 should be applied to "the entire period up to trying the accused" and that it is a broad, "open-ended" duty on the Government. 58 M.J. 54, 60; *see also United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999) (referring to Article 10's requirements as "stringent").

The Government argues that this is not a speedy trial violation, because Hicks was being held as an enemy combatant, so his detention cannot be categorized as "pretrial." But the government can point to nothing in the statutory language or in any case that would release it from its obligation to take "immediate steps" to inform a person it has detained of the "specific

wrong of which he is accused" and "to try him or . . . release him." 10 U.S.C. § 810. Nor does it offer any authority to suggest that accountability does not begin when the detainee is placed in military control. *See United States v. Young*, 61 M.J. 501, 504 (A. Ct. Crim. App. 2005). It is thus arrest or confinement that triggers the speedy trial guarantee. *Earl*, 2003 CCA LEXIS 92; *United States v. Burrell*, 13 M.J. 437, 440-41 (C.M.A. 1982); *United States v. Acireno*, 15 M.J. 570, 572 (A.C.M.R. 1982).

Even were the Government correct that the clock does not begin to tick automatically upon detention, Hicks's clock would still have begun to tick long ago. The government has known that it might try Hicks almost as soon as he arrived in Guantanamo in January 2002. Indeed, in spring 2002, the government opened its criminal investigation of Hicks and interrogated him on multiple occasions. *See* Trial Balloon Worth Bursting, Milw. J. & Sentinel 14, Apr. 25, 2002 (noting the administration's efforts to contrive a way to try detainees held at Guantanamo from being brought before military tribunals without specific evidence they had engaged in war crimes); Hicks Aff. ¶ 3 (Ex. 2). At the very latest, the speedy-trial clock begins when the government should have known of the *possibility* of charges. *United States v. Bray*, 52 M.J. 659, 661-62 (A.F. Ct. Crim. App. 2000); *see also Acireno*, 15 M.J. at 572-73 (noting Government's heavy burden in showing diligence in processing charges). Clearly, the government has contemplated trying Hicks since at least spring 2002.

And even were we to give the Government yet another benefit of the doubt and not start the speedy-trial clock until July 3, 2003 when President Bush designated Hicks as a person eligible for trial before a military commission, *see* Second Am. Pet. at 9, ¶ 26, there would still be a speedy trial violation. (Indeed, the fact that the Government designated him eligible for trial in July 2003 shows that it had researched -- and therefore known of -- the *possibility* of charges

well before that date.) At that point, the Government publicly stated its intention to try Hicks. *See* Charge Sheet ¶ 1 (Ex. 7). The government further demonstrated this intent that same month by moving him into solitary in Camp Echo, where he was held apart from other detainees who were still designated only as "enemy combatants" and not yet formally designated for trial. Nevertheless, the Government did not formally charge Hicks until June 10, 2004, almost a full year later. Charge Sheet; Second Am. Pet at 10, ¶ 29.

Respondents assert that even if the UCMJ applies, the length of Hicks's confinement does not violate § 810. But there is no reasonable explanation for the undue delay. Respondents cannot reasonably have needed over two years (including one year after Hicks had been deemed eligible for trial) to gather evidence. Indeed, the baseline for assessing speedy trial violations under § 810 is *thirty days*. *See Cooper*, 58 M.J. 54, 60 (C.A.A.F. 2003) (identifying Speedy Trial Act, 18 U.S.C. § 3161(b) as relevant baseline); *Kossman*, 38 M.J. at 261 (observing that "3 months is a long time to languish in a brig awaiting the opportunity to confront one's accusers,"); *United States v. Hatfield*, 44 M.J. 22, 23 (C.A.A.F. 1996) (dismissing case for speedy trial violation based on 106 days of confinement). As Justices Scalia and Stevens said in unchallenged words, under the Habeas Corpus Act in England, "a second magna carta, and a stable bulwark of our liberties," "imprisonment without indictment or trial for felony or high treason would not exceed approximately three to six months." *Hamdi*, 124 S. Ct. at 2662 (Scalia, J, dissenting).

It is true that a lengthy delay, standing alone, does not automatically create a speedy trial violation. However, such a delay triggers Respondents' responsibility to demonstrate good faith. *United States v. Goode*, 54 M.J. 836 (2001) (finding that delay in trial was partly due to a defense request, actually helped the defendant, and that prosecution had attempted to reduce

delay); *United States v. Laminman*, 41 M.J. 518, 520-21 (C.G. Ct. Crim App. 1994) (burden is on government to show it has taken "immediate steps"). Here, Respondents have offered no showing of good faith or that they took any immediate steps to try Hicks. The generic assertion that conspiracy takes years to investigate is unsupported by any showing that the government made every effort to proceed expeditiously.

Further, Hicks's detention, solitary confinement and abusive treatment while in custody have prejudiced Hicks. In both the Sixth Amendment and Article 10 contexts, the harms that can amount to prejudice include "oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the [accused's] defense will be impaired by dimming memories and loss of exculpatory evidence." *Doggett v. United States*, 505 U.S. 647, 654 (1992) (internal quotation marks omitted; alterations in original); *see also United States v. West*, 504 F.2d 253, 256 (D.C. Cir. 1974); *Barker v. Wingo*, 407 U.S. 514, 532 (1972); *Birge*, 52 M.J. at 212; *United States v. Williams*, No. ACM 35122, 2004 WL 388773, at *4 (A.F. Ct. Crim. App. 2004). Hicks unquestionably has suffered oppressive pretrial incarceration including torture and solitary confinement. *See* Second Am. Pet. at 8-9, ¶¶ 22-27. The needless brutality to which he was subjected necessarily weighs more heavily on the prejudice scale than most detentions. *See* Hicks Affidavit. Hicks has also suffered anxiety and concern as a result of his prolonged uncertain status. *See id*; *see also United States v. Marion*, 404 U.S. 307, 320 (1971); *United States v. Calloway*, 505 F.2d 311, 319 (D.C. Cir. 1974). Finally, because Hicks was not appointed military defense counsel until almost two years into his detention -- and five months after the President's designation -- he was unable to begin preparing his defense at the same time the prosecution was gathering the freshest evidence. *See* Second Am. Pet. at 9, ¶ 27. During the period of Hicks's detention he has been "powerless to exert his own investigative efforts to



**U.S. District Court Litigation**
**ıan U.S. v. Barhoumi**

mitigate the[] erosive effect of the passage of time," *Smith v. Hooey*, 393 U.S. 374, 380 (1969), while Respondents have been free to conduct investigations, contact and interrogate potential witnesses, preserve evidence and communicate with council. Although "time's erosion of exculpatory evidence and testimony can rarely be shown" directly, "excessive delay presumptively compromises the reliability of a trial." *Doggett*, 505 U.S. at 655-56 (internal quotation marks omitted). Moreover, Hicks will be less able to aid his own defense after having endured years of psychological and physical torture. Respondents have thus clearly violated Article 10,[70] which was intended to prohibit precisely the kind of "foot-dragging" that has characterized Hicks's case from day one. *Kossman*, 38 M.J. at 262.

**C. Hicks Is Entitled to Dismissal of the Charges.**

The appropriate remedy for a violation of speedy trial rights under federal law is dismissal of the charges against Hicks. *See, e.g., United States v. Hatfield*, 44 M.J. 22, 24-5 (C.M.A. 1996) (dismissing charges for UCMJ Article 10 violation); *Strunk v. United States*, 412 U.S. 434, 439-40 (1973) (dismissal is only proper remedy for Speedy Trial Clause violations); *Bray*, 52 M.J. at 662 ("As the Government failed to comply with the appellant's right to a speedy trial, the remedy is dismissal of the affected charge."); *Kossman*, 38 M.J. at 262 (remedy of Article 10 violation is dismissal of charges with prejudice). Although an evaluation of prejudice may be part of the determination of whether dismissal is appropriate, dismissal is particularly appropriate in cases where, as here, there has been "truly neglectful" government "attitudes," or "intentional dilatory conduct." *United States v. Edmond*, 41 M.J. 419, 421 (1995).

## CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's motion for partial

[70] For the same reasons, Respondents' have violated the Sixth Amendment's speedy trial requirement. *See Barker*, 407 U.S. at 532.

summary judgment, and determine now that the commission proceedings against Mr. Hicks are illegal.

Dated: August 17, 2005
Washington, D.C.

Respectfully submitted,
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| DAVID M. HICKS,<br>Petitioner,<br><br>v.<br><br>GEORGE WALKER BUSH,<br>President of the United States,<br>*et al.,*<br><br>Respondents. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Civil Action No. 02-CV-00299 (CKK) |

**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**

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## INTRODUCTION

Pursuant to the Court's August 5, 2005 minute order, respondents respectfully submit this renewed response to the Second Amended Petition (dkt. no. 77) ("petition") with respect to petitioner's challenges to the military commission process. For the reasons set forth below, the Court should dismiss and enter judgment for respondents on petitioner's military commission claims and otherwise deny petitioner's requests for injunctive and other relief related to military commission proceedings.

The D.C. Circuit's decision just over one month ago in Hamdan v. Rumsfeld, __ F.3d __, 2005 WL 1653046, No. 04-5393 (D.C. Cir. Jul. 15, 2005), effectively resolves the claims raised by petitioner in this case with respect to his impending trial by military commission. Specifically, Hamdan has confirmed the President's authority to establish military commissions. Furthermore, it has rejected a challenge, such as petitioner's, to the military commissions under the Geneva Convention Relevant to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 (1955) ("GPW"), concluding that the GPW is not enforceable in federal court and, in any event, does not apply to detainees such as petitioner. Hamdan has also confirmed that military commission procedures do not have to comply with provisions of the Uniform Code of Military Justice not specifically applicable to commissions.

Hamdan went even further, however, concluding that courts should, in any event, abstain with respect to issues concerning how otherwise lawfully established military commissions are conducted. Thus, to the extent petitioner's claims in this case have not already been specifically rejected on the merits in Hamdan, they are properly the subject of abstention as explained in Hamdan, and must be rejected.

In sum, the D.C. Circuit has effectively resolved the challenges to the military commission raised in this case: petitioner's claims are properly the subject of abstention and/or lack merit. Petitioner's military commission claims, therefore, should be dismissed.

## BACKGROUND

### Statement of Facts

1. On September 11, 2001, the al Qaeda terrorist network launched a coordinated attack on the United States, killing approximately 3,000 persons. Congress responded by passing a resolution authorizing 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.

Authorization for Use of Military Force, Pub. L. 107-40, §§ 1-2, 115 Stat. 224 (2001) ("AUMF").

Congress emphasized that the forces responsible for the September 11th attacks "continue to pose an unusual and extraordinary threat to the national security," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Id.

Pursuant to this authorization and his authority under the Constitution, the President, as Commander in Chief, dispatched United States armed forces to seek out and subdue the al Qaeda terrorist network and the Taliban regime and others that had supported it. In the course of that

campaign – which remains ongoing[1] – the United States and its allies have captured thousands of individuals overseas, many of whom are foreign nationals. The Military, consistent with settled historical practice in times of war, has determined that many of those individuals should be detained during the conflict as enemy combatants. Approximately 500 of these foreign nationals designated for detention as enemy combatants are being held by the U.S. Department of Defense ("DoD") at the United States Naval Base at Guantanamo Bay, Cuba. Petitioner is among those being so detained as enemy combatants. See Respondents' Factual Return to Petition for Writ of Habeas Corpus by Petitioner David M. Hicks at 1 (dkt. no. 83).

2. Equally consistent with historical practice, the President has ordered the establishment of military commissions to try a subset of those detainees for violations of the law 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

[1] Recent headlines make clear that the war against al Qaeda and its supporters continues to rage both in and outside of Afghanistan. See, e.g., Kevin Sullivan, Al Qaeda's No. 2 Blames Blair, Issues Warning, Wa. Post, Aug. 5, 2005, at A1; Daniel Cooney (AP), U.S., Afghan Troops Launch Major Offensive, Wa. Post, Aug. 14, 2005, at A17; Steve Coll and Susan B. Glasser, Terrorists Turn to the Web as a Base of Operations, Wa. Post, Aug. 7, 2005, at A1; Ellen Knickmeyer, 14 Marines Die in Huge Explosion in Western Iraq, Wa. Post, Aug. 4, 2005, at A1; Jonathan S. Landay, A Difficult Road in Afghanistan, Philadelphia Inquirer, Aug. 13, 2005, at A1; Craig S. Smith, The Struggle for Iraq, N.Y. Times, at A7. See also Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law (dkt. no. 82) at 16-17 & nn.17-18.

821 and 836 of title 10, United States Code."[2] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001) ("Military Order").

The President made several findings in establishing the military commissions through the Military Order. He found, inter alia, that:

- the scale of attacks by terrorists, including al Qaeda, have "created a state of armed conflict" requiring the use of the Military;

- such terrorists "possess both the capability and the intention" to carry out further, massively destructive attacks;

- "for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to" the Military Order to "be detained, and, when tried, . . . be tried for violations of the laws of war and other applicable laws by military tribunals;" and

- "[g]iven the danger to the safety of the United States and the nature of international terrorism . . . it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."

Id., §§ 1(a)-(f).

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[2] Sections 821 and 836 are, respectively, Articles 21 and 36 of the UCMJ. These sections provide, 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, provost courts, or other military tribunals of concurrent jurisdiction with 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.

**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.

The Military Order applies to "any individual who is not a United States citizen with respect to whom" the President makes two determinations "in writing": (1) that there is "reason to believe that such individual" is or was a member of al Qaeda or harbored such individuals, or "engaged in, aided or abetted, or conspired to commit, acts of international terrorism" adversely affecting United States' interests, or harbored such individuals; and (2) that "it is in the interest of the United States that such individual be subject to this order." Military Order § 2(a). The Order further provides for trial of such individuals by military commission "for any and all offenses triable by military commission," with punishment "in accordance with the penalties provided under applicable law, including life imprisonment or death." Id. § 4(a).

The President's Military Order authorizes the Secretary of Defense to issue orders and regulations governing the Military Commissions.[3] The Secretary of Defense, acting pursuant to the Military Order, established the Appointing Authority for Military Commissions.[4] The Appointing Authority has many responsibilities, including the authority to appoint military

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[3] These orders and regulations "shall at a minimum provide for," among other things, "a full and fair trial, with the military commission sitting as the triers of both fact and law," Military Order § 4(c)(2); "admission of such evidence as would . . . have probative value to a reasonable person," id. § 4(c)(3); "conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present," id. § 4(c)(6); and "submission of the record of the trial, including any conviction or sentence, for review and final decision by" the President or the Secretary of Defense if so designated by the President, id. § 4(c)(8).

[4] See Department of Defense Directive No. 5105.70, Feb. 10, 2004 (available at http://www.defenselink.mil/news/Apr2004/d20040408dir.pdf) ("DoDD 5105.70"). The Secretary designated John D. Altenburg, Jr., a respondent in this action, to serve as the Appointing Authority.

commissions to try individuals subject to the Military Order. DoDD 5105.70 § 4.[5] The military commissions that the Appointing Authority establishes have jurisdiction over individuals subject to the Military Order who are "[a]lleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority." Military Commission Order No. 1, 32 C.F.R. § 9.3(a) (2003) ("MCO No. 1") (Military Commission Orders are available at http://www.defenselink.mil/news/Aug2004/commissions_orders.html). The commissions have jurisdiction over offenses that are "violations of the laws of war and all other offenses triable by military commission." Id. § 9.3(b).[6]

The Secretary of Defense's Military Commission Instruction contains an extensive set of procedures that govern the conduct of the military commissions.[7] Among other things, the Accused will (1) receive a copy of the charges "sufficiently in advance of trial to prepare a defense"; (2) be presumed innocent until proven guilty; and (3) be found not guilty unless the offense is proved beyond a reasonable doubt. Id. §§ 9.5(a)-(c). The prosecution must provide

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[5] Additional responsibilities of the Appointing Authority are to: designate a judge advocate of any United States Armed Force to serve as a Presiding Officer over each military commission; approve and refer charges against such individuals; approve plea agreements; decide interlocutory questions certified by the Presiding Officer; ensure military commission proceedings are open to the maximum extent practicable; and order that investigative or other resources be made available to Defense Counsel and the Accused as necessary for a full and fair trial. DoDD 5105.70 § 4.

[6] An individual so charged (the "Accused") is assigned or may choose another available defense counsel ("one or more Military Officers who are judge advocates of any United States armed force") to conduct his defense before the Commission. MCO No. 1 § 9.4(c)(2). The Accused may also retain a civilian attorney of choice at no expense to the United States government, provided that such attorney meets certain criteria. Id. § 9.4(c)(2)(iii)(B).

[7] The various orders and instructions pertaining to the military commissions are available at www.defenselink.mil/news/commission.html.

the defense "with access to evidence [it] intends to introduce at trial" and to "evidence known to the prosecution that tends to exculpate the Accused." Id. § 9.5(e). The Accused is permitted but not required to testify at trial, and the Commission may not draw an adverse inference from a decision not to testify. Id. § 9.5(f). The Accused also "may obtain witnesses and documents for [his] defense, to the extent necessary and reasonably available as determined by the Presiding Officer," id. § 9.5(h), and may present evidence at trial and cross-examine prosecution witnesses, id. § 9.5(i). In addition, once a Commission's finding on a charge becomes final, "the Accused shall not again be tried" for that charge. Id. § 9.5(p). The Secretary of Defense has directed the commissions to provide for a "full and fair trial," to "[p]roceed impartially and expeditiously," and to "[h]old open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer[.]" Id. §§ 9.6(b)(1)-(3).[8]

Once a trial is completed (including sentencing in the event of a guilty verdict), the Presiding Officer must "transmit the authenticated record of trial to the Appointing Authority," id. at § 9.6(h)(1), which "shall promptly perform an administrative review of the record of trial," id. § 9.6(h)(3). If the Appointing Authority determines that the commission proceedings are "administratively complete," the Appointing Authority must transmit the record of trial to the Review Panel, which consists of three military officers,[9] at least one of whom has experience as a

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[8] Proceedings may be closed in order to (1) protect classified information; (2) prevent unauthorized disclosure of protected information; (3) protect the physical safety of participants, including witnesses; and (4) protect intelligence and law enforcement sources and methods. MCO No. 1, 32 CFR § 9.6(b)(3). In no circumstance, however, may the detailed defense counsel be excluded from a proceeding, id., and in no circumstance may the Commission admit into evidence information not presented to detailed defense counsel, id. § 9.6(d)(5)(ii)(C).

[9] These officers may include civilians commissioned pursuant to 10 U.S.C. § 603.

judge. Id. § 9.6(h)(4). The Review Panel must return the case to the Appointing Authority for further proceedings when a majority of that panel "has formed a definite and firm conviction that a material error of law occurred." Id. § 9.6(h)(4)(ii); Military Commission Instruction No. 9, Review of Military Commission Proceedings, December 26, 2003, § 4C(1)a ("MCI No. 9 ") (available at: http://www.defenselink.mil/news/Jan2004/d20040108milcominstno9.pdf). On the other hand, if a majority of the panel finds no such error, it must forward the case to the Secretary with a written opinion recommending that (1) each finding of guilt "be approved, disapproved, or changed to a finding of Guilty to a lesser-included offense" and (2) the sentence imposed "be approved, mitigated, commuted, deferred, or suspended." MCI No. 9, § 4C(1)b. "An authenticated finding of Not Guilty," however, "shall not be changed to a finding of Guilty." MCO No. 1, 32 C.F.R. § 9.6(h)(2).

The Secretary must review the trial record and the Review Panel's recommendation and "either return the case for further proceedings or . . . forward it to the President with a recommendation as to disposition," if the President has not designated the Secretary as the final decision maker. MCI No. 9, § 5. In the absence of such a designation, the President makes the final decision; if the Secretary of Defense has been designated, he may approve or disapprove the commission's findings or "change a finding of Guilty to a finding of Guilty to a lesser-included offense, [or] mitigate, commute, defer, or suspend the sentence imposed or any portion thereof." Id. § 6.

3. Petitioner was initially captured in Afghanistan in late 2001 by Northern Alliance forces and was subsequently transferred to the control of United States forces. Petition ¶ 21. Petitioner was transferred to Guantanamo Bay in January, 2002. Id. ¶ 22. Pursuant to the

Military Order, on July 3, 2003, the President designated petitioner for trial by military commission, upon determining that there was reason to believe that Hicks was a member of al Qaeda or otherwise involved in terrorism against the United States. On November 28, 2003, the Chief Defense Counsel detailed Major Michael Mori as petitioner's defense counsel. Id. ¶ 27. Subsequently, Mr. Joshua Dratel joined Major Mori as civilian co-counsel, and Mr. Stephen Kenny of Australia joined the defense team as a foreign attorney consultant. Id.

On June 9, 2004, the Appointing Authority approved charges against petitioner, and the charges were referred to the Military Commission on June 25, 2004. Id. ¶ 29. Petitioner is charged with conspiracy, attempted murder by an unprivileged belligerent, and aiding the enemy. See id. Petition Ex. 2 ("Charge"). (For the elements of these charges, see Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission, April 30, 2003, 32 C.F.R. §§ 11.6(c)(6); (b)(3), (c)(7); (b)(5) ("MCI No. 2") (available at: http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf)). The conspiracy charge alleges that from January to December, 2001, petitioner "knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with . . . members and associates of the al Qaida organization . . . to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism."[10] Charge ¶ 19.

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[10] The general allegations in support of the conspiracy charge regarding al Qaeda state that "[b]etween 1989 and 2001, al Qaida established training camps . . . in Afghanistan . . . and other countries for the purpose of supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries." Charge ¶ 14. It also alleges that "[i]n February of 1998, Usama Bin Laden . . . and others under the banner of the 'International Islamic Front for Jihad on the Jews and Crusaders,' issued a fatwa (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military . . . .'" Id.

As for Hicks's role in the conspiracy, the charge alleges that in January, 2001, Hicks traveled to Afghanistan to attend al Qaeda terrorist training camps and participated in various aspects of al Qaeda training throughout 2001. Id. ¶¶ 20.a-i. The charge further alleges that Hicks, while he was in Pakistan, learned of the attacks of September 11, 2001, and returned to Afghanistan to rejoin his al Qaeda associates. Id. ¶ 20.j. The charge concludes by alleging that Hicks, armed with an AK-47, ammunition, and grenades, then participated in al Qaeda operations directed against United States and other Coalition forces. Id. ¶¶ 20.k-m.

Hicks is also charged with attempted murder by an unprivileged belligerent. That charge alleges that Hicks attempted to murder by small arms fire and other means "American, British, Canadian, Australian, Afghan, and other Coalition forces while he did not enjoy combatant immunity." Id. ¶ 21. Finally, Hicks is charged with aiding the enemy for his activities in 2001. Id. ¶ 22.

The initial hearing in the Commission was held on August 25, 2004. A motions hearing occurred on November 1, 2004, and trial was formally scheduled to commence on January 10, 2005. In those proceedings, petitioner filed eighteen motions and two written objections in the case, presenting many of the same claims found in his petition.[11] However, on December 10, 2004, before a ruling on any of the motions and prior to the scheduled trial, the Appointing

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¶ 16. It further alleges that "[s]ince 1989, members and associates of al Qaida . . . have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001." Id. ¶ 18.

[11] Petitioner's motions included: motions to dismiss for denial of a speedy trial; an equal protection challenge; a jurisdictional venue challenge; failure to allege criminal offenses; and a challenge to the Appointing Authority's legal authority. Copies of relevant motions are available at www.defenselink.mil/news/Dec2004/commissions_motions_hicks.html.

Authority for Military Commissions issued a formal written directive holding the Hicks military commission trial in abeyance pending the outcome of the D.C. Circuit appeal in Hamdan v. Rumsfeld, No. 04-5393 (D.C. Cir.). See Notice of Recent Issuances (dkt. no. 142).[12]

4. On February 19, 2002, petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, which he amended on March 18, 2002 (dkt. no. 25), challenging petitioner's detention as an enemy combatant. After remand of the case as a result of the Supreme Court's decision in Rasul v. Bush, 542 U.S. 466, 124 S. Ct. 2686 (2004), on September 27, 2004, this Court granted petitioner leave to file his Second Amended Petition for Writ of Habeas Corpus and for Injunctive and other Relief (dkt. no. 77), which contains additional claims challenging the legality of petitioner's upcoming trial by military commission.[13] Separate briefing then occurred on military commission issues and on Hicks's detention as an enemy combatant.[14]

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[12] Petitioner's military commission trial remains in abeyance with proceedings contemplated to resume soon, but the trial on the merits should not occur earlier than the first week of October 2005.

[13] The petition contains eight counts. Count Six concerns petitioner's designation as an enemy combatant. The remaining counts are various challenges to the military commission proceedings.

[14] With regard to the military commission issues, respondents filed 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), petitioner responded with his Brief in Opposition to Respondents' Motion to Dismiss and in Support of Petitioner David M. Hicks's Cross-Motion for Partial Summary Judgment (dkt. no. 102), and respondents subsequently filed their 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). Before a reply was filed by petitioner, proceedings on the military commission issues were stayed, as described in the text. See Order (dkt. no. 143); Order (dkt. no. 170).

The Court stayed proceedings on the military commission issues in light of the Appointing Authority's stay of petitioner's military commission trial pending the appeal in Hamdan. See Order (dkt. no. 143); Order (dkt. no. 170) (noting that although "this case was transferred to Judge Joyce Hens Green for ruling on two earlier motions, the Court specifically declined to transfer the Government's Motion to Dismiss [on military commission issues], and did not subsequently transfer Petitioner's Motion for Partial Summary Judgment.") Respondents' motion regarding enemy combatant issues was decided by Judge Joyce Hens Green, see In re Guantanamo Bay Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005), and the matter is currently on appeal along with Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005) (Leon, J.) (dismissing challenges by Guantanamo Bay petitioners detained as enemy combatants), with oral argument scheduled for September 8, 2005. In the interim, Judge Green has stayed proceedings related to the enemy combatant issue in the case pending appeal. See Order Granting in Part and Denying in Part Respondents' Motion for Certification of January 31, 2005 Orders and for Stay (dkt. no. 162). On July 15, 2005, the D.C. Circuit decided Hamdan v. Rumsfeld, 2005 WL 1653046 (D.C. Cir.).[15]

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With regard to the enemy combatant issues, respondents filed Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support (dkt. no. 82) and a factual return (dkt. no. 83).

[15] On August 8, 2005, Hamdan's counsel filed a petition for certiorari with the Supreme Court. Hamdan has also filed a motion requesting the D.C. Circuit to stay its mandate in the case. As previously indicated to the Court, respondents intend to go forward with military commission proceedings relative to petitioner Hicks pending the ultimate resolution of Hamdan.

***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[16] to establish the military commissions.[17] 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

[16] 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.

[17] 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.

commissions through the predecessor to 10 U.S.C. § 821.[18] See 2005 WL 1653046 at *3. 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."[19] 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."[20] 2005 WL 1653046 at *4.[21]

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

[19] 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.

[20] 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.

[21] 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

The Court of Appeals further held that even if the 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."[22] 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")[23] 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[24] in the GPW contemplate application in two types of conflicts: GPW art. 2 (Common Article 2) 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

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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)).

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

[23] See GPW art. 4.

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

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.[25] 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 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)).

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[25] 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").

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).[26]

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[26] 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.

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)[27] 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 governing military commissions."[28] 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

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[27] 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.

[28] 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.

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.[29] 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 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.

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[29] 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).

## 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,[30] such as the one that will try petitioner Hicks, through the AUMF, 10 U.S.C. § 821, and 10 U.S.C. § 836(a).[31] See 2005 WL 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

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[30] 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).

[31] Petitioner is also wrong that the "Constitution expressly grants Congress the sole power to 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 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).

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[32] – 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 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

[32] See supra note 1.

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.[33]

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[33] Although 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).

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. 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))[34]; 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).

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

[34] In People's Mojahedin, the D.C. Circuit, in considering a petition for judicial review by two 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).

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.[35]

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, 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

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[35] 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.

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,[36] 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 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.

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[36] 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.

The petition alleges that "[the Supreme Court has held that any discrimination against aliens not involving government employees is subject to strict scrutiny," but cites no cases to support that proposition. Petition ¶ 77. The two leading cases addressing equal protection claims by aliens, In re Griffiths, 413 U.S. 717, 721-22 (1973), and Graham v. Richardson, 403 U.S. 365, 372 (1971), stand for the proposition that lawful, resident aliens are a "suspect class" for equal protection purposes when challenging state, not federal, policies, and that policies that differentiate between that group and other similarly situated persons are subject to "close judicial scrutiny." See Graham, 403 U.S. at 372. Nothing in either case suggests that the Supreme Court meant to include aliens differently situated from Griffiths and Richardson, who were lawfully admitted resident aliens. See, e.g., Griffiths, 413 U.S. at 722 (according protection to resident aliens on the premise that "like citizens, [they] pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad ways to our society").

As a representative of the broader unprotected class of aliens, Hicks's challenge would be subject to rational basis review. See, e.g., Dandridge v. Williams, 397 U.S. 471, 485 (1970); United States v. Carolene Products, 304 U.S. 144, 152 (1938); see also Verdugo-Urquidez, 494 U.S. at 273 (rejecting nonresident alien's reliance on Graham as basis for claim for treatment akin to citizens).[37] Under that standard, the Military Order must be upheld as long as a court can identify any rational basis for it. See Carolene Products, 304 U.S. at 152. Given that the "[e]xecutive power over enemy aliens . . . has been deemed throughout our history, essential to

[37] It is, in any event, well established that enemy combatants – the only individuals subject to trial by military commission – possess no constitutional right to be tried for their war crimes in front of an Article III court. See Ex parte Quirin, 317 U.S. 1 (1942) (citizen and alien enemy combatants alike are subject to trial by military commission).

war-time security," Eisentrager, 339 U.S. at 774, it cannot seriously be argued that the President's action, taken in response to attacks executed by a foreign-based terrorist organization, lacks a rational basis.

Moreover, courts have only applied heightened scrutiny to policies regarding aliens that are promulgated by states, as opposed to the federal government. Griffiths and Graham, the two leading cases cited supra, dealt respectively with Connecticut's bar admission rules and Arizona and Pennsylvania's distribution of welfare benefits. In these and other cases involving state action, the Court has made it clear that federal policies regarding aliens are entitled to a much higher degree of deference.

Indeed, cases considering federal policies that differentiate against aliens are marked by the Court's extreme deference towards the political branches. In Mathews v. Diaz, 426 U.S. 67 (1976), the Court expressly distinguished state and federal actions for purposes of equal protection doctrine relating to aliens, id. at 84-85, explaining that the relationship between the United States and aliens "has been committed to the political branches of the Federal Government," id. at 81. The Court went on to apply great deference in upholding a federal law that differentiated against aliens for purposes of determining eligibility for Medicare benefits. A host of other cases echo the judicial deference toward federal policies governing aliens reflected in Mathews. See, e.g., Fiallo v. Bell, 430 U.S. 787, 792 (1977); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952). The concern motivating the Court's deference – that regulation of aliens is committed to the political branches of the federal government – is magnified in this case, where the President's Military Order not only applies to aliens, but does so in order to prosecute the war against al

Qaeda effectively. Cf., e.g., Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988) ("courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"). Accordingly, the heightened scrutiny that would apply to state actions differentiating against lawful resident aliens does not apply to the President's exercise of his war powers. Even under a heightened scrutiny standard, however, the extraordinary circumstances in this case would justify the Military Order.

C. The President's Order Does Not Violate 42 U.S.C. § 1981.

Petitioner's argument that the Military Order violates 42 U.S.C. § 1981, Petition ¶¶ 79-81, is equally meritless. Although the petition quotes 42 U.S.C. § 1981(a), see Petition ¶ 79 n.17, it fails to quote an additional provision of the statute that nullifies petitioner's claim. Section § 1981(c) provides that "[the rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. § 1981(c) (emphasis added). This provision renders § 1981 facially inapplicable to federal action. For this reason, every federal Court of Appeals that has considered the issue since the law was amended in 1991 to include this provision has held that federal actions cannot give rise to claims under § 1981.[38] See Davis-Warren Auctioneers, J.V. v. F.D.I.C., 215 F.3d 1159, 1161 (10th Cir. 2000); Davis v. United States Dep't of Justice, 204 F.3d 723, 725-26 (7th Cir. 2000); Lee v. Hughes, 145 F.3d 1272, 1277 (11th Cir. 1998), cert. denied, 525 U.S. 1138 (1999); see also Williams v. Glickman, 936 F. Supp. 1, 4-5 (D.D.C. 1996) (Flannery, J.).

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[38] Even if § 1981 did apply to the federal government, the Supreme Court has held (in the context of state action, of course) that the section is co-extensive with the Equal Protection Clause. See Grutter v. Bollinger, 539 U.S. 306, 343 (2003); General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 389-91 (1982). Petitioner's § 1981 claim, thus, would fail for the same reasons that doom his constitutional equal protection challenge.

For the foregoing reasons, petitioner's equal protection challenge fails.

## IV. PETITIONER'S CHALLENGE TO THE OFFENSES WITH WHICH HE HAS BEEN CHARGED MUST BE DISMISSED.

Petitioner asserts that he is being improperly tried before the military commission for offenses that are not violations of the law of war and were instead created ex post facto. Petition ¶¶ 53-65. Petitioner has been charged with conspiracy, attempted murder by an unprivileged belligerent, and aiding the enemy. Petition Ex. 2 ("Charge").[39] Hicks claims that "the Charges do not allege any offenses against Hicks under the law of war as it existed at the time he allegedly committed these acts," Petition ¶ 57, and that he is being tried for crimes created "long after the alleged 'offenses' were committed," id. ¶ 53. Petitioner is wrong on both counts. The offenses petitioner has been charged with are violations of the law of war, and they existed at the time Hicks is alleged to have violated them. Petitioner's claim, therefore, must be dismissed if it is even considered, given that, as explained below, it is properly the subject of abstention.

### A. Petitioner's Claim is Subject to Abstention.

The petitioner in Hamdan raised the same kind of argument raised by petitioner here, asserting that the charge of conspiracy against him was not triable by military commission. See Hamdan Appellee Brief at 70 (available at 2004 WL 3080434 at *70) (asserting that the commission lacks "Subject-Matter Jurisdiction" and that "Conspiracy is not triable by the commission"). The D.C. Circuit, however, did not deem the claim worthy of discussion. See 2005 WL 1653046 at *9 ("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

[39] For the elements of these charges, see MCI No. 2, 32 C.F.R. §§ 11.6(c)(6); (b)(3); (c)(7); (b)(5).

judicially enforceable, Army Regulation 190-8 provides a basis for relief."). Thus, the Court of Appeals either considered the claim meritless or subject to abstention.

Perhaps the most logical view is that the D.C. Circuit did not regard Hamdan's challenge as jurisdictional in a sense requiring pre-trial habeas review and chose to abstain from exercising jurisdiction over this type of challenge. This Court should also abstain from exercising jurisdiction over Hicks's similar challenge to the offenses with which he has been charged before the military commission. Cf. United States v. Baucum, 80 F.3d 539, 540 (D.C. Cir. 1996) (rejecting argument that constitutional challenge to criminal statute is jurisdictional in nature and prevents criminal trial absent prior adjudication of constitutionality); Deaver v. Seymour, 822 F.2d 66 (D.C. Cir. 1987) (holding that the target of an indictment cannot raise a constitutional challenge to the statute authorizing the investigation by way of a pretrial civil action when the target has the ability to raise the same constitutional argument as a defense at trial). Regardless, however, petitioner's claim lacks merit.

### B. The Offenses for Which Petitioner is Being Tried Properly Involve Violations of the Law of War that Predate the Conduct With Which He is Charged.

Because, as explained below, the charges against petitioner properly allege violations of the law of war that predated the conduct that is the basis for the charges, petitioner's claims that the President created these charges ex post facto, see Petition ¶¶ 55-57, are without merit. The President did not "define" any offenses. Rather, the President, acted pursuant to his authority in 10 U.S.C. § 836 to prescribe "procedures," including "modes of proof," for "military commissions and other military tribunals." See Military Order § 4(c). Pursuant to the President's directive, the Secretary of Defense caused to be promulgated, "Crimes and Elements

for Trial by Military Commission," MCI No. 2, 32 C.F.R. Part 11 (2003); Military Order § 6(a). That instruction sets out a non-exclusive list of violations of the law of war and other crimes triable by military commission, and their respective elements, that may be prosecuted by a military commission.[40] See 32 C.F.R. §§ 11.3, 11.6. It further specifies, however, that

> [n]o offense is cognizable in a trial by a military commission if that offense did not exist prior to the conduct in question. These crimes and elements derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war. They constitute violations of the law of armed conflict or offenses that, consistent with that body of law, are triable by military commission. Because this document is declarative of existing law, it does not preclude trial for crimes that occurred prior to its effective date.

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[40] Additionally, contrary to petitioner's contention, Petition ¶ 55, Congress need not codify or specifically authorize the offenses to be tried by military commission. The Quirin Court held not only that Congress had authorized the President to use military commissions, but also that Congress did not purport to codify violations of the law of war over which the commissions could exercise jurisdiction. The Court held that Congress, via UCMJ Article 15, now 10 U.S.C. § 821, acted to define the law of war as incorporating the body of common law applied by military commissions. See Quirin, 317 U.S. at 38 (the "Act of Congress [Article 15], by incorporating the law of war, punishes" violations of common law of war); id. at 28 ("Congress . . . has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.") The Court explained that the whole point of Article 15 was congressional recognition and approval of the military's enforcement of a body of common law governing the rules of warfare that Congress did not purport to codify:

> Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war . . . and which may constitutionally be included within that jurisdiction. Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.

Id. at 30 (citation omitted); see also Yamashita v. Styer, 327 U.S. 1, 7-8 (1946) (same).

Id. § 11.3 (a). As shown below, there can be no doubt that petitioner is charged with offenses contained in the instruction and that allege violations of the long-standing law of war.[41]

1. *The Commission Possesses Jurisdiction to Try Hicks for Conspiracy.*

The offense of conspiracy with which petitioner is charged—conspiring to attack civilians, attack civilian objects, commit murder as an unprivileged belligerent, destroy property as an unprivileged belligerent, and engage in terrorism—implicates the most basic protections of the law of war[42] and plainly describes an offense against the law of war. See 32 C.F.R. §§ 11.6(a)(2), (a)(3), (b)(2), (b)(3), (b)(4); Dep't of the Army, Field Manual 27-10, The Law of Land Warfare ¶ 500 ("FM 27-10") (excerpts attached as Exhibit B) ("Conspiracy, direct incitement, and attempts to commit, as well as complicity in the commission of, crimes against peace, crimes against humanity, and war crimes are punishable."). As such, military commissions have jurisdiction over conspiracy charges.

In upholding the trial by military commission of the Nazi saboteurs who attempted to destroy certain facilities within the United States, the Quirin Court recognized that "[b]y universal agreement and practice the law of war draws a distinction between the armed forces

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[41] Petitioner grounds his ex post facto argument in the Constitution. See Petition ¶ 56 (citing U.S. CONST. art. 1, § 9, cl. 3). As we have argued supra § II.B, aliens outside the United States and lacking voluntary contacts with the U.S., such as petitioner, cannot avail themselves of the protections of the U.S. Constitution. In any event, that issue is the subject of the pending appeals in Khalid and In re Guantanamo Detainee Cases, which supports abstention by the Court with respect to the ex post facto claim.

[42] The President, the Congress, and NATO have all recognized al Qaeda's attacks as an act of war. See Military Order, § 1(a); AUMF; and Statement of NATO Secy. Gen. (Oct. 2, 2001) (available at http://usinfo.-state.gov.topical/pol/terror/01100205.htm). In any event, whether there exists a state of armed conflict to which the law of war apply is a political question for the President, not the courts. See Prize Cases, 67 U.S. (2 Black) 635, 670 (1862); Eisentrager, 339 U.S. at 789; Ludecke v. Watkins, 335 U.S. 160, 170 (1948).

and the peaceful populations of belligerent nations." 317 U.S. at 30. The Court likewise confirmed that "an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property" is an "offender[ ] against the law of war." Id. at 31. Under these precepts, al Qaeda's attacks on American civilian targets were obviously law-of-war violations. Hicks does not contend otherwise; instead, he argues that conspiracy was not an offense "under the law of war as it existed at the time he allegedly committed these acts." Petition ¶ 57.

Here again, Hicks cannot escape Quirin. The petitioners there were charged with three substantive counts[43] and a fourth that asserted "[c]onspiracy to commit the offenses alleged in charges 1, 2 and 3." 317 U.S. at 23. In the Court's July 31, 1942, per curiam decision—which was supplemented but not superseded by a full opinion issued on October 29, 1942, see id. at 1 & nn.3-4—the Court held, inter alia, "[t]hat the charges preferred against petitioners on which they are being tried by military commission . . . allege an offense or offenses which the President is authorized to order tried before a military commission." 317 U.S. at 2 (emphasis added). Whether or not the Court believed one of the first three counts was independently sufficient to sustain the military commission's jurisdiction, the Court never questioned that conspiracy to commit a war crime is itself a war crime. See also 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, where the "charges and specifications before us clearly state an offense of unlawful belligerency, contrary to the established and judicially recognized law of war").

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[43] Defendants were charged with a "[v]iolation of the law of war" (charge 1), providing or attempting to provide intelligence to the enemy (charge 2), and spying (charge 3). 317 U.S. at 23.

The charge of conspiracy has long been recognized as a proper offense under the law of war. William Winthrop in Military Law and Precedents 839 n.5 (2d ed. 1920) (excerpt attached as Exhibit C), while discussing the types of conspiracies properly tried by military commissions noted, inter alia, some of the following: conspiracy by a Confederate Army captain with others, including Jefferson Davis, "against the lives and health of Union soldiers held as prisoners of war at Andersonville, [Georgia];" a group that attempted to seize a steamer in Panama in 1864; and a conspiracy involving a William Murphy, Jefferson Davis, and others, to "burn and destroy boats on the western rivers." Additionally, the Army's Law of Land Warfare manual recognizes such an offense. FM 27-10, ¶ 500; see also Mudd v. Caldera, 134 F. Supp. 2d 138 (D.D.C. 2001) (Friedman, J.) (military commission had jurisdiction to try conspirator in assassination of President Lincoln);[44] Charles Howland, Digest of Opinions of the Judge Advocate General of the Army 1071 (1912) ("During the Civil War a very great number and variety of offenses against the laws and usages of war . . . were passed upon and punished by military commissions" including "conspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy").[45]

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[44] Contrary to petitioner's contention, the International Military Tribunal at Nuremberg did not reject "conspiracy" as a valid charge. Petition ¶ 61. Although the Charter establishing the Tribunal did not authorize prosecutions for conspiracy to commit war crimes and crimes against humanity, this does not imply that such charges were not cognizable under the law of war at the time. And the Charter did authorize charges of conspiracy to commit an aggressive war, so prosecutions for conspiracy to violate at least some of the law of war occurred at Nuremberg. The Nurnberg Trial 1946, 6 F.R.D. 69, 111-12 (1946-47).

[45] Several law-of-war sources have prohibited and punished the sort of conspiracy with which Hicks is charged. For instance, the Convention on the Prevention and Punishment of the Crime of Genocide (GC), Dec. 9, 1948, 78 U.N.T.S. 277, specifically prohibits "[c]onspiracy to commit genocide." GC Art. 3(c). Similarly, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has interpreted Article 7 of the ICTY statute to cover "joint criminal

2. *The Commission Possesses Jurisdiction to Try Hicks for Attempted Murder "While He Did Not Enjoy Combatant Immunity."*

The charge against petitioner for attempted murder is also valid. Contrary to petitioner's allegation, this charge does not "criminalize participation in war." Petition ¶ 62. Rather, petitioner is charged with unlawful participation in war as an unprivileged belligerent. Those who commit acts of belligerency during an armed conflict while they do not enjoy combatant immunity have historically been treated harshly under the law of war, even with summary execution. See, e.g., Winthrop, Military Law and Precedents, 783 (1895, 2d Ed. 1920). In addition to members of formal armed forces, "privileged belligerents include members of militias who are under responsible command, who carry arms openly, have a distinctive sign recognizable at a distance," and who are part of a force that operates in accord with the law of war." See GPW art. 4(A)(1), (2), (6). Hicks is being held as an enemy combatant, a member of or affiliated with al Qaeda, see Respondents' Factual Return to Petition For Writ of Habeas Corpus by Petitioner David M. Hicks at 11 (dkt. no. 83) (Exhibit A (Unclassified Summary of Basis for Tribunal Decision)), and al Qaeda is an organization that does not operate in accord with the law of war, see Hamdan, 2005 WL 1653046 at *6. Accordingly, Hicks can be considered and charged as an unprivileged belligerent for attempting to commit murder as an unprivileged belligerent.

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enterprise liability" where the defendant (1) is among a "plurality of persons"; (2) shares with them a "common plan" involving the commission of a crime listed in the statute; and (3) participates in the "execution of the . . . plan." Prosecutor v. Krstic, Case No. IT-98-33-T, at ¶ 611 (ICTY Trial Chamber Aug. 2, 2001); see Prosecutor v. Furundzija, Case No. IT-95-17/1-A, at ¶ 119 (ICTY Appeals Chamber July 21, 2000) ("There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise." (quotation omitted)).

As an unprivileged belligerent, any active participation in combat by petitioner is unlawful per se and may be tried by military commission. See Quirin, 317 U.S. at 31 ("Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.") (footnote omitted). As the Law of Land Warfare manual further provides, individuals "who take up arms and commit hostile acts without having complied with the conditions prescribed by the law of war for recognition as belligerents" are not entitled to combatant immunity for their hostile acts, but rather "may be tried and sentenced to execution or imprisonment." FM 27-10, ¶ 80.

3. *The Commission Possesses Jurisdiction to Try Hicks for "Aiding the Enemy."*

The final charge against petitioner, "Aiding the Enemy," also clearly falls within the jurisdiction of the military commission. The crime of aiding the enemy derives from existing law; in fact, Congress has both previously recognized the offense and stated that it can be tried by military commission. Article 104 of the UCMJ ("Aiding the enemy") provides, in pertinent part, that "[a]ny person who . . . aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things . . . shall suffer death or such other punishment as a court-martial or military commission may direct." 10 U.S.C. § 904 (emphasis added). Based on the existence of this crime, MCI No. 2, the function of which was, in effect, to identify various offenses that "derive from the law of armed conflict" and could be considered by the military commissions, lists "Aiding the Enemy" as one of the offenses that could be charged before the military commissions in their exercise of jurisdiction over those subject to the President's Military Order,

i.e., individuals there is "reason to believe" are or were members of al Qaeda . . . or "engaged in, aided or abetted, or conspired to commit, acts of international terrorism" adversely affecting United States' interests, where "it is in the interest of the United States that such individual be subject to this order." Military Order § 2(a), (b). (emphasis added).

Further, Hicks's argument that as an Australian citizen he had no duty to the United States that would make his alleged aid to the enemies of the United States a charge subject to adjudication by military commissions, Petition ¶ 63, is irrelevant.[46] Allegiance to the United States, while perhaps an element of the offense of treason, is not an element of the offense of aiding the enemy. MCI No. 2 noted in the Comments section to "Aiding the Enemy" that in order for a person to be convicted of this offense, the defendant's conduct would have to be wrongful: the requirement that conduct be "wrongful for this crime necessitates that the accused act without proper authority." See 32 C.F.R. § 11.6(b)(5)(ii)(B). Any active participation in combat or hostilities by an unlawful or unprivileged belligerent, as Hicks is alleged to be, is unlawful or wrongful per se, see Quirin, 317 U.S. at 31, so there is no need to prove that an unlawful belligerent owed any kind of allegiance. However, even under the standard applicable to a lawful belligerent acting against the United States or its allies, whose combatant immunity would likely protect him from criminal prosecution for acts of aggression absent proof that the defendant acted wrongfully because he owed "allegiance or some duty to the United States of America or to an ally or coalition partner," see 32 C.F.R. § 11.6(b)(5)(ii)(C), petitioner would be

[46] "Aiding the Enemy," as provided in MCI No. 2, requires proof beyond a reasonable doubt of the following elements: (a) The accused aided the enemy; (b) The accused intended to aid the enemy; (c) The conduct took place in the context of and was associated with armed conflict." See MCI No. 2, ¶¶ 3(A), 6(B)(5)(a).

implicated because he is a citizen of Australia, a supporting ally of the United States that deployed forces to Afghanistan.

Under these sources, the charges against petitioner – implicating him in al Qaeda's attacks on the United States and his participation with al Qaeda forces in combat operations directed against the United States and its allies – "plainly allege[] violation[s] of the law of war" properly triable before a military commission. See Quirin, 317 U.S. at 36.

## V. PETITIONER'S SPEEDY TRIAL CLAIM MUST BE REJECTED.

Petitioner argues that he has been denied a speedy trial in contravention of Article 10 of the UCMJ (10 U.S.C. § 810),[47] the GPW,[48] and the Sixth Amendment.[49] See Petition ¶¶ 98-109. This claim must be rejected.

### A. This Court Should Abstain from Considering Hicks's Argument Regarding a Speedy Trial.

As an initial matter, the Court should abstain from addressing petitioner's speedy trial claim before the military commission is conducted. The Supreme Court's holding in United

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[47] Article 10 of the UCMJ, 10 U.S.C. § 810, provides, "[w]hen 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 dismiss the charges and release him."

[48] Hicks claims he is entitled to a speedy trial under Article 103 of the GPW which provides, "[j]udicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offense, or if it is essential to do so in the interests of national security. In no circumstances shall this confinement exceed three months." See Petition ¶ 103 (emphasis omitted).

[49] Petitioner also alleges that he is entitled to a speedy trial because the Sixth Amendment to the U.S. Constitution requires that in all criminal prosecutions, "the accused shall enjoy the right to a speedy . . . trial." See Petition ¶ 108.

States v. MacDonald, 435 U.S. 850 (1978), makes clear that a speedy trial claim does not generally afford a reviewing court a basis to take the extraordinary step of disrupting or precluding a trial. There, the Court ruled that a criminal defendant may not appeal before trial an order denying his motion to dismiss on speedy trial grounds. The Court explained that "the Speedy Trial Clause does not . . . encompass a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all." Id. at 861. Rather, "[i]t is the delay before trial, not the trial itself, that offends against the constitutional guarantee," and whether that delay prejudiced the defendant's ability to obtain a fair trial cannot generally be determined until after trial. Id.[50] Indeed, the vague and generalized nature of petitioner's claim of prejudice, see infra, only serves to highlight the premature status of consideration of a speedy trial claim at this time.

Moreover, a speedy trial claim has no impact on the Councilman abstention rule embraced by Hamdan with respect to issues of how the military commission carries out its business. Indeed, federal courts have rejected the contention that alleged speedy trial violations cause irreparable harm that justifies pre-trial intervention by a reviewing court. In Carden v. Montana, 626 F.2d 82 (9th Cir. 1980), for example, the Ninth Circuit held that an alleged speedy trial violation in state court did not constitute "the type of 'special circumstances' which warrant federal intervention" on habeas. Id. at 84. The court noted that the Supreme Court has identified the limited circumstances in which departure from the abstention doctrine is appropriate, namely, "in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary

[50] "Resolution of a speedy trial claim necessitates a careful assessment of the particular facts of the case;" the claim is "best considered only after the relevant facts have been developed at trial." 435 U.S. at 858.

circumstances where irreparable injury can be shown." Id. (quoting Perez v. Ledesma, 401 U.S. 82, 85 (1971)). The Ninth Circuit went on to rule that the petitioners had not shown irreparable injury, because their right to a speedy trial could be vindicated after the trial, via dismissal of the charges. Id.

Further, while the speedy trial issue was raised by Hamdan on appeal as part of his argument against abstention, see Appellee's Brief at 30 (2004 WL 4080434 at *30), and the Hamdan Court "considered all of Hamdan's" contentions, 2005 WL 1653046 at *9, the D.C. Circuit chose to leave this issue untouched. This is not surprising since the Hamdan Court's reasoning for abstaining from testing the military commission against the GPW equally applies to his speedy trial claim. The issue Hicks's speedy trial claim raises "is not whether the commission may try him, but rather how the commission may try him. That is by no stretch a jurisdictional argument." 2005 WL 1653046 at *7. Accordingly, "comity would dictate" deference to the military proceedings.[51] Id. For all of these reasons, this Court should abstain from addressing the speedy trial issue before Hicks is tried by the military commission.

B. Petitioner's Speedy Trial Claim Lacks Merit.

Although the Court can and should dispose of petitioner's speedy trial claim by abstaining from deciding it, petitioner's claim also lacks merit. For one thing, Hamdan forecloses petitioner's reliance on the GPW. As explained above, the Hamdan Court held that the GPW is not judicially enforceable, and even if it was, it does not apply to detainees such as

[51] See also Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 172-73 (D.D.C. 2004) (Robertson, J.) (abstaining from deciding speedy trial claim and finding that it is "well established in any event that the critical element of prejudice is best evaluated post-trial") (citing MacDonald, 435 U.S. at 858-59), rev'd on other grounds, 2005 WL 1653046 (D.C. Cir. Jul. 15, 2005).

petitioner, determined to be part of al Qaeda.[52] 2005 WL 1653046 at *4-7. Therefore, under Hamdan, Hicks cannot seek in this Court to enforce the GPW as it may pertain to speedy trial.

Furthermore, to the extent petitioner relies upon the UCMJ, i.e., 10 U.S.C. § 810, the D.C. Circuit held in Hamdan that the UCMJ does not constrain military commissions except as specifically provided therein; thus, the UCMJ imposes "only minimal restrictions upon . . . [the] form and function" of military commissions. 2005 WL 1653046 at *8. Section 810 makes no mention of military commissions such as petitioner's, and it does not constrain the commission. See id. (military commissions are "'our common law war courts. . . . Neither their procedure nor their jurisdiction has been prescribed by statute'") (quoting Madsen v. Kinsella, 343 U.S. 341, 346-48, 351 n.17 (1952)).[53]

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[52] Petitioner also cites the Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("Fourth Geneva Convention"), 1956 WL 54810 (U.S. Treaty), T.I.A.S. No. 3365, 6 U.S.T. 3516, art. 71 (civilians and "protected persons" must be brought to trial "as rapidly as possible"), in support of his speedy trial claim. Petition ¶ 107 (erroneously citing Fourth Geneva Convention, art. 7). The rationale for Hamdan's conclusion that the GPW is not judicially enforceable, however, necessarily forecloses any claim that the Fourth Geneva Convention may be enforced in court. And Hamdan's additional holding, based on the common articles of the Conventions, that the GPW does not apply to detainees such as petitioner, 2005 WL 1653046 at *4-*7, would likewise preclude a claim under the Fourth Geneva Convention in this case.

[53] As to petitioner's speedy trial claim based on the Sixth Amendment, 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 Sixth Amendment. 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

Even assuming speedy trial concepts under 10 U.S.C. § 810 or the Sixth Amendment applied to petitioner, no speedy trial violation would be supported, for a number of reasons. Petitioner cannot tie a speedy trial claim to the length of his detention, see Petition ¶¶ 37, 102, because he is otherwise being detained, not as a military commission defendant, but as an enemy combatant who is subject to detention for the duration of the ongoing armed conflict. See Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) (plurality opinion) (concluding that detention of enemy combatants "for the duration of the particular conflict in which they are captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use [in the AUMF]."); see also Respondents' Factual Return to Petition for Writ of Habeas Corpus by Petitioner David M. Hicks at 1 (dkt. no. 83) (noting that petitioner is subject to detention based on determination of Combatant Status Review Tribunal that petitioner is an enemy combatant).

To the extent petitioner claims that a speedy trial clock was triggered by the referral of charges in June 2004, military courts have denied speedy trial claims where the pretrial confinement period was a similar or longer amount of time, cf., e.g., United States v. Goode, 54 M.J. 836, 838-40 (N-M. Ct. Crim. App. 2001) (337-day pretrial confinement did not violate Article 10); United States v. Reeves, 34 M.J. 1261, 1261-63 (N-M. Ct. M.R. 1992) (per curium) (462-day delay in preferring charges did not violate due process), and there is no reason for a different result here.

Nor can petitioner legitimately complain of a lack of "reasonable diligence," see United States v. Cooper, 58 M.J. 54, 58 (C.A.A.F. 2003), giving rise to a speedy trial violation. Cf.

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1653046 at *7.

Barker v. Wingo, 407 U.S. 514, 531 (1972) (constitutional speedy trial right not established by "any inflexible rule;" balancing required of factors, such as length of and reason for delay, defendant's assertion of his right, and prejudice to defendant.); United States v. Kossman, 38 M.J. 258 (C.M.A. 1993) ("Pointedly, however, the drafters of Article 10 made no provision as to hours or days in which a case must be prosecuted because there are perfectly reasonable exigencies that arise in individual cases which just do not fit under a set time limit.") (internal quotation marks omitted). The government has charged Hicks with participating in a foreign-based, far-reaching conspiracy spanning several years. See Charge ¶¶ 4-20. Petitioner concedes that "extraordinary or compelling circumstances" would justify delay. See Petition ¶ 102. The breadth and complexity of the charge, as well as the fact that it was brought during the ongoing war against al Qaeda and its supporters, are such "extraordinary or compelling circumstances." Cf. Barker v. Wingo, 407 U.S. 514, 531 (1972) (in the context of a constitutional speedy trial claim, "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge."). Here, respondents have undertaken painstaking intelligence-gathering and interrogation with respect to hundreds of enemy combatants and suspected members of al Qaeda, a highly-disciplined organization whose agents span the globe and operate in secrecy. See generally Al-Qaida Training Manual ("Manchester Manual"), available at <http://www.usdoj.gov/ag/trainingmanual.htm>. It should thus come as no surprise that the Executive has required sufficient time in this case, than might otherwise be needed in more common criminal offenses.[54]

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[54] Furthermore, any delay due to resolution of the appeal in Hamdan should not give rise to a speedy trial violation, given that the case concerned the very authority of the military commissions to proceed and, after expedited proceedings, was resolved in favor of respondents.

Petitioner's claim also founders on his failure to show prejudice from the alleged delay. See Barker, 407 U.S. at 533-34 (identifying four factors relevant to constitutional speedy trial claim, including prejudice to the defendant, and holding that defendant was minimally prejudiced by delay of more than five years); MacDonald, 435 U.S. at 858 (constitutional speedy trial right protects against three types of injury, but "the most serious" is impairment of the defense caused by delay); Cooper, 58 M.J. at 61 (directing military courts to consider Barker factors in evaluating Article 10 [§ 810] claim). Petitioner alleges that "statements against Hicks may be introduced at the Commission" from witnesses who have been released and makes general allegations that he will be prejudiced by any delay. Petition ¶¶ 38-40. Accordingly, petitioner's claims allege no concrete prejudice, and are speculative as to any prejudice he may suffer. Such "[g]eneralized assertions of the loss of memory, witnesses, or evidence are insufficient to establish actual prejudice." See United States v. Manning, 56 F.3d 1188, 1194 (9th Cir. 1995). Likewise, the speculative nature of petitioner's allegation cannot form the basis for a finding of prejudice. See id. (rejecting prejudice claim that embraces "pure conjecture").

Even assuming § 810 and/or the Sixth Amendment applied to Hicks, whatever right he would have under those provisions could be fully vindicated under MacDonald, as explained above, through post-trial review of the impact on Hicks's defense of the allegedly unlawful delay. Because Hicks has shown "no harm other than that attendant to resolution of his case in the military court system," this Court "must refrain from intervention, by way of injunction or

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Cf. United States v. Loud Hawk, 474 U.S. 302, 312-16 (1986) (interlocutory appeals by government can justify delay in trial in face of constitutional speedy trial claim, depending upon, inter alia, the strength of the government's position and importance of the issue).

otherwise." Councilman, 420 U.S. at 758. Petitioner's speedy trial claim, therefore, must be dismissed.

## VI. ALL RESPONDENTS EXCEPT FOR THE SECRETARY OF DEFENSE SHOULD BE DISMISSED AS RESPONDENTS TO PETITIONER'S MILITARY COMMISSION CLAIMS.

As an additional matter, although petitioners name a number of respondents in their petition, Secretary Rumsfeld is the only proper respondent, and the remaining respondents should be dismissed with respect to petitioner's military commission claims. Petitioner is detained overseas by the Department of Defense, and he is subject to an impending trial by the Military, through entities and procedures established by the Secretary of Defense. Thus, all respondents other than Secretary Rumsfeld should be dismissed. See Rumsfeld v. Padilla, 124 S. Ct. 2711, 2718 n.9 (2004) (only the "custodian" is proper habeas respondent); Sept. 29, 2004 Mem. Op. and Order in Gherebi v. Bush, No. 04-CV-1164, at 7-8 (dkt. no. 27).

Furthermore, the President is plainly not a proper respondent for an additional reason: It is long settled that a court of the United States "'has no jurisdiction . . . to enjoin the President in the performance of his official duties'" or otherwise to compel the President to perform any official act. Franklin v. Massachusetts, 505 U.S. 788, 803 (1992) (plurality opinion) (quoting Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1866)); 505 U.S. at 825 (Scalia, J., concurring in part and concurring in the judgment). While the Supreme Court has left open the question whether the President may be ordered to perform a purely "ministerial" duty, see 505 U.S. at 802, the relief petitioner seeks here with respect to his military commission – primarily, an order invalidating and enjoining the commission – is far from ministerial. As the Seventh Circuit explained in a habeas case brought by an alien enemy combatant, "[n]aming the President

as a respondent was not only unavailing but also improper" because "[s]uits contesting actions of the executive branch should be brought against the President's subordinates." Al-Marri v. Rumsfeld, 360 F.3d 707, 708 (7th Cir. 2004), cert. denied, 125 S. Ct. 34 (2004); see also Padilla v. Bush, 233 F. Supp. 2d 564, 582 (S.D.N.Y. 2002) (because "this court has no power to direct the President to perform an official act," the President was not a proper respondent in a habeas case brought by a citizen held as an enemy combatant), rev'd on other grounds, Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), rev'd, 124 S. Ct. 2711, 2716 n.4 (2004).

Indeed, the docket sheet in this Court for the Hamdan case indicates that all respondents except Secretary Rumsfeld were terminated as respondents on November 23, 2004. Similarly here, respondents other than Secretary Rumsfeld should be dismissed.

## CONCLUSION

For the reasons stated above, respondents respectfully request that their motions to dismiss or for judgment as a matter of law be granted, that writs of habeas corpus not issue, and that all relief requested by petitioners be denied.

Dated: August 17, 2005

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| IBRAHIM AHMED MAHMOUD AL QOSI,<br><br>Plaintiff,<br><br>v.<br><br>GEORGE W. BUSH, et al.<br>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.

/s/_____
PAUL L. FRIEDMAN
United States District Judge

DATE: December 17, 2004