No. 05-184

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD,
SECRETARY OF DEFENSE, *et al.*,

Respondents.

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

BRIEF OF CITIZENS FOR THE COMMON DEFENCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

Citizens for the Common Defence ("CCD") is an association that advocates a conception of robust Executive Branch authority to meet the national security threats that confront the nation in its war against international terrorists. The organization's name derives from the Preamble to the Constitution, which recognizes that to "provide for the common defence" against foreign threats is one of the great objects of government that our Constitution was meant to secure. Far from being inconsistent with "secur[ing] the Blessings of Liberty to ourselves and our Posterity," the vigorous Executive power necessary to defend our nation against foreign enemies was seen by the Framers as a vital precondition to securing those blessings and an integral part of the same libertarian enterprise.

CCD's members are lawyers and law professors from across the country, most of whom served as law clerks to federal court judges or Justices of this Court, and/or as executive branch officials in the current or past Administrations. A partial list of CCD's members is included as Appendix A to this brief.

SUMMARY OF ARGUMENT

A long line of historical precedents, stretching from our Nation's founding to the modern era, confirms that military commissions have been used extensively to try violations of the laws of war committed by those with whom the United States is engaged in armed conflict. *See infra* at 4-22

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters to that effect have been lodged with the Clerk of the Court.

(discussing numerous such examples of military commissions from the Revolutionary War, the Seminole War, the Mexican War, the Civil War, the Modoc War, and World War II). Specifically relying upon this well-established historical practice, this Court has held that the authority to convene military commissions to try enemy violators of the laws of war is an "important incident" of the President's constitutional power to conduct armed conflict. *Ex Parte Quirin*, 317 U.S. 1, 28 (1942); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality); *In re Yamashita*, 327 U.S. 1, 11 (1946). Moreover, Congress has by statute expressly ratified and reaffirmed the Executive's traditional use of military commissions to try enemy violators of the laws of war. *See infra* at 22-27. Because the President's November 13, 2001 Military Order adheres to a long line of historical precedent concerning such uses of military commissions, it falls well within his constitutional and statutory authority. This Court should affirm the decision of the court of appeals.

ARGUMENT

THE PRESIDENT'S AUTHORITY TO ORDER THAT PETITIONER SHALL BE TRIED BY MILITARY COMMISSION IS CONFIRMED BY HISTORICAL PRECEDENT, BY STATUTE, AND BY THE DECISIONS OF THIS COURT

I. THE PRESIDENT'S ORDER

On September 11, 2001, the al Qaeda terrorist network headed by Osama bin Laden used hijacked airliners to carry out a large-scale and coordinated attack on New York's World Trade Center and on the headquarters of the United States Department of Defense in Virginia. Al Qaeda's effort to use a fourth plane to strike another target in Washington—presumably the Capitol or the White House—was thwarted when the passengers revolted against their hijackers, who then intentionally crashed the plane in a Pennsylvania field.

The extraordinary scale of this attack, which resulted in the deaths of approximately 3,000 persons and property losses in the billions of dollars, led Congress on September 18, 2001 to authorize the President to use "all necessary and appropriate force" to destroy and disable the al Qaeda organization and to subdue the Taliban regime in Afghanistan that had harbored and assisted al Qaeda. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, § 2(a) (2001).[2]

After hostilities against the Taliban and al Qaeda had been commenced and were ongoing, the President on November 13, 2001 issued a Military Order that, among other things, required designated al Qaeda members and collaborators, "when tried, [to] be tried by *military commission* for any and all offenses triable by military commission." Military Order, §§ 2(a), 4(a), 66 Fed. Reg. 57833, 57834 (Nov. 13, 2001) (emphasis added). On July 3, 2003, the President specifically designated Petitioner Hamdan as a person subject to this Military Order, finding that there was reason to believe that he had been a member or collaborator of al Qaeda. Pet. App. 1a-2a. Based on his admitted service as Osama bin Laden's personal driver from 1996-2001, Petitioner was subsequently charged to be tried before a military commission on a single count of conspiring with bin Laden and others to commit violations of the laws of war, including attacks on civilians and civilian objects and murder by an unprivileged belligerent. *Id.* at 2a, 65a-67a, 76a; *see also* J.A. 137-41.

As set forth below, the President's Military Order follows a long line of historical precedent in which military commissions were used to try enemy violators of the laws of war.

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[2] Although the Authorization for Use of Military Force uses general terms to describe the "nations, organizations, or persons" against whom military force was authorized, there is no doubt that al Qaeda and the Taliban are included among the organizations against whom Congress had authorized military force. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality).

II. MILITARY COMMISSIONS HAVE BEEN USED REPEATEDLY THROUGHOUT OUR NATION'S HISTORY, WITH OR WITHOUT AFFIRMATIVE CONGRESSIONAL AUTHORIZATION, TO TRY AND PUNISH ENEMY OFFENDERS AGAINST THE LAWS OF WAR

If there were ever a subject on which a "page of history is worth a volume of logic," *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921), it is the scope of Executive power against foreign enemies in a time of war. Mindful that the "care of the common defence" requires the *flexible* exercise of powers "co-extensive with all the possible combinations" of the "infinite" circumstances that may "endanger the safety of nations," the Framers allocated the war powers to the Federal government "without limitation." THE FEDERALIST NO. 23, at 126 (E.H. Scott ed. 1898) (A. Hamilton). And because the Framers recognized that "[e]nergy in the Executive" is "essential to the protection of the community against foreign attacks," *id.*, NO. 70, at 384, and that "the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand," *id.*, NO. 74, at 407, the Constitution confers the entirety of the "Executive power" on the President alone and expressly makes him the "Commander in Chief" of the armed forces of the United States. U.S. CONST., art. II, §§ 1, 2. Given that "no governmental interest is more compelling than the security of the Nation," *Haig v. Agee*, 453 U.S. 280, 307 (1981), the Court can ill afford to ignore the practical lessons of history in assessing whether a particular exercise of Executive authority falls within the President's broad and flexible powers under the Constitution to defeat and disable foreign enemies.

Here the lessons of history are easily discerned. Although over time military commissions "have taken many forms and borne many names," *Madsen v. Kinsella*, 343 U.S. 341, 347 & n.11 (1952), the concept of a "common-law war court" that

is established, not by statute, but by the President or his military commanders has a long history:

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

Id. at 346-48 (footnotes omitted); *see also* WILLIAM E. BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW 275 (1892) ("[T]he war court, originally based on the common law of war, has always been recognized in the service."). Thus, although the use of the term "military commission" to refer to such common-law war courts did not become firmly settled until the time of the Mexican War, the use of such special tribunals goes back to the Nation's founding.

As set forth below, a careful review of the use of military commissions during our Nation's wars leaves little doubt that the President possesses power to establish military commissions to try enemy offenders against the laws of war.

A. The Revolutionary War

During the Revolutionary War, American commanders used military commissions on numerous occasions, particularly against spies. *Ex Parte Quirin*, 317 U.S. 1, 42, n.14 (1942) (summarizing numerous such instances); *see also* Christopher M. Evans, *Terrorism on Trial: The President's Constitutional Authority to Order the Prosecution of Suspected Terrorists by Military Commission*, 51 DUKE L.J. 1831, 1836-37 (2002) ("Throughout the Revolutionary War, a number of enemy spies were tried and convicted before military commissions.").

In one of the most famous instances, General George

Washington used a "Board of General Officers" to try Major John André, a British officer, for violating the laws of war by spying within American lines. *Quirin*, 317 U.S. at 31 n.9 (summarizing André case). After secretly meeting with General Benedict Arnold (whose treasonous activities had not yet been detected), André used a civilian disguise and an assumed name to travel clandestinely behind American lines, all the while hiding in his boots military intelligence he had received from Arnold. WILLARD STERNE RANDALL, BENEDICT ARNOLD: PATRIOT AND TRAITOR 545-55 (1990). André was captured on September 23, 1780, and six days later, Washington appointed a 14-member board to try him for violating the laws of war. *Id.* at 552-55, 565-66; *see also* ROBERT MCCONNELL HATCH, MAJOR JOHN ANDRÉ: A GALANT IN SPY'S CLOTHING 259 (1986). Washington reserved to himself the final decision as to André's fate. RANDALL, *supra*, at 565.

During the Board proceeding, André largely admitted the charges and, in particular, he conceded that he had not been traveling under a flag of truce. HATCH, *supra*, at 260. This latter concession was significant, because it contradicted the legal theory under which André's British superiors had sought to secure his return. *Id.* at 258, 261-62. After reviewing the evidence, the Board issued a unanimous recommendation to Washington that André "'ought to be considered as a spy from the enemy and that, agreeable to the law and usage of nations, it is their opinion he ought to suffer death.'" RANDALL, *supra*, at 566 (quoting from the Board's letter to Washington). In accepting the recommendation, and notifying the British of the verdict, Washington relied upon André's admissions and also concluded that André's activities in any event clearly exceeded what a flag of truce might have permitted. HATCH, *supra*, at 262-63. André was hanged on October 2, 1780. *See id.* at 568-69.

Washington's authority to convene the Board that tried

André stemmed from his status as commander-in-chief and proceeded "not under the statutory law but the common law of war." BIRKHIMER, *supra*, at 275. Washington and his legal advisor (Alexander Hamilton), undoubtedly thought so, for while André was tried by a special "Board of General Officers," his civilian co-conspirator, Joshua Hett Smith, was "tried by *court-martial* in 1780, *under a resolution of Congress*, for assisting and combining with Gen. Arnold." WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 832 (2d ed. 1920) (emphasis added)[3]; HATCH, *supra*, at 259 (noting that, while André's special board convened, Smith waited "for his own trial before a general court-martial").[4]

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[3] Winthrop does not cite the specific resolution of Congress to which he was referring, but it may have been the resolution of Feb. 27, 1778, which prescribed that any "inhabitant[] of these states" who engaged in spying "shall suffer death by the judgment of a court martial." 10 JOURNALS OF THE CONTINENTAL CONGRESS 204 (Feb. 27, 1778) (1908 ed.). Not being an "inhabitant of these states," André obviously did not fall within that resolution. Although the Continental Congress had also authorized death "by sentence of a court martial" for any foreigners "who shall be found lurking as spies *in or about the fortifications or encampments of the armies of the United States*, or any of them," 5 JOURNALS OF THE CONTINENTAL CONGRESS 693 (Aug. 21, 1776) (1906 ed.) (emphasis added), this authorization presumably did not extend to André, who was found by three militiamen who accosted him on a road near Tarrytown, New York, not far from the British lines. HATCH, *supra*, at 241-44; RANDALL, *supra*, at 552-54.

[4] Professor Turley has argued that "the Andre case is not particularly helpful in supporting the historical basis for military tribunals" because, he says, Joshua Smith "was given a civilian and not a military trial" and "was not subjected to a military proceeding." Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649, 724 (2002). This argument fails, because the factual premise of Professor Turley's argument is inaccurate. As Washington himself explained in an October 29, 1780 letter to the Governor and Lieutenant Governor of New York:

> I have the honor to transmit your Excellency the proceedings of the Court Martial upon Joshua Smith; by which you will perceive out of

B. The First Seminole War

During the First Seminole War, General Andrew Jackson invaded the Spanish territory of Florida for the declared purpose of subduing Seminoles and others who had engaged in cross-border raids. BIRKHIMER, *supra*, at 275-76. During this Florida campaign, Jackson issued a general order on April 26, 1818, in which he established a "special court" to try two British citizens, Alexander Arbuthnot and Robert C. Ambrister, for violations of the laws of war. *Id.* at 276. Specifically, Arbuthnot was charged with spying, and with aiding and inciting the Indians to war against the United States, and Ambrister was charged with having "assum[ed] command of the Indians in ... war with the United States." MARQUIS JAMES, ANDREW JACKSON: THE BORDER CAPTAIN 312-13 (1933). After hearing the evidence, the special court convicted both defendants and sentenced Arbuthnot to death by hanging and Ambrister to be shot; the court, however, almost immediately reconsidered Ambrister's sentence and reduced it to fifty lashes and imprisonment for one year. *Id.* at 313-14. Although Jackson approved Arbuthnot's sentence, he rejected the reconsideration of Ambrister's sentence and ordered that he be shot. *Id.* at 314; BIRKHIMER, *supra*, at 276; WINTHROP, *supra*, at 464.

Jackson's authority to convene this "special court"—"such

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four charges exhibited against him the Jurisdiction of the Court was only found competent to one, of which they have acquitted him for want of sufficient evidence. As he was brought out of Your State into this for trial, I have thought proper to send him back to West Point. I think it necessary to inform you, that he will be shortly released from confinement unless the Civil Authority should interpose to demand him.

GEORGE WASHINGTON PAPERS AT THE LIBRARY OF CONGRESS, 1741-1799: Series 3 (Richard Varick Transcripts: Continental Army Papers 1775-83), Subseries C (Civil Officials and Citizens), Letterbook 4, Images 13-14, available at <http://memory.loc.gov/cgi-bin/ampage?collId=mgw3&fileName=mgw3c/gwpage004.db&recNum=0>.

as would now be known as a military commission"—was grounded, not "in the statutory law, but in the laws of war." BIRKHIMER, *supra*, at 277. Moreover, Jackson's power to establish such a commission did not require a formal declaration of war: "Although war had not formally been declared against Spain, a state of war against her dependency [Florida] in fact existed," *id.*, and Jackson's invasion of Florida occurred with the acquiescence of President Monroe and the affirmative approval of Secretary of War Calhoun. JAMES, *supra*, at 308-09. The resulting state of armed conflict gave Jackson, as commander of the American forces, the right "to convene a war court for the trial" of persons charged with "a violation of the laws of war." BIRKHIMER, *supra*, at 277.

Jackson's Florida campaign proved controversial, both with the Spanish and with some in Congress. *See, e.g.*, 15 ANNALS OF CONGRESS 256-68 (1819) (reproducing Senate committee report on the Seminole War). With respect to the trial of Arbuthnot and Ambrister specifically, two main criticisms emerged, but neither of them undermines the general proposition that a military commission may be used to try violations of the laws of war. First, a sharp debate arose as to whether the actions of Arbuthnot and Ambrister were violations of the laws of war *at all*, thereby arguably placing them outside the jurisdiction of a military commission.[5] This criticism does not question the general power to use military commissions to try law-of-war offenses, but only whether there was such an offense to try in this case. Second, Jackson's refusal to accept the special court's reduction of

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[5] *Compare* 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 735 (1819) (majority report of House committee) (arguing that none of the offenses charged were triable before a military court other than the spying charge against Arbuthnot, who was acquitted on that count) *with id.* at 739 (minority report of House Committee) (defending Jackson's actions); 15 ANNALS OF CONGRESS at 267-68 (Senate report) (arguing that the charged offenses were not violations of the laws of war).

Ambrister's sentence was met with near unanimous condemnation.[6] Petitioner's amicus makes much of Winthrop's criticism of Jackson in this regard, *see* Brief *Amicus Curiae* of Louis Fisher at 6, but fails to note that Winthrop did *not* indicate disapproval of the military commission itself. On the contrary, Winthrop specifically endorsed the military commission's conviction and sentence of Ambrister as "the legal and only sentence." WINTHROP, *supra*, at 464.[7]

C. The Mexican War

United States military commanders again relied on military commissions during the Mexican War. Most notably, General Winfield Scott issued a General Order establishing "military commissions" to try, *inter alia*, a range of offenses committed in Mexico by members of the U.S. army as well as certain offenses committed "upon individuals of the [U.S.] army, or their property, *against the laws of war*, by individuals of a hostile country [Mexico]." *See* BIRKHIMER, *supra*, at 466-68 (reproducing General Scott's Gen. Order No. 287 (Sept. 17, 1847), which amended Scott's Gen. Order No. 20 (Feb. 19, 1847)) (emphasis added). In practice, these military commissions operated mostly as occupation or

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[6] *See* 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, *supra*, at 735, 739 (majority and minority of House report both criticize this action by Jackson); 15 ANNALS OF CONGRESS at 268 (Senate report) (arguing that Jackson wrongly "set aside the sentence of the court, and substituted for that sentence his own arbitrary will"); WINTHROP, *supra*, at 464-65 (stating that Jackson's refusal to accept the sentence reduction was "wholly arbitrary and illegal" and that, "[f]or such an order and its execution a military commander would *now* be indictable for murder").

[7] Notably, the procedures in place under the current military commissions do *not* authorize the reviewing authority to increase a sentence, but only to approve the sentence or to "mitigate, commute, defer, or suspend the sentence." Military Commission Order No. 1, § 6(H)(6) (Aug. 31, 2005), available at <http://www.defenselink.mil/news/Sep2005/d20050902order.pdf>.

martial-law courts, and thus the crimes brought before them "were mainly criminal offenses of the class cognizable by the civil courts in time of peace." WINTHROP, *supra*, at 832. These commissions, however, also "tr[ied] unlawful combatants for violations of the law of war, such as 'threatening the lives of soldiers" and 'riotous conduct.'" Michael O. Lacey, *Military Commissions: A Historical Survey*, 2002 ARMY LAWYER 41, 43.

Moreover, General Scott also established a second class of tribunal, denominated a "council of war," for the specific purpose of trying offenses against the laws of war. *Id.*; WINTHROP, *supra*, at 832-33. As Winthrop explained, "[t]he principal charges referred to and passed upon by these courts were Guerilla warfare or Violation of the Laws of War by Guerilleros, and Enticing or Attempting to entice soldiers to desert the U.S. service." *Id.*; *see also* A. Wigfall Green, *The Military Commission*, 42 AM. J. INT'L L. 832, 833 (1948) ("[T]he council of war performed the functions of the modern military commission.").

Like Generals Washington and Jackson before him, General Scott's establishment of these special military tribunals was undertaken, not pursuant to an explicit statutory authorization, but instead pursuant to his powers as a military commander. BIRKHIMER, *supra*, at 278. Indeed, Scott's General Orders specifically recited that the existing Articles of War largely did *not* extend to the situations he sought to cover by his orders. *Id.* at 466-67 (Gen. Order No. 287).

D. The Civil War

"During the Civil War the military commission was extensively used for the trial of offenses against the law of war." *Quirin*, 317 U.S. at 32 n.10; *see also id.* (discussing numerous military commission trials of Confederate officers and agents for violations against the laws of war); WINTHROP, *supra*, at 783-84 (discussing numerous trials of Confederate guerillas);

MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 168 (1991) ("During the Civil War, the army conducted at least 4,271 trials by military commission."). Indeed, in President Lincoln's General Order No. 100, which restated the applicable laws of war—and which is commonly known as the "Lieber Code," after the Columbia University professor largely responsible for drafting it—the authority to use "military commissions" to try and punish offenses "under the common law of war" was expressly reaffirmed. *See* Gen. Order No. 100, art. 13 (Apr. 24, 1863), available at <http://www.yale.edu/lawweb/avalon/lieber. htm>.

Many of these Civil War military commissions addressed paradigmatic and egregious violations of the laws of war. For example, in January 1865, Confederate Captain Robert C. Kennedy, who had attempted to set fire to numerous buildings in New York City while dressed as a civilian, was convicted by a military commission of "'undertaking to carry on irregular and unlawful warfare.'" *Quirin*, 317 U.S. at 33 n.10 (citation omitted). Also tried by military commission in 1865 was Captain Henry Wirz, the Confederate commandant of Andersonville prison, where 13,000 Union army prisoners of war perished between 1864 and 1865. After the conclusion of the war, Wirz was tried by a commission in Washington, D.C. on charges of "cruel treatment and unlawful killing of prisoners of war under [his] charge." WINTHROP, *supra*, at 792. Wirtz was found guilty and sentenced to be hanged. *Id.*; Lewis L. Laska & James M. Smith, *"Hell and the Devil": Andersonville and the Trial of Captain Henry Wirz, C.S.A. 1865*, 68 MIL. L. REV. 77, 96 (1975); *see also* NEELY, *supra*, at 171 (noting that, in Missouri, where there was "widespread guerrilla warfare," scores of persons were tried by military commission for "serious crimes of guerrilla activity or joining the Confederate army").

Some of the particular uses of military commissions during

the Civil War were more controversial. For example, as the late Chief Justice Rehnquist noted, the decision to try the Lincoln-assassination conspirators "before a military commission was itself controversial and has remained so." WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 148 (1998). The military commission in that case, consisting of nine officers, found all eight of the defendants guilty of conspiring to kill Lincoln "in aid of the existing armed rebellion against the United States.'" *Id.* at 146 (citation omitted); *see also* id. at 162. On the question whether Lincoln's assassins could be tried by a military commission, Attorney General James Speed opined at the time that they "not only may but ought to be tried by a military tribunal." *Military Commissions*, 11 Op. Att'y Gen. 297, 298 (1865). Speed reasoned that the laws of war authorized military tribunals "to determine the fate of those who are active, but secret, participants in the hostilities," *id.* at 305, and that, in particular, assassination of the commander-in-chief during a time of war was a violation of the laws of war triable by military commission. *Id.* at 316.

The courts that have reviewed the question have upheld the use of military commissions to try the Lincoln conspirators. Three years after the trial, in July 1868, a Florida federal court so held in rejecting a habeas petition filed by co-conspirator Dr. Samuel Mudd. *Ex Parte Mudd*, 17 F. Cas. 954 (S.D. Fla. 1868). Adopting reasoning comparable to Speed's, the court held that the conspirators were properly tried before a military commission because they had assassinated "the Commander in Chief of the army for military reasons," namely, to "impair the effectiveness of military operations, and enable the rebellion to establish itself into a Government." 17 F. Cas. at 954. Some 133 years later, Mudd's grandson obtained a further review of the matter by filing an application with the Army Board for Correction of Military Records, and then seeking review under the Administrative Procedures Act when the Assistant Secretary of the

Army reversed the Board's grant of relief to Mudd. *Mudd v. Caldera*, 134 F. Supp. 2d 138, 140-42 (D.D.C. 2001). The district court held that the "decision to charge Mudd with a law of war violation" was supported by precedent and "cannot be disturbed," and that it was therefore "permissible for him to be tried before a military commission even though he was a United States and a Maryland citizen and the civilian courts were open at the time of his trial." *Id.* at 146-47.[8]

Other uses of military commissions during the Civil War—such as the trial of notorious "Copperhead" Clement Vallandigham on a dubious charge of "having expressed sympathies for those in arms against the Government of the United States," *Ex Parte Vallandigham*, 68 U.S. 243, 244 (1863)—pushed the boundaries of such jurisdiction and were controversial even among many supporters of the Union effort. *See generally* REHNQUIST, *supra*, at 62-73 (describing the considerable controversy that surrounded Vallandigham's prosecution). Nonetheless, this Court sidestepped, on jurisdictional grounds, any review of Vallandigham's conviction. 68 U.S. at 251-54.

After the Civil War was over, however, this Court disapproved a particular use of a military commission arising from that war. *Ex Parte Milligan*, 71 U.S. 2 (1866). Milligan had been convicted by a military commission on various charges, including "[v]iolation of the laws of war," in connection with his alleged participation in "a secret society" of Confederate sympathizers "known as the Order of American Knights or Sons of Liberty." *Id.* at 6-7. The Court rejected the notion that, under the laws of war, a military commission could have jurisdiction over Milligan, holding that he had been at all times "a citizen in civil life, in nowise connected with the

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[8] On Mudd's appeal, the D.C. Circuit declined to reach the merits, instead concluding that Mudd's descendants lacked standing. *Mudd v. White*, 309 F.3d 819 (D.C. Cir. 2002).

military service," and resident in a State "which has upheld the authority of the government, and where the courts are open and their process unobstructed." *Id.* at 121-22. The Court also rejected the argument that the actions taken against Milligan in Indiana were within the power of "martial law" administration, holding that the lack of hostilities in Indiana vitiated any reliance on martial law. *Id.* at 124-30. As this Court later explained in *Quirin*, the *Milligan* Court "was at pains to point out" that Milligan "*was not an enemy belligerent* either entitled to the status of a prisoner of war *or* subject to the penalties imposed upon unlawful belligerents." 317 U.S. at 45 (emphasis added). That is, "Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present...—martial law might be constitutionally established." *Id.*; *see also Hamdi*, 542 U.S. at 523 (plurality) (stating that *Quirin* "both postdates and clarifies *Milligan*").

E. The Modoc War

The United States again used military commissions in 1873 in connection with hostilities against the Modoc tribe in Oregon and California. On April 11, 1873, at a meeting between a U.S. peace commission and a delegation of Modocs to discuss terms of a peace treaty, the Modocs instead surprised the commissioners, assassinated two of them (one of whom was a General), and seriously wounded a third. *See* KEITH A. MURRAY, THE MODOCS AND THEIR WAR 136-39, 177-92 (1959); *see also The Modoc Indian Prisoners*, 14 Op. Att'y Gen. 249, 249-50 (1873). Within two months, the perpetrators were captured and hostilities effectively ceased. *Id.* at 250; MURRAY, *supra*, at 267-70. The War Department recommended that those responsible for the assassinations be tried for law-of-war violations before a military commission, and President Grant referred the matter to the Attorney General for his opinion. 14 Op. Att'y Gen. at 249-50.

Attorney General George H. Williams opined that the Modoc leaders could be tried by a military commission, which he described as deriving its "authority and validity from the common law of war." 14 Op. Att'y Gen. at 251. Noting various historical precedents for employing military commissions to try law-of-war violations, Williams concluded "that a military commission may be appointed to try such of the Modoc Indians now in custody as are charged with offenses against the recognized laws of war." *Id.* at 253. Specifically, Williams concluded that, "[a]ccording to the laws of war there is nothing more sacred than a flag of truce dispatched in good faith, and there can be no greater act of perfidy and treachery than the assassination of its bearers." *Id.* at 250. A military commission subsequently tried and sentenced to death six of the Modocs, but President Grant commuted two of the sentences to life imprisonment. MURRAY, *supra*, at 283-97.

F. World War II

Military commissions were again used to try law-of-war violations in the Spanish American War, the Philippine Insurrection, and World War I. *See* HOWARD S. LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES 16 (1993); Lacey, *supra*, 2002 ARMY LAWYER at 45. But World War II and its aftermath saw more extensive use of military commissions, and gave rise to at least three decisions of this Court that specifically upheld the use of such tribunals.

1. *Ex Parte Quirin*

In *Ex Parte Quirin*, this Court addressed the question whether trial of unlawful enemy combatants by military commission was "in conformity to the laws and Constitution of the United States." 317 U.S. at 18-19. The petitioners in *Quirin*, eight Germans who previously had lived in the U.S. for substantial periods of time before returning to Germany, had been trained in sabotage and sent by the German govern-

ment to the United States to destroy strategic military facilities. *Id.* at 20-21. After coming ashore in New York and Florida, they discarded their German military uniforms, dressed themselves as civilians, and proceeded on their mission, carrying explosives and incendiary devices. *Id.* at 21. Before the saboteurs could carry out their mission, FBI agents arrested them in New York and Chicago.[9] Shortly after the arrests, President Franklin D. Roosevelt issued a proclamation declaring that all persons "who give obedience to or act under the direction of" a nation at war with the United States, and enter or attempt to enter the United States during wartime "and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals." Proclamation No. 2561, 7 Fed. Reg. 5101 (July 3, 1942).

The commission trial began in Washington on July 8, 1942, and by July 27 all of the evidence had been received. 317 U.S. at 23. Before closing arguments, however, the petitioners sought leave to file a writ of habeas corpus in the district court, which denied the applications. *Id.* at 5-6. The petitioners thereupon filed an appeal to the D.C. Circuit and petitions for certiorari before judgment in this Court, which granted these petitions and set the cases for argument on July 29 and 30. *Id.* at 6, 18. On July 31, the Court issued a brief per curiam order affirming the judgment of the district court, denying leave to file habeas corpus petitions in this Court, and announcing that a more detailed opinion would be issued

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[9] The saboteurs had been captured only because one of them had a change of heart and turned himself in to the FBI. David J. Danelski, *The Saboteurs' Case,* 1996 JOURNAL OF S. CT. HISTORY 61, 64-65 (1996). The Government did not publicly reveal this fact at the time, presumably because in 1942 it was concerned that, if the Nazi authorities realized that the saboteurs had so easily managed to enter the U.S., the Germans might have been emboldened to try again. *Id.* at 66.

at a later date. *Id.* at 18 (unnumbered footnote). The trial resumed on August 1, and the commission convicted all eight defendants and sentenced them to death on August 3. *Danelski*, 1996 JOURNAL OF S. CT. HISTORY at 71. President Roosevelt thereafter commuted the sentences of the two cooperators (Dasch and Burger),[10] but he approved the sentences on the other six, all of whom were executed on August 8, 1942. *Id.* at 72.

On October 29, this Court issued a unanimous 30-page opinion explaining its decision to uphold the use of a military commission for the saboteurs. The Court noted that the Articles of War enacted by Congress in 1916 specifically recognized and preserved the validity of military commissions by providing that the court-martial jurisdiction created by the Articles did not "'depriv[e] military commissions ... of concurrent jurisdiction in respect of offenders or offenses that by statute *or the law of war* may be triable by such military commissions.'" 317 U.S. at 27 (quoting Article 15, 10 U.S.C. § 1486 (1940 ed.)) (emphasis added). Because the law of war was part of the law of nations, Congress has thus effectively exercised its constitutional power to "define and punish offenses against the law of nations" by sanctioning military commissions for those offenses that, under "the law of war, are cognizable by such tribunals." *Id.* at 28. In establishing the commission, the President has thus exercised the authority granted by Congress "and also such authority as the Constitution itself gives the Commander in Chief." *Id.*

In addressing whether the petitioners had committed an offense that, under the "law of war," was triable by military commission, the Court rejected the threshold argument that no reliance could be placed on the common law of war unless Congress itself first undertook "to codify that branch of inter-

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[10] The cooperators were released from prison in 1948 and deported back to Germany. Danelski, 1996 JOURNAL OF S. CT. HISTORY at 81 n.45.

national law." 317 U.S. at 29. The Court held that Congress had properly "incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war." *Id.* at 30; *see also id.* at 29 (stating that Congress may properly "adopt[] by reference the sufficiently precise definition of international law"). Turning to the charges against the petitioners, the Court had little difficulty concluding that, under the law of war, "[u]nlawful combatants" are "subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." *Id.* at 31. As "familiar examples" of such acts, the Court referred to spies and "enemy combatant[s] who without uniform come[] secretly through the lines for the purpose of waging war by destruction of life or property." *Id.*

The Court also specifically noted that this understanding of the law of war had been repeatedly affirmed in the historical practices of American military commanders. 317 U.S. at 31-32 & nn. 9 & 10 (citing, *inter alia*, the André case, General Scott's Mexican War commissions, the Lieber Code, and the Civil War commissions, including that for Captain Robert Kennedy). The historical record confirmed that it had been "recognized in practice both here and abroad" that individuals who enter a country's territory without uniform to destroy life and property within that country "have the status of unlawful combatants punishable as such by military commission." *Id.* at 35. Because the saboteurs had violated settled principles of the law of war by entering the United States to destroy strategic war industries "without uniform or other emblem signifying their belligerent status," they were unlawful combatants subject to trial and punishment by military commission. *Id.* at 31, 37.

The Court also rejected the petitioners' arguments that, under the Fifth and Sixth Amendments, they had to be charged by a grand jury and tried by a jury. 317 U.S. at 38-45. Just as the Fifth and Sixth Amendment guarantees had

always been construed as not extending to petty offenses not triable by jury at common law, so too those rights did not extend to military offenses that, under the common law of war, had long been tried by military tribunals. *Id.* at 39-40. Moreover, the long-standing historical practice of using military commissions confirmed that this was "a construction of the Constitution which has been followed since the founding of our Government." *Id.* at 41; *see also id.* at 42-44 n.14 (summarizing numerous examples of military tribunals since the founding of the Republic).

The Court also rejected the argument of petitioner Haupt—who claimed to be a U.S. citizen—that his trial by military commission was barred under *Ex Parte Milligan*. *Quirin*, 317 U.S. at 45-46. Stating that it "construe[d] the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it," the *Quirin* Court distinguished *Milligan* on the ground that "Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war." *Id.* at 45. The opposite was true in the saboteurs' case. *Id.* at 45-46.

2. *In re Yamashita*

Four years later, this Court again upheld the jurisdiction of a military commission, this time to try a Japanese general in the Philippines (then a U.S. territory) for violating the laws of war by failing to prevent soldiers under his control from committing widespread atrocities. *In re Yamashita*, 327 U.S. 1, 5, 14-16 (1946). The Court reaffirmed that the "congressional recognition of military commissions and its sanction of their use in trying offenses against the law of war ... sanctioned their creation by military command in conformity to long-established American precedents." *Id.* at 10. This authority to appoint a military commission to try law-of-war offenses flowed directly from the power to conduct war: "An important incident to the conduct of war is the adoption of

measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who ... have violated the law of war." *Id.* at 11. Moreover, the Court rejected Yamashita's argument "that there is no authority to convene a commission after hostilities have ended to try violations of the law of war committed before their cessation," instead holding that such authority existed "at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government." *Id.* at 12. The Court also rejected Yamashita's contentions that the charged offense did not state a violation of the law of war; that the proceedings of the commission should have followed the procedural prescriptions of the Articles of War; and that his trial violated the Geneva Convention of 1929. *Id.* at 13-26.

3. *Madsen v. Kinsella*

After World War II, this Court again approved of the use of military commissions, this time to try an American who murdered her U.S.-soldier husband in occupied Germany. *See Madsen v. Kinsella*, 343 U.S. 341 (1952). Although the petitioner agreed that she could have been tried by court-martial, she objected to the use of the special occupation military tribunals that had been established in Germany. 343 U.S. at 345. While the tribunal at issue in *Madsen* was an occupation court and not one established to try a violation of the law of war, the Court's analysis broadly surveyed the history of military commissions in general (*i.e.*, not just occupation courts) and reaffirmed their robust historical pedigree: "Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war." *Id.* at 346.

The *Madsen* Court's general observations concerning military commissions included two additional points that are worthy of note. First, the Court specifically concluded that, because neither the procedure nor the jurisdiction of military

commissions had been restricted by statute, the President, "as Commander-in Chief of the Army and Navy of the United States," may "in time of war, establish and prescribe the jurisdiction and procedure of military commissions." *Id.* at 347-48. Second, the Court rejected the petitioner's argument that the jurisdictions of courts-martial and military commissions were mutually exclusive, holding that, in preserving military-commission jurisdiction in Article 15 of the Articles of War, Congress had explicitly made the jurisdiction "'concurrent.'" *Id.* at 350-51 (quoting Article 15).[11]

III. CONGRESS AND THIS COURT HAVE EXPRESSLY SANCTIONED THE USE OF MILITARY TRIBUNALS TO TRY LAW-OF-WAR VIOLATIONS

Several conclusions follow from this long-established history of using military commissions to try enemies who violate the laws of war, and collectively they establish that Petitioner Hamdan's jurisdictional challenges to his commission are without merit.

First, the repeated and longstanding use of such commissions, even without specific congressional authorization, strongly confirms this Court's conclusion that the Executive's powers as Commander-in-Chief include the authority to establish commissions to try enemies who violate the laws of war. *Quirin*, 317 U.S. at 28. "A important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but *to seize and subject to disciplinary measures* those enemies who in their attempt to thwart or impede our military effort have

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[11] The use of military commissions was also authorized during the Korean War, but the authority was never invoked prior to the final exchange of prisoners between the sides. Daryl A. Mundis, *The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 AM. J. INT'L L. 320, 321 n.14 (2002).

violated the law of war." *Id.* at 28-29 (emphasis added); *see also Yamashita*, 327 U.S. at 11. Accordingly, "[i]n the absence of attempts by Congress to limit the President's power," there can be no question that the President may "in time of war, establish and prescribe the jurisdiction and procedure of military commissions." *Madsen*, 343 U.S. at 348; *see also Hamdi*, 542 U.S. at 518 (plurality) ("[T]he capture, detention, and *trial* of unlawful combatants, 'by universal agreement and practice,' are 'important incident[s] of war.'") (citation omitted) (emphasis added).

Second, not only has Congress refrained from limiting the President's ability to use military commissions, it has affirmatively endorsed and reaffirmed the exercise of such authority in accordance with traditional usage. *Yamashita*, 327 U.S. at 7-9; *Quirin*, 317 U.S. at 27-30. As this Court noted in those decisions, Congress in 1916 created an express statutory reservation of jurisdiction for military commissions in Article 15 of the revised Articles of War. Article 15 read:

> The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving *military commissions*, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or *offenses that by the law of war may be lawfully triable by such military commissions*, provost courts, or other military tribunals.

39 Stat. 651, 652-53 (1916) (emphasis added). As the *Quirin* Court correctly held, Congress thereby "explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases." 317 U.S. at 28; *see also Yamashita*, 327 U.S. at 10.

Moreover, the legislative history of Article 15 confirms what the text makes clear: Congress intended to permit the military to continue its well-established practice of trying law-of-war violations by military commission. During con-

gressional testimony regarding Article 15, Judge Advocate General Crowder stated, "A military commission is our common law war court. It has no statutory existence, though it is recognized by statute law." S. REP. NO. 130, 64th Cong., 1st Sess. 40 (1916). Crowder explained that Article 15 was necessary to permit continued use of military commissions—to save for military commissions "the jurisdiction they now have and make[] it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient." *Id.*

The congressional ratification of military-commission authority is further, and incontestably, confirmed by Congress' 1950 enactment of the Uniform Code of Military Justice ("UCMJ"), 64 Stat. 115 (1950) (codified at 10 U.S.C. §§ 801-947) (consolidating and reorganizing the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard). It is significant that, in undertaking this revision, Congress specifically retained the very language of Article 15 that this Court had definitively construed as authorizing the use of military commissions to try law-of-war offenses. Like Article 15 of the prior Articles of War, Article 21 of the UCMJ 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.

10 U.S.C. § 821. Further, Congress again recognized the valid use of military commissions in the UCMJ through Article 36, which permits the President to prescribe the procedures to be used "in courts-martial, military commissions and other military tribunals." 10 U.S.C. § 836.

If Congress had disapproved of *Quirin*'s and *Yamashita*'s interpretation and reliance on Article 15 of the Articles of War, presumably it would have deleted or modified the reservation-of-jurisdiction clause that had been construed in those cases. Instead, Congress retained Article 15, using virtually the same wording. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2130 (2005) (stating that "the legislative history of § 821 makes clear that Congress was aware of and accepted the Court's interpretation" of Article 15). In doing so, Congress unmistakably reaffirmed its approval of the use of military tribunals for trying law-of-war violations. *See, e.g., Keene Corp. v. United States*, 508 U.S. 200, 212 (1993) (when Congress reenacts language that has previously been definitively construed, "we apply the presumption that Congress was aware of these earlier judicial interpretations and, in effect, adopted them").

Third, because Congress explicitly stated that the traditional military-commission jurisdiction thus preserved is, to the extent of any overlap, "*concurrent*" to that of courts-martial under the UCMJ, 10 U.S.C. § 821 (emphasis added), there can be no serious argument that military commissions may only exercise jurisdiction in situations where courts-martial are unavailable. Indeed, this Court expressly so concluded in *Madsen*, 343 U.S. at 350-51 (noting that the use of "concurrent" in Article 15 compels this conclusion), and Congress retained that language in the UCMJ. Although Petitioner and many of his amici appear to think that it would be wise policy to limit the use of military commissions to a "gap-filling" jurisdiction, the political branches have instead chosen to preserve the flexibility to use special military tribunals that are "adapted in each instance to the need that called [them] forth." *Id.* at 347-48.

The historical evidence likewise refutes Petitioner's argument that military commissions have been permitted only "in

priate force" against al Qaeda in order to subdue it and prevent further attacks. Pub. L. No. 107-40, § 2(a), 115 Stat. at 224. That authorization specifically brings into play, to the full extent of the powers of both political branches, the ordinary "'incident[s] of war,'" including the "capture, detention, *and trial* of unlawful combatants" of the opposing force. *Hamdi*, 542 U.S. at 518 (plurality) (citation omitted) (emphasis added). Because the use of military commissions has been recognized since the Nation's founding as an important incident of the power to conduct congressionally authorized armed conflict, the President, as Commander-in-Chief, is empowered to use military commissions to investigate and punish enemy law-of-war violations.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February 2006

zones of active military operations and used to try war crimes or enforce justice in occupied territory when no other courts were open or had jurisdiction." Brief for Petitioner at 9-10; *see also* Brief *Amicus Curiae* of Louis Fisher at 11 (stating that military commissions "have traditionally been limited to a zone of combat operations or occupied territory"). As the court of appeals noted, the German saboteurs were tried "in Washington, D.C., in the Department of Justice building" and "the military commission in *Yamashita* sat in the Philippines"—at the time, American territory—"after Japan had surrendered." Pet. App. 6a-7a. Likewise, the Modoc conspirators were tried on American soil after active fighting had ceased. *See supra* at 15-16.[12]

Fourth, the historical precedents confirm that the authority to use military commissions does *not* depend upon a formal declaration of war. As set forth above, numerous examples of the use of military commissions arose during conflicts in which there was no formal declaration of war. *See supra* at 8-16 (describing the use of military commissions during the Seminole War, the Civil War, the Modoc War, and the Philippine Insurrection). In any event, Congress itself has explicitly acknowledged the existence of an armed conflict with al Qaeda—the "organization[]" that "planned, authorized, committed, [and] aided" the September 11 attack—and has authorized the President to use "all necessary and appro-

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[12] Because Petitioner's military commission is based on his status as someone who is a member or collaborator of al Qaeda—an organization with whom the U.S. is engaged in armed conflict—and who has committed a violation of the laws of war, Petitioner is mistaken in relying upon inapposite cases addressing the use of military commissions in connection with the imposition of martial law. Brief for Petitioner at 18, 25-26 (citing *Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946)). *See* John M. Bickers, *Military Commissions are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 TEX. TECH. L. REV. 899, 902-13 (2003) (discussing distinctions between these different uses of military commissions).

APPENDIX A

The following is a list of selected members of Citizens for the Common Defence:

Jackie M. Bennett, Jr.
Bradford A. Berenson
Richard D. Bernstein
Robert H. Bork
Adam H. Charnes
Miguel A. Estrada
Eric George
Ed R. Haden
Charles C. Hwang
Christopher Landau
Kevin P. Martin
Christopher D. Moore
Ryan D. Nelson
Christopher Oprison
Eugene Volokh