IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. HICKS, Petitioner, v. GEORGE WALKER BUSH, President of the United States, *et al.,* Respondents.	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

TABLE OF CONTENTS

PAGE

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).

---

[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

[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

---

[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

[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.

[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

---

¶ 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]

---

[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]

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]

---

[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

---

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)).

---

[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]

[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

---

[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.

---

[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

---

[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]

[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

---

[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.

---

[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.).

[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.

---

[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

---

[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").

[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]

---

[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.

---

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

---

[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]

---

[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.

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]

[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

---

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,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

DOUGLAS N. LETTER
Terrorism Litigation Counsel

/s/ Terry M. Henry / Nicholas J. Patterson
JOSEPH H. HUNT (D.C. Bar No. 431134)
VINCENT M. GARVEY (D.C. Bar No. 127191)
TERRY M. HENRY
ANDREW I. WARDEN
NICHOLAS J. PATTERSON
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, DC 20530
Tel: (202) 514-4107
Fax: (202) 616-8470

Attorneys for Respondents