[ORAL ARGUMENT SCHEDULED FOR MARCH 8, 2005]

No. 04-5393

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

SALIM AHMED HAMDAN,
Petitioner-Appellee,

v.

DONALD H. RUMSFELD, U.S. SECRETARY OF DEFENSE, ET AL.,
Respondents-Appellants.

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

BRIEF FOR APPELLANTS

PAUL D. CLEMENT
Acting Solicitor General

CHRISTOPHER A. WRAY
Assistant Attorney General

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
Acting United States Attorney

GREGORY G. KATSAS
Deputy Assistant Attorney General

JONATHAN L. MARCUS
Assistant to the Solicitor General

DOUGLAS N. LETTER
(202) 514-3602
ROBERT M. LOEB
(202) 514-4332
AUGUST FLENTJE
SHARON SWINGLE
ERIC MILLER
Attorneys, Appellate Staff
Civil Division, Room 7268
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

STEPHAN E. OESTREICHER, JR.
Criminal Division, Appellate Section

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici.

1. The named petitioner-appellee is Salim Ahmed Hamdan. The habeas petition was originally brought in the name of his lawyer, Charles Swift, as "next friend" to Hamdan. The petition has since been amended to be in Hamdan's name only.

2. Respondents-Appellants are: Donald H. Rumsfeld, United States Secretary of Defense; John D. Altenburg, Jr., Appointing Authority for Military Commissions, Department of Defense; Brigadier General Thomas L. Hemingway, Legal Advisor to the Appointing Authority for Military Commissions; Brigadier General Jay Hood, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; George W. Bush, President of the United States.

3. Amici appearing in the district court were: Allied Educational Foundation, Washington Legal Foundation; a group of 16 law professors (Bruce Ackerman, Rosa Ehrenreich Brooks, Sarah H. Cleveland, William S. Dodge, Martin S. Flaherty, Ryan Goodman, Oona Hathaway, Derek Jinks, Kevin R. Johnson, Jennifer S. Martinez, Judith Resnik, David Scheffer, Anne-Marie Slaughter, David Sloss, Carlos M. Vazquez, David C. Vladeck); a group of four retired Generals and Admirals (Richard O'Meara, John D. Hutson, Lee F. Gunn, David M. Brahms); Center for International Human Rights of Northwestern University School of Law, Louise Doswald-Beck,

Guy S. Goodwin-Gill, Frits Kalshoven, and Marco Sassoli; and "271 United Kingdom and European Parliamentarians."

B. Rulings Under Review.

This appeal is from the district court's order in *Hamdan* v. *Rumsfeld, et al.*, No. 04-CV-1519, 2004 WL 2504508 (D.D.C. Nov. 8,. 2004)(Robertson, J.). The notice of appeal was filed on November 12, 2004.

C. Related Cases.

There are several related cases brought by detainees at the Guantanamo Naval Base pending in the district court in this Circuit:

1. *Hicks (Rasul) v. Bush*, S. Ct.; D.C. Cir. No. 02-5284; No. 02-CV-0299 (D.D.C.) (J. Kollar-Kotelly)
2. *Al-Odah v. United States*, No. 02-CV-0828 (D.D.C.) (J. Kollar-Kotelly)
3. *Habib v. Bush*, No. 02-CV-1130 (D.D.C.) (J. Kollar-Kotelly)
4. *Kurnaz v. Bush*, No. 04-CV-1135 (D.D.C.) (J. Huvelle)
5. *O.K. v. Bush*, No. 04-CV-1136 (D.D.C.) (J. Bates)
6. *Begg v. Bush*, No. 04-CV-1137 (D.D.C.) (J. Collyer)
7. *Khalid (Benchellali) v. Bush*, No. 04-CV-1142 (D.D.C.) (J. Leon)
8. *El-Banna v. Bush*, No. 04-CV-1144 (D.D.C.) (J. Roberts)
9. *Gherebi v. Bush*, No. 04-CV-1164 (J. Walton)
10. *Boumediene v. Bush*, No. 04-CV-1166 (D.D.C.) (J. Leon)

11. *Anam v. Bush*, No. 04-CV-1194 (D.D.C.) (J. Kennedy)

12. *Almurbati v. Bush*, No. 04-CV-1227 (J. Walton)

13. *Abdah v. Bush*, No. 04-CV-1254 (D.D.C.) (J. Kennedy)

14. *Belmar v. Bush*, No. 04-CV-1997 (D.D.C.) (J. Collyer)

15. *Al-Qosi v. Bush*, 04-CV-1937 (D.D.C.) (J. Friedman).

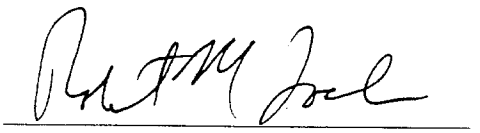
16. *Jarallah Al-Marri v. Bush* (we have been informed that this suit will be filed in the D.C. federal district court shortly, but it has not been docketed yet).

17. *Al-Marri v. Bush*, 04-CV-2035-GK (J. Kessler)

18. *Paracha v. Bush*, 04-CV-2022-PLF (J. Friedman)

19. *Zemiri v. Bush*, 04-CV-2046-CKK (J. Kollar-Kotelly)

Counsel is not aware at this time of any other related cases within the meaning of D.C. Cir. Rule 28(a)(1)(C).



Robert M. Loeb
Counsel for Appellants

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GLOSSARY

AUMF	Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)
CSRT	Combatant Status Review Tribunal
Geneva Convention	Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949
JA.	Joint Appendix
Military Order	Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001)
POW	Prisoner of war
UCMJ	Uniform Code of Military Justice

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANTS

STATEMENT OF JURISDICTION

On November 8, 2004, the district court granted in part the habeas corpus petition of Salim Ahmed Hamdan, a trained al Qaeda operative and driver for international terrorist leader Osama bin Laden. Hamdan is currently detained by the U.S. military at Guantanamo Bay Naval Base in Cuba, and he has been charged in military proceedings with conspiring to commit murder and terrorism, among other offenses. The district court's jurisdiction was invoked by Hamdan under 28 U.S.C. §§ 1331, 1361, 1391, 1651, 2241, and 5 U.S.C. § 702.

In its November 8 ruling, the court enjoined the current military commission proceedings against Hamdan and ordered him released to the general detention population at Guantanamo. On November 12, 2004, the Government filed a notice of appeal from the district court's November 8 order. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the district court erred in refusing to abstain from interfering with ongoing military commission proceedings instead of awaiting their outcome.

2. Whether the district court erred in holding that Hamdan has judicially enforceable rights under the current Geneva Convention Relative to the Treatment of Prisoners of War (Aug. 12, 1949, T.I.A.S. No. 3364, 6 U.S.T. 3316) (Geneva Convention).

3. Whether the district court erred in overruling the President's determination as Commander in Chief that al Qaeda combatants are not covered by the Geneva Convention.

4. Whether the district court erred in holding that Hamdan has a colorable claim of prisoner-of-war status under the Geneva Convention.

5. Whether the district court erred in holding that the federal regulations governing military commissions must conform to the provisions in the Uniform

Code of Military Justice (UCMJ) that apply only to courts-martial.

6. Whether the President has inherent power to establish military commissions.

STATEMENT OF THE CASE

Hamdan was captured in Afghanistan in November 2001. Because of his close link to al Qaeda and Osama bin Laden, the U.S. military, at the direction of the President, is detaining him at Guantanamo as an enemy combatant and has charged him with conspiring to commit murder, terrorism, and other offenses against the laws of war. Military commission proceedings against Hamdan on this charge were underway when the district court took the unprecedented step of enjoining them. The court held that it had the authority to intervene before the proceedings were completed, that Hamdan has judicially enforceable rights under the Geneva Convention that precluded his trial before a military commission, that the Geneva Convention is applicable to an al Qaeda detainee, and that Congress has imposed limits on the President's authority to convene a military commission to try offenders against the laws of war. The court further ordered Hamdan released into the general detention population at Guantanamo. The Government immediately appealed, and this Court granted the motion to expedite this appeal.

TREATY, STATUTORY AND REGULATORY PROVISIONS AT ISSUE

The relevant texts of the Geneva Convention, the Uniform Code of Military Justice, the President's Order establishing military commissions, the federal regulations governing military commissions, the Authorization for Use of Military Force, the President's Memorandum regarding the applicability of the Geneva Conventions to al Qaeda and the Taliban, and Army regulation 190-8 are set forth in an addendum to this brief.

STATEMENT OF THE FACTS

A. On September 11, 2001, the United States endured a foreign enemy attack more savage, deadly, and destructive than any sustained by the Nation on any one day in its history. That morning, agents of the al Qaeda terrorist network hijacked four commercial airliners and crashed them into targets in the Nation's financial center and its seat of government. The attacks killed approximately 3,000 persons and caused injury to thousands more persons, destroyed billions of dollars in property, and exacted a heavy toll on the Nation's infrastructure and economy.

The President took immediate action to defend the country and prevent additional attacks. Congress swiftly enacted its support of the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist

attacks that occurred on September 11, 2001." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) (AUMF).

The President ordered the armed forces of the United States to subdue the al Qaeda terrorist network, as well as the Taliban regime in Afghanistan that supported it. In the course of those armed conflicts, the United States, consistent with the Nation's settled practice in times of war, has seized numerous persons fighting for the enemy and detained them as enemy combatants. Equally consistent with historical practice, the President ordered the establishment of military commissions to try members of al Qaeda and others involved in international terrorism against the United States for violations of the laws of war and other applicable laws. In doing so, the President expressly relied on "the authority vested in me * * * as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the [AUMF] * * * and sections 821 and 836 of title 10, United States Code." Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001) (Military Order).

In July 2003, the President, acting pursuant to the Military Order, designated Hamdan for trial before a military commission, finding "that there is reason to believe that [Hamdan] was a member of al Qaeda or was otherwise

involved in terrorism directed against the United States." JA 74. Hamdan was charged with a conspiracy to commit attacks on civilians and civilian objects, murder and destruction of property by an unprivileged belligerent, and terrorism. JA 192.

The charge against Hamdan arises out of his close connection to bin Laden and his participation in al Qaeda's campaign of international terrorism against the United States. JA 191-194. Hamdan served as bin Laden's bodyguard and personal driver. In that capacity, he delivered weapons and ammunition to al Qaeda members and associates; transported weapons from Taliban warehouses to the head of al Qaeda's security committee at Qandahar, Afghanistan; purchased or otherwise secured trucks for bin Laden's bodyguard detail; and drove bin Laden and other high-ranking al Qaeda operatives in convoys with armed bodyguards. JA 193.

The charge also alleges that Hamdan was aware during this period that bin Laden and his associates had participated in terrorist attacks against U.S. citizens and property, including the September 11 attacks. JA 193. Hamdan received terrorist training himself, learning to use machine guns, rifles, and handguns at an al Qaeda training camp in Afghanistan. *Ibid.*

In the military commission proceedings at Guantanamo, Hamdan has legal

counsel appointed to represent him. This commission consists of three military officers of the rank of colonel. Hamdan has the right to a copy of the charge in a language he understands, the presumption of innocence, and proof beyond a reasonable doubt. He may confront witnesses against him and subpoena his own witnesses, if reasonably available. Hamdan will have access to all evidence, except classified material, which must be provided to his counsel. If Hamdan is found guilty by the commission, that judgment will be reviewed by a review panel, the Secretary of Defense, and ultimately the President, if he does not designate the Secretary as the final decisionmaker. 32 C.F.R. Pt. 9.

While at Guantanamo, Hamdan has also been given a hearing before a Combatant Status Review Tribunal, which confirmed that he is an enemy combatant who is "either a member of or affiliated with Al Qaeda," subject to continued detention. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (plurality opinion); *id.* at 2678-2679 (Thomas, J. dissenting); *see* JA 243-244, 249-251

B. Hamdan's counsel instituted these proceedings by filing a petition for mandamus or habeas corpus in the United States District Court for the Western District of Washington, alleging in relevant part that trial before a military commission rather than a court-martial convened under the UCMJ would be unconstitutional and a violation of the Geneva Convention. JA 38-68. While

Hamdan acknowledged in his petition that he worked for bin Laden for many years prior to his capture, *see* Pet. ¶¶ 15-16, he asserted that he was unaware of bin Laden's terrorist activities, *id.* ¶ 19. The district court in Washington transferred the case to the District of Columbia.

The district court here granted the petition in part, holding that Hamdan could not be tried before a military commission. JA 371-372. The court first declined to abstain from interrupting the pending military commission proceedings; the court determined that it could stop them in their tracks[1] simply because Hamdan challenged the jurisdiction of the commission over him. JA 378-380.

Next, the court ruled that the military commission lacked jurisdiction over Hamdan because a "competent tribunal" had yet to determine whether Hamdan was entitled to prisoner-of-war (POW) status under the Geneva Convention, a status that the court believed would preclude his trial by military commission. In so holding, the district court determined that the Convention grants Hamdan rights enforceable in federal court and overruled the President's determination that al Qaeda combatants are not covered by it. JA 387, 394-397.

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[1] The Commission was in the midst of conducting a hearing on Hamdan's motions — which raise the very same challenges Hamdan raises in his federal petition — when it received word of the district court's order.

The court further held that, even if a "competent tribunal" determines that Hamdan is an unlawful enemy combatant rather than a POW, he can be tried by a military commission only if the commission rules are amended so that they are consistent with Article 39 of the UCMJ, which governs the presence of the accused at a court-martial.

Based on these legal rulings, the court took the extraordinary step of enjoining the ongoing military commission proceedings and ordered Hamdan released to the general detention population at Guantanamo Bay Naval Base. JA 371-372.

SUMMARY OF ARGUMENT

The district court's deeply flawed ruling constitutes an extraordinary intrusion into the Executive's power to conduct military operations to defend the United States. In a case where the district court should have simply abstained, it instead engaged in a wide-ranging analysis of enemy status and international treaties in which it gave greater weight to advice the President did not adopt than to the President's own determinations. The resulting opinion erroneously interprets United States and international law in ways that would give enemy combatants unprecedented access to the United States courts. Indeed, the court's ruling applies not to lawful combatants, but to terrorists such as bin Laden and

other al Qaeda leaders and operatives, despite the Executive's determination that, as a terrorist organization that is not a party to the Geneva Convention and openly flouts the laws of war, al Qaeda is not entitled to the protections that contracting parties agree will govern their mutual relations. And, by ruling that any combatant — including a known al Qaeda operative — is presumptively protected under the Geneva Convention based solely on his unsupported claim of entitlement, the district court has expanded the Convention's protections far beyond the scope agreed to by the Executive with the advice and consent by the Senate. Finally, the district court held invalid the President's authority, exercised since the Revolutionary War and inherent in his role as Commander in Chief, to establish military tribunals to punish enemy violations of the laws of war. Each of these unprecedented rulings would be a ground for reversal and should be repudiated; that they were made in a case in which the district court should not have exercised jurisdiction in the first instance merely underscores that the district court's analysis was wrong.

I. The district court erred in failing to abstain from interrupting Hamdan's trial by military commission. The Supreme Court has instructed that courts should not entertain an attack on ongoing military proceedings, even if the challenge is framed in jurisdictional terms. Although there is a limited exception

for challenges brought by U.S. civilians subjected to military proceedings, it does not apply to Hamdan, an alien enemy combatant charged with an offense against the laws of war. Judicial interference in Hamdan's trial would improperly intrude on the Executive's conduct of war, and require consideration of a host of legal questions that may be wholly unnecessary to resolve if the military proceedings are allowed to run their course. Thus, Hamdan's premature challenge should not have been considered until military proceedings are complete.

II. Having decided to consider Hamdan's claims, the district court ruled that the military commission lacks jurisdiction over Hamdan, because a "competent tribunal" has not determined whether Hamdan, notwithstanding his status as an al Qaeda operative, is a POW under Article 4 of the Geneva Convention. In the absence of a determination that Hamdan is not a POW, the court ruled that the Convention requires that Hamdan may only be tried by court-martial. In so ruling, the district court made several independent legal errors.

As an initial matter, the district court erred in holding that the Geneva Convention provides Hamdan with rights enforceable by individuals in the courts of the United States. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Supreme Court concluded that the 1929 Geneva Convention, the predecessor to the 1949 Convention, did not confer rights enforceable in our domestic, civilian

courts. The Court recognized that enforcement of the treaty is instead a matter of state-to-state relations. There is no indication in the 1949 Convention's text or drafting and ratification history to suggest that the President, the Senate, or the other ratifying nations meant to make a truly revolutionary change by creating judicially enforceable rights. To the contrary, the Convention sets out a detailed dispute-resolution procedure making no mention of litigation in the domestic courts of signatory nations.

By permitting captured enemies to continue their fight in our courts, the district court's holding threatens to undermine the President's power to subdue those enemies. Not surprisingly, there is no indication that either the President or the Senate countenanced such a result when the Convention was ratified.

The district court justified this extraordinary and counterintuitive result on the ground that it was compelled by Article 21 of the UCMJ. That provision merely preserves the historical jurisdiction of military commissions over offenses against the laws of war in the face of the extension of courts-martial jurisdiction effected by the UCMJ. Article 21 in no way limits the President's authority under the Constitution to subject alleged offenders against the laws of war to trial by military commission, let alone provides a backdoor mechanism for judicial enforcement of the Geneva Convention at the behest of enemy aliens. Rather, as

the Supreme Court has repeatedly held, Article 21 reflects Congressional recognition and preservation of the President's authority to establish military commissions as he deems necessary to try enemy belligerents for offenses against the laws of war.

Having erroneously concluded that the Geneva Convention is judicially enforceable at the behest of enemy fighters generally, the district court compounded that error by holding the Convention specifically enforceable by Hamdan, a confirmed al Qaeda operative. That latter holding required the district court to overrule the President's determination that the Geneva Convention does not extend to al Qaeda operatives. The President's decision that a foreign terrorist network is not a party to a treaty and does not enjoy protections under that treaty, however, is an exercise of his Commander-in-Chief and foreign-affairs powers not subject to countermand by the courts.

Even if the President's determination about the coverage of the Geneva Convention were judiciary reviewable, it is plainly correct. By its terms, the Convention applies to cases of "armed conflict which may arise between two or more of the High Contracting Parties." Al Qaeda is not a "High Contracting Party" to the Geneva Convention, which it is has not signed — nor could it do so, since it is obviously not a state. Because the President has authoritatively and

correctly determined that the Geneva Convention does not cover al Qaeda, the military commission's jurisdiction over Hamdan is not dependent on compliance with the Convention's provisions.

Even assuming that the Geneva Convention applied to al Qaeda and was judicially enforceable by captured enemy fighters, the district court further erred in holding that Hamdan had raised a colorable claim of POW status. Even if al Qaeda were a party to the Convention, Hamdan could not qualify as a POW because al Qaeda does not meet *any* of the requirements set out in Article 4 of the Convention, such as wearing a distinctive sign and conducting operations "in accordance with the laws and customs of war." Indeed, Hamdan has never even claimed that he is part of a group entitled to lawful belligerent status. Rather, his claim all along has been that, notwithstanding his close ties to bin Laden, he is an innocent civilian – a claim he is free to raise as a defense before the military commission. Moreover, to the extent that that claim ever raised a relevant "doubt" under Article 5 of the Geneva Convention, a competent tribunal – the Combatant Status Review Tribunal – put it to rest when it confirmed the military's prior determination, reflected in the Charge, that Hamdan is an al Qaeda operative. Because there is no doubt as to Hamdan's status, there is no need for yet another tribunal (other than the military commission itself) to consider Hamdan's claim

that he is a civilian, and he has made no claim to being a lawful belligerent that would call his status into question or require the convening of an Article 5 tribunal.

III. The district court also ruled that, even if another competent tribunal is convened and determines that Hamdan is not a POW such that he is eligible for trial by military commission, Hamdan still must be provided the functional equivalent of a court-martial. The district court predicated this ruling not on the Geneva Convention, but rather on its interpretation of the UCMJ. In particular, the district court ruled that, because Article 36 of the UCMJ provides that the rules the President prescribes for military commissions "may not be contrary to or inconsistent with" the UCMJ, the military commission rules cannot materially diverge from those rules in the UCMJ that are facially applicable only to courts-martial. The district court's conclusion that Article 36 imposes substantial restrictions on the President's authority to use military commissions is no less flawed than its parallel interpretation of Article 21.

Congress has never sought to regulate military commissions comprehensively; rather, it has recognized and approved the President's historic use of military commissions as he deems necessary to prosecute offenders against the laws of war. Article 21 itself reflects Congress's hands-off approach to

military commissions, as does the fact that only eight other articles of the UCMJ even mention them. If, as the district court would have it, the military commission must follow the UCMJ rules that apply to courts-martial only, then the UCMJ's provisions that expressly apply to military commissions would be superfluous. Moreover, if military commissions must follow the same procedures as courts-martial, there is no point in having a military commission, whose jurisdiction the UCMJ recognizes precisely because of the historic authority and flexibility the President has had to administer justice to enemy fighters who commit offenses against the laws of war. Finally, the district court's reading of Article 36 creates grave doubts about its constitutionality, because that reading frustrates the exercise of the President's war powers.

STANDARD OF REVIEW

The district court's ruling is based upon several errors of law subject to *de novo* review. *United States v. Bookhardt*, 277 F.3d 558, 564 (D.C. Cir. 2002).

ARGUMENT

I. THE DISTRICT ERRED IN REFUSING TO ABSTAIN FROM INTERRUPTING HAMDAN'S TRIAL BEFORE THE MILITARY COMMISSION.

The district court concluded that it had authority to intervene in the ongoing military proceedings upon finding that Hamdan had raised a "substantial" challenge to the commission's jurisdiction. JA 379-380. This finding is badly flawed and calls for reversal.

The Supreme Court has instructed that a civilian court should normally await the final outcome of ongoing military proceedings before entertaining an attack on those proceedings. In *Schlesinger v. Councilman*, 420 U.S. 738 (1975), the Supreme Court explained that the need for protection against judicial interference with the "primary business of armies and navies to fight or be ready to fight wars" "counsels strongly against the exercise of equity power" to intervene in an ongoing court-martial. 420 U.S. at 757 (quotation omitted). The Court held that even a case with relatively limited potential for interference with military action — *i.e.*, the prosecution of a serviceman for possession and sale of marijuana — implicated "unique military exigencies" of "powerful" and "contemporary vitality." *Ibid.* These exigencies, the Court held, should normally preclude a court from entertaining "habeas petitions by military prisoners unless all available

military remedies have been exhausted." *Id.* at 758.

In addition to underscoring the military factors supporting abstention, the *Councilman* Court emphasized that abstention would properly respect the judgment of a coordinate branch of government that military prosecution and review were the best way to balance "military necessities" with "ensuring fairness to servicemen charged with military offenses." *Id.* at 757. The military forum could also be expected to gain "familiarity with military problems" and corresponding expertise. *Id.* at 758.

Finally, the *Councilman* Court emphasized prudential considerations in support of abstention. Although the petitioner in *Councilman* had alleged that the military court-martial lacked jurisdiction to try him, "whether he would be convicted was a matter entirely of conjecture," and "there was no reason to believe that his possible conviction inevitably would be affirmed." *Id.* at 754. Awaiting the outcome of the military proceedings would permit any eventual judicial review to "be informed and narrowed," thus avoiding "duplicative proceedings" and judicial involvement that, in hindsight, turned out to be unnecessary. *Id.* at 756-757.

The factors the Court emphasized in *Councilman* apply *a fortiori* here, where the military seeks to adjudicate war crimes in the midst of an ongoing war,

as opposed to off-post marijuana dealings in Oklahoma. The potential for interfering with the military's primary mission, for disturbing the delicate national security balance struck by the President, and for reaching unnecessary holdings are all magnified here. Indeed, Hamdan's trial implicates military exigencies of the highest order — enforcing the laws of war against an enemy force that is targeting civilians for mass death — a task surely as exigent as maintaining discipline in the Nation's own troops. *See Yamashita v. Styer*, 327 U.S. 1, 11 (1946) ("trial and punishment of enemy combatants" for war crimes is "part of the conduct of war operating as a preventive measure against such violations").

The district court nevertheless refused to abstain because it viewed the petition as raising a substantial challenge to the military commission's jurisdiction over him. JA 379. The precedent of the Supreme Court and this Court make clear, however, that there is no general exception to *Councilman* for a "jurisdictional challenge." *See Councilman*, 420 U.S. at 741-742, 758-759; *New v. Cohen*, 129 F.3d 639, 644-646 (D.C. Cir. 1997). In fact, *Councilman* and *New* both involved jurisdictional challenges. Moreover, if abstention were held not to apply to military prisoners raising jurisdictional challenges, abstention would be a meaningless doctrine, since absent a statutory right of review, judicial scrutiny of military proceedings is limited to review for jurisdictional or other

fundamental defects. *See, e.g.*, *Councilman*, 420 U.S. at 746-747.

There is a narrow exception to the general rule against intervention in pending military proceedings, but it applies only in cases brought by *U.S. citizen civilians*, who assert a substantial claim that the military has no authority over them *at all*. *See New*, 129 F.3d at 152. In cases applying the exception, it was "undisputed that the persons subject to the court-martials either never had been, or no longer were, in the military," and thus appeared to be outside military jurisdiction altogether. *Ibid* (citing *McElroy v. U.S. ex rel. Guagliardo*, 361 U.S. 281 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11 (1955)). The issue raised in those cases was thus "whether under Art. I Congress could allow the military to interfere with the liberty of civilians *even for the limited purpose of forcing them to answer to the military justice system.*" *Councilman*, 420 U.S. at 759 (emphasis added).

Here, in contrast, requiring Hamdan to complete the military commission proceedings before invoking the equity jurisdiction of a federal court does not raise unfairness or liberty concerns. Hamdan is being detained as an enemy combatant and will continue to be detained as such whether his trial goes forward before a military commission or other military tribunal. *See Hamdi*, 124 S. Ct. at 2639-2643. Given that Hamdan clearly falls within the jurisdiction and authority

of the military, as the district court itself recognized, JA 398, his circumstances are akin to those of the service member in *Councilman*, who likewise was unquestionably "subject to military authority." *Councilman*, 420 U.S. at 759; *see also New*, 129 F.3d at 644-645.

The *Reid* and *Toth* line of cases is patently inapplicable not only in light of Hamdan's confirmed status as an enemy combatant, but also because Hamdan is not a U.S. citizen. The premise for *Reid* and *Toth* was the constitutional liberty interest that a citizen, but not an alien abroad, enjoys. As an alien with no voluntary ties to the United States, Hamdan "can derive no comfort" from those cases. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 270 (1990); *see also 32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002); *Harbury v. Deutch*, 233 F.3d 596, 602-604 (D.C. Cir. 2000), *rev'd on other grounds sub nom.*, 536 U.S. 403 (2002).

The district court also cited *Parisi* v. *Davidson*, 405 U.S. 34 (1972), for the proposition that it was not required to abstain. In *Parisi*, the Court held that a habeas action challenging the rejection of an application for discharge from the armed forces could proceed despite ongoing court-martial proceedings related to the petitioner's refusal to board a plane to Vietnam. Like the petitioner in *New*, however, Hamdan "can find no solace in *Parisi*," where the "doctrine of comity

was seen to have no application * * * because the military tribunal could not award the service member the desired relief — conscientious objector discharge — in conjunction with the court-martial proceedings." 129 F.3d at 646; *see Parisi*, 405 U.S. at 41 (habeas petition relating to discharge "was independent of the military criminal proceedings"). Hamdan has raised the same legal claims that form the basis for his habeas corpus petition in the proceedings before the military commission, which is fully capable of addressing them and providing a remedy if appropriate. This case thus presents the "direct intervention" in pending military proceedings decried as improper in *Parisi*, 405 U.S. at 41; see also *New*, 129 F.3d at 644 (refusing to "extend the *Parisi* exception beyond the circumstances of that case").

Finally, in the district court, Hamdan relied on *Ex parte Quirin*, 317 U.S. 1 (1942), to support his assertion that abstention was unwarranted. His reliance is misplaced. First, the petitioners there, which included a presumed U.S. citizen, faced imminent execution, which is not the case here. Second, the government did not ask the *Quirin* Court to abstain. Third, the case was decided long before *Councilman*, which sets out the governing rule for abstention in challenges to military proceedings and before precedent definitively establishing the constitutionality of military commissions. Compare *Ex parte Milligan*, 71 U.S. (4

Wall.) 2 (1866) (the most apposite precedent when *Quirin* was decided), with *Quirin*, 317 U.S. 1 (upholding military commission proceedings); *Yamashita*, 327 U.S. 1 (same); *Johnson v. Eisentrager*, 339 U.S. 763, 785-790 (1950) (same in dicta); *Madsen v. Kinsella*, 343 U.S. 341 (1952) (same).

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE MILITARY COMMISSION LACKED JURISDICTION OVER HAMDAN.

The district court held that the military commission cannot assert jurisdiction over Hamdan, a confirmed al Qaeda combatant charged with an offense against the laws of war, until and unless a "'competent tribunal' referred to in Article 5 [of the Geneva Convention] concludes" that Hamdan is not entitled to the protections that the Geneva Convention affords prisoners of war. JA 398. That holding is premised on a series of deeply flawed and logically anterior legal rulings — that the Geneva Convention is judicially enforceable at the behest of a captured enemy fighter; that, contrary to the President's determination, the Geneva Convention applies to al Qaeda operatives; and that Article 5 of the Convention and a corresponding Army regulation compel the convening of yet another tribunal to consider Hamdan's claim that he is a civilian — all of which are necessary steps to the erroneous result the court reached.

A. The Geneva Convention Does Not Provide Hamdan Judicially Enforceable Rights.

The district court erred in holding that Hamdan has judicially enforceable rights under the Geneva Convention.[2] Enforcement of the Convention is a matter of State-to-State relations, not judicial resolution.

1. As this Court has explained, "[s]ince * * * 1796, the courts of this country have uniformly held that it is not for the judiciary to determine whether a treaty has been broken either by the legislature or the executive, and, accordingly, have consistently declined jurisdiction of such matters." *Z. & F. Assets Realization Corp. v. Hull*, 114 F.2d 464, 471 (D.C. Cir. 1940) (footnotes omitted), *aff'd on other grounds*, 311 U.S. 470 (1941); *see also Canadian Trans. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980). As a rule, "[a] treaty is primarily a compact between independent nations." *Head Money Cases*, 112 U.S. 580, 598 (1884).

Significantly for the case at bar, judicial enforcement of a treaty is not presumed. Rather, absent a clear intent to the contrary, a treaty "depends for the

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[2] The Third Geneva Convention of 1929 was adopted as an extension to the protections provided by the Hague Convention of 1907. It was revised in 1949, with the modified form adopted on August 12, 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, and entered into force on October 21, 1950. The Treaty was ratified by the Executive with advice and consent of Senate on February 2, 1956.

enforcement of its provision[s] on the interest and the honor of the governments which are parties to it." *Head Money Cases,* 112 U.S. at 598; *accord Charlton*, 229 U.S. at 474.

Thus, the Supreme Court has long held that, in regard to individuals seeking enforcement of a treaty, "judicial courts have nothing to do and can give no redress." *Head Money Cases*, 112 U.S. at 598; *accord Whitney v. Robertson,* 124 U.S. 190, 194-195 (1888); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988) (refusing to adjudicate the claim that U.S. policy and actions concerning Nicaragua violated the U.N. Charter); *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972) (rejecting claim based on alleged violations of the NATO Status of Forces Agreement). The treaty "addresses itself to the political, not the judicial department; and the legislature must execute the [treaty] before it can become a rule for the Court." *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.).

2. The district court's ruling that the Geneva Convention confers individual rights enforceable through suits in our domestic, civilian courts is not only contrary to the general rule, but it also disregards the text and history of the Convention, as well as the ramifications of such a conclusion.

As an initial matter, any examination of whether the Convention provides

individuals with judicially enforceable rights must begin with the fact that the Supreme Court held that the 1929 Geneva Convention did *not* provide such rights. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court expressly concluded that German prisoners of war challenging the jurisdiction of a military tribunal "could not" invoke the 1929 Third Geneva Convention because the protections afforded under it were not judicially enforceable by the captured party. *Id.* at 789. Rather, the Court held, those protections "are vindicated under it only through protests and intervention of protecting powers." *Id.* at 789 n.14.[3]

This Court, too, has recognized that the 1929 version of the Third Geneva Convention did not provide individuals with judicially enforceable rights. In *Holmes*, 459 F.2d at 1221-22, the Court explained that "the obvious scheme of the Agreement [is] that responsibility for observance and enforcement of these rights is upon political and military authorities, and that rights of alien enemies are vindicated under it only through protests and intervention of protecting powers * * *." *Id.* at 1222 (footnotes and quotations omitted).

When the President ratified and the Senate granted its advice and consent for the current version of the Convention, there was no indication that they

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[3] Although the Court in *Rasul v. Bush*, 124 S. Ct. 2686 (2004), concluded that *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484 (1973), overruled the statutory predicate for the statutory habeas ruling in *Eisentrager*, this aspect of *Eisentrager*, as well as its constitutional holding and other merits discussion, remains good law.

changed the essential character of the treaty to permit alleged treaty violations to be enforced by captured enemy forces through the captor's judicial system. There is nothing in the text or history of the revised version in effect today that would lead to the conclusion that it was intended to revolutionize the treaty and grant the captured parties rights enforceable in the domestic courts of the nation that captured them. To the contrary, the plain terms of the revised Convention show that, as with the 1929 version, vindication of the treaty is a matter of State-to-State diplomatic relations, not domestic court resolution.

Article 1 of the treaty explains that the parties to the Convention "undertake to respect and to ensure respect for the present Convention in all circumstances." Art. 1. This was an important revision of the 1929 Convention, which provided that the "Convention shall be respected * * * in all circumstances." 1929 Convention, Art. 82. The 1949 revision clarified that it was the duty of all parties not only to adhere to the Convention, but also to ensure compliance by every other party to the convention. *See* 59 INTERNATIONAL LAW STUDIES: PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT, 26-27 (Naval War College Press 1978). Establishing a peer-nation duty to ensure enforcement was deemed at the time to be a critical advancement in securing compliance with the treaty. *Ibid.*

Further to effectuate compliance, the 1949 Convention relied upon third-

party — "protecting powers"[4] — oversight. Article 8 provides that the treaty is to be "applied with the cooperation and under the scrutiny of the Protecting Powers * * *." Art. 8. Reliance upon "protecting powers" was also a prime feature of the 1929 Convention. *See* 1929 Convention Art. 86. Article 11 of the 1949 revision of the Convention, however, clarified and increased the role of the protecting powers in cases where there is a disagreement about the application or interpretation of the Treaty: "in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement." Art. 11. Thus, Article 11 sets out one of the primary "methods for resolving" disputes relating to application and interpretation of the Convention. *See* 59 INTERNATIONAL LAW STUDIES at 87.

The "second method for resolving disputes" described in the 1949 Convention is the "'enquiry' provided for in Article 132." 59 INTERNATIONAL LAW STUDIES at 88. Article 132 provides that at "the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention." Art. 132.

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[4] The role of the "protecting power," in modern time, has been performed by the International Committee of the Red Cross. In 1949, it was typically performed by a neutral state.

It further states that if "agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed." *Ibid.* This Article was deemed an improvement over the 1929 Convention, which did not provide for the use of an "umpire" to settle disputes. *See* 1929 Convention, Art. 30.

The Convention thus creates specific measures to ensure enforcement, none of which remotely contemplated a lawsuit brought by the captured party in the courts of the detaining nation to enforce the treaty. *See Hamdi v. Rumsfeld*, 316 F.3d 450, 468-469 (4th Cir. 2003), *overruled on other grounds*, 124 S. Ct. 2633 (2004). Moreover, where the contracting nations to the Convention wanted to require enforcement beyond the two prescribed methods and the peer enforcement mandated by Article 1, they said so directly. Article 129 requires the signatory nations to "undertake to enact any legislation necessary to provide effective *penal* sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in [Article 130]." (Emphasis added.) Then, under the Convention, it is the duty of the signatory nations to bring the offenders before their own courts. Art. 129. That is yet another enforcement mechanism that does not rely on judicially enforceable rights. Even under this Article, judicial enforcement occurs only at the behest of the Executive and

involves the implementing statute, not the treaty itself. As was the case with the 1929 Convention, the 1949 Convention itself does not provide judicially enforceable rights to individuals. *See also* S. Exec. Rep. 9, 84th Cong., 1st Sess. 6-7 (1955) (citing the enforcement provisions discussed above and the newly created obligation of contracting States to enact penal sanctions for "grave breaches of the Convention," with no suggestion of such a radical change as permitting enemy combatants to enforce in U.S. courts the provisions of the treaty).

Thus, it is no accident that over the last fifty years no court of appeals has ever construed the 1949 Convention as granting individuals judicially enforceable rights. *See Hamdi*, 316 F.3d at 468-469; *see also Al Odah v. United States*, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randoph, J., concurring), *overruled on other grounds*, 124 S. Ct. 2686 (2004); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-809 (D.C. Cir. 1984) (Bork, J., concurring).

3. The district court's primary rationale for finding that the Convention provides Hamdan with judicially enforceable rights is that the treaty protects individuals – *i.e.*, persons captured or otherwise detained during an armed conflict. But that was true of the 1929 version of the treaty, see, *e.g.*, 1929 Convention, Arts. 2, 3, 16, 42, which the Supreme Court held did not grant individuals

judicially enforceable rights.

Beyond the observation that the Convention protects individuals, the district court relied upon the fact that "the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation." JA 397. But that fact is consistent with the reality that the Executive Branch viewed the Convention as largely enforceable at the State-to-State level, with the absence of implementing legislation fully explained by the absence of any need to enact such legislation. There is certainly no evidence that the President, the Senate, and the other contracting nations intended to revolutionize the treatment of detained enemy combatants by suddenly providing for individual rights enforceable in the courts of the detaining nation. Obviously, the Executive's responsibility to adhere to a treaty is unrelated to whether the treaty provides individuals with judicially enforceable rights. If anything, the fact that the Executive has faithfully implemented the Convention for more than fifty years without recognizing judicially enforceable rights militates against judicial intervention in its functioning.

4. The district court ignored the obvious impact of its ruling. If the Convention provided individuals with judicially enforceable rights, then there is the obvious and substantial danger that enemies captured on the battlefield will

continue their fight in U.S. courts, filing habeas actions and other civil claims challenging the implementation of the Geneva Convention. There is no reason that the Executive and Senate were any more welcoming of that extraordinary prospect than Justice Jackson in his opinion for the Court in *Eisentrager,* 339 U.S. at 779. Such a result would indisputably encumber the President's authority as Commander in Chief. Indeed, it is nearly unimaginable to consider the implications of having permitted the more than two million POWs held during World War II to enforce their 1929 Geneva Convention protections through legal actions filed in the United States. Whenever possible, interpretations of a treaty that produce anomalous or illogical results should be avoided.[5] *See El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 171 (1999). The Executive Branch's construction of the Convention would avoid those consequences and is entitled to "great weight." *See, e.g., United States v. Stuart*, 489 U.S. 353, 369 (1989); *Sumitomo Shoji Am., Inc.*, 457 U.S. at 184-185.

5. The district court's contention that Congress somehow enacted the

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[5] For the same reasons, the district court erred in concluding that Common Article 3 of the Geneva Convention could supply a basis on which to grant Hamdan relief. Common Article 3 does not apply here for the additional reason that the conflict with al Qaeda is "of an international character," thereby falling outside the plain terms of the Article, which applies to "armed conflict not of an international character." Moreover, regardless of whether Common Article 3 has attained the status of customary international law, it cannot override a contrary executive act. See *The Paquete Habana*, 175 U.S. 677, 700 (1900).

procedural protections embodied in the Geneva Convention as judicially enforceable domestic law via 10 U.S.C. § 821's reference to the "law of war" is equally erroneous. That UCMJ Article provides, in relevant part, that

> The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions * * * of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions[.]

10 U.S.C. § 821. The district court held that Hamdan is not an "offender" who by "the law of war" is triable by military commission, because he must be presumed to have POW status unless and until a "competent tribunal" under the Geneva Convention determines otherwise, and because that POW status entitles him to a trial by court-martial pursuant to Article 102 of the Geneva Convention. JA 398.

First, because the Geneva Convention is not judicially enforceable, it does not provide norms that the courts can interpret and apply to a statute that references the "law of war." *See Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2763, 2767 (2004) (courts cannot give effect to non-self-executing treaty in action brought under statute that recognizes federal jurisdiction over torts "in violation of the law of nations or a treaty of the United States").

Second, Article 21 in no way curtails the authority of the President. Rather, it preserves the President's preexisting constitutional authority to establish military commissions to try offenders or offenses against the laws of war. In fact,

the Supreme Court concluded that identical language in the predecessor provision to Article 21 — Article 15 of the Articles of War — "*authorized* trial of offenses against the laws of war before such commissions." *Quirin*, 317 U.S. at 29 (emphasis added). *See also id.* at 28 ("By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war").

The history of this provision also makes clear that its purpose was to express Congressional approval for the traditional use of military commissions under past practice. When the language now codified in Article 21 was first included in the Articles of War in 1916, it was intended to acknowledge and sanction the pre-existing jurisdiction of military commissions. The language was introduced as Article 15 of the Articles of War at the same time that the jurisdiction of general courts-martial was expanded to include all offenses against the laws of war. The new Article 15 stated (like current Article 21) that the "provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions * * * of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions." Act of August 29, 1916, 39 Stat. 619, 653.

Judge Advocate General of the Army Crowder, the proponent of the new article, testified before the Senate that the military commission "is our common-law war court," and that "[i]t has no statutory existence." S. Rep. No. 64-130, at 40 (1916). The new Article 15 thus was not *establishing* military commissions and defining or limiting their jurisdiction. Rather, as General Crowder explained, it was recognizing their existence and preserving their authority: "It just saves to these war courts the jurisdiction they now have and makes it concurrent with courts-martial * * *." *Id.* *See also* S. Rep. No. 63-229, at 53 (1914) (testimony of Judge Advocate General Crowder before House Committee on Military Affairs).

In explaining the history of the provision now codified in Article 21, the Supreme Court has described the testimony of Judge Advocate General Crowder as "authoritative." *Madsen*, 343 U.S. at 353. The Court thus determined that the effect of this language was to preserve for such commissions "the *existing* jurisdiction which they had over * * * offenders and offenses" under the laws of war. *Id.* at 352 (emphasis added). As the Court noted, because the statute simply *recognized* the existence of military commissions, "[n]either their procedure nor their jurisdiction has been prescribed by statute." *Id.* at 347.

Given the text and history of Article 21, the provision must be read as preserving the traditional jurisdiction exercised by military commissions over

offenses or offenders against the laws of war. The statute, in other words, simply preserves Executive Branch practice. The Supreme Court has adopted precisely this understanding of the Article and has thus explained that "[b]y * * * recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles [of War], Congress gave sanction * * * to *any* use of the military commission contemplated by the common law of war." *Yamashita*, 327 U.S. at 20 (emphasis added). *See also id.* at 7.

The district court apparently believed that Article 21's reference to the "law of war" means that certain procedural protections in the Geneva Convention became entitlements for those subject to military commissions, irrespective of whether the conduct for which they stand prosecuted would place them within the traditional jurisdiction of military commissions. But Article 21 did nothing more than recognize that "military tribunals shall have jurisdiction to try offenders or offenses against the law of war," *Quirin*, 317 U.S. at 28. In recognizing that jurisdiction, Congress "incorporated by reference * * * all offenses which are defined as such by the law of war," *id.* at 30. It did not purport to restrict the President's traditional authority to subject persons charged with such offenses to trial by military commission, and it certainly did not intend to make the Geneva Convention and the whole common-law body of war principles judicially

enforceable against the Executive.

Hamdan has undoubtedly been charged with an offense that by the law of war is triable by military commission – indeed, the district court did not hold otherwise; by conspiring with enemy forces to target civilians, he is also precisely the type of "offender" against the laws of war who falls within the traditional jurisdiction of military commissions recognized by Article 21. The district court therefore erred in holding that Article 21 bars the military commission from exercising the very type of jurisdiction that Article sought to preserve. Indeed, even if the district court's highly implausible understanding of what Article 21 meant by an "offender" were correct, Article 21 still recognizes the jurisdiction of the military commission over Hamdan by virtue of the offense with which he is charged. That is because Article 21 preserves the military commission jurisdiction over "offenders *or* offenses that by statute or by the law of war" are triable by military commission. That phrasing reflects the historical fact that military commissions not only exercised jurisdiction over individuals charged with offenses against the laws of war, but also over individuals charged with ordinary offenses committed, for example, in an occupation zone. *See Duncan v. Kahanamoku*, 327 U.S. 304, 313-314 & n.8 (1946) (citing "the well-established power of the military to exercise jurisdiction over * * * enemy belligerents,

prisoners of war, or others charged with violating the laws of war"); *id.* at 314 & n.9 (citing the additional "power of the military to try *civilians* in tribunals established as part of a temporary military government over occupied enemy territory" where "civilian government cannot and does not function") (emphasis added). The laws of war permitted the latter type of "offender" to be tried by military commission, despite the fact that the offense committed was not itself a violation of the laws of war.

Here, the district court never found that the law of war would not permit the charged offense to be tried by military commission, nor could it have done so given that the Charge implicates the most basic protections of the laws of war. The district court's conclusion that Article 21 bars Hamdan's trial for that offense is erroneous on that ground alone, because the statute clearly preserves the traditional jurisdiction of military commissions over "offenses" against the laws of war. See *Quirin*, *supra*.

The district court thus got it exactly backwards when it concluded that the President's action here conflicts with "the express or implied will of Congress" and thus falls "into the most restricted category of cases identified by Justice Jackson in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952)." JA 384. The President is acting with the approval of

Congress reflected in Article 21 and the Authorization to Use Military Force. As such, his action falls into Justice Jackson's first category, where "his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.* at 635-636 (Jackson, J., concurring). In these circumstances, the President's action is "supported by the strongest presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Ibid.*

Moreover, even assuming contrary to its text, structure, and history that Article 21 was designed to restrict the President's authority to try offenses against the laws of war, the district court's reliance on Justice Jackson's *Youngstown* concurrence still would have been misplaced. First, the President here, unlike in *Youngstown*, clearly believed he was acting with congressional authorization, as his invocation of Article 21 in the Military Order makes clear. The President's judgment that he is acting in accord with a federal statute should not lightly be brushed aside, especially where that judgment involves an exercise of his core authority over foreign affairs and enemy forces in wartime. Second, *Youngstown* is inapposite because it involved action in the *civilian* sector in the form of a directive to the Secretary of Commerce to assume control over private industry. In sharp contrast, an order directed to the military to try enemy

combatants for offenses against the laws of war is a quintessentially *military* measure that lies at the heart of the Commander in Chief's authority. *See Hamdi*, 124 S. Ct. at 2640; *Quirin*, 317 U.S. at 28-29. Finally, while the district court here went to great lengths to invalidate the President's action, Justice Jackson would have "indulge[d] the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society." 343 U.S. at 640.

B. The District Court Erred In Overruling The President's Determination That Al Qaeda Combatants Are Not Covered By The Geneva Convention.

Even assuming that the Geneva Convention were judicially enforceable and that Article 21 of the UCMJ incorporated it as a limitation on the President's authority, the Geneva Convention would not limit the President here, because the President determined that the Convention does not apply to al Qaeda. In particular, the President determined that "none of the provisions of [the] Geneva [Convention] apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to [the] Geneva" Convention.[6] The district court, however,

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[6] Memorandum for the Vice President, et al. from President, Re: Humane Treatment of al Qaeda and Taliban Detainees at 1. *See* Addendum 11.

"rejected" that conclusion, as well as the Commander in Chief's underlying rationale that the United States was engaged in separate conflicts with Afghanistan's Taliban regime and the al Qaeda terrorist network, operating within and outside of Afghanistan. Relying on advice to the President that he did not adopt, the court held that the Geneva "Conventions * * * are triggered by the place of the conflict, and not by what particular faction a fighter is associated with." JA 387. This ruling contravenes the President's Commander-in-Chief and foreign-affairs authority and is inconsistent with the plain terms of the Geneva Convention.

1. The President's determination that the Convention does not apply to the conflict with al Qaeda was an exercise of the President's war powers and his broad authority over foreign affairs, *see United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), and was made in accordance with the Congressional resolution authorizing the use of force. That quintessential exercise of Executive authority is binding on the courts. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964). ("Political recognition is exclusively a function of the Executive").

The decision whether the Geneva Convention applies to the conflict with al Qaeda goes to the core of the President's powers as Commander in Chief and is

inherently one of foreign policy, an area where courts must refrain from interfering with the authority of the elected branches. *See Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). Congress has not in any way endeavored, contrary to the President, to impose the requirements of the Convention upon our fight against al Qaeda operatives. *See Santiago v. Nogueras*, 214 U.S. 260, 266 (1909); *The Thomas Gibbons*, 12 U.S. (8 Cranch) 421, 427-428 (1814). To the contrary, Congress has acknowledged the very distinction made by the President here by authorizing the use of force against *both* any "*organization*[] * * * [that the President] determines planned, authorized, committed, or aided the" September 11 attacks — (*i.e.*, al Qaeda) — and also any "*nation*[] * * * [that] harbored such organization[]" —(*i.e.*, Afghanistan). AUMF (emphases added).

The decision whether the Convention applies to a terrorist network like al Qaeda is akin to the decision whether a foreign government has sufficient control over an area to merit recognition or whether a foreign state has ratified a treaty and is therefore entitled to benefit from its provisions. In both cases, the question is one for the Executive to make. *See Doe v. Braden*, 57 U.S. (16 How.) 635, 657 (1853) (the determination whether a state has properly ratified a treaty "belong[s] *exclusively* to the political department of the government") (emphasis added); *see also Charlton v. Kelly*, 229 U.S. 447, 469-476 (1913); *Holmes*, 459 F.2d at 1215

n.26.

The Executive must act without fear of judicial reversal in this area, because "it would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered." *Braden*, 57 U.S. (16 How.) at 657. Similarly, the President's determination that al Qaeda is not a party to the Geneva Convention and, accordingly, that terrorists fighting for al Qaeda cannot claim the benefits of that Convention, is binding on the courts.

2. Even if judicial review of the President's decision were appropriate, that decision is manifestly correct. The plain language of the Convention specifies that it applies not based upon *where* a conflict occurs, but instead upon whether a power engaged in the conflict is a High Contracting Party to the Convention. By its terms, the "Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." Geneva Convention, Art. 2.

Thus, the Convention would apply to a conflict between the United States

and Afghanistan, both High Contracting Parties, and could therefore potentially apply to Afghanistan's Taliban regime — as the President determined it did. The final clause of Article 2, however, makes explicit that it does not apply to a conflict with an entity that is not a High Contracting Party, even if that conflict is one facet of a conflict between High Contracting Parties: "Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it *in their mutual relations*." *Ibid.* (emphasis added). A Contracting Party, on the other hand, is only bound by the Convention "in relation to the said Power [that is not a High Contracting Party], if the latter accepts and applies the provisions thereof." *Ibid.*

Here, al Qaeda is not a High Contracting Party, and, far from having accepted or applied the provisions of the Convention, it openly flouts them. Al Qaeda is not a State; rather, it is a terrorist network composed of members from many nations, with ongoing international terrorist operations. Al Qaeda therefore cannot qualify as a "Power in conflict" that could benefit from the Convention even if it were to "accept[] and appl[y]" the Convention (which, of course, it has not). Instead, the term "Power" refers to States that would be capable of ratifying the Convention and other international agreements — something that a terrorist

organization like al Qaeda cannot do.[7]

Even if al Qaeda could be thought of as a "Power" within the meaning of Article 2, al Qaeda has consistently acted in flagrant defiance of the law of armed conflict. For example, it has used operatives not in any kind of uniform to hijack civilian aircraft and to crash them into the World Trade Center, deliberately targeting civilians. And, of course, al Qaeda has not signed the Convention. Accordingly, the Convention, by its plain language, does not apply to operatives of the al Qaeda terrorist organization.[8]

Further, it would be perverse to bind the United States to the Geneva Conventions in its fight against al Qaeda, an organization which depends for success upon violating the traditional laws of war by kidnaping civilians, torturing

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[7] *See, e.g.*, G.I.A.D. Draper, The Red Cross Conventions 16 (1958) (arguing that "in the context of Article 2, para. 3, 'Powers' means States capable then and there of becoming Contracting Parties to these Conventions either by ratification or by accession"); 2B Final Record of the Diplomatic Conference of Geneva of 1949, at 108 (explaining that Article 2(3) would impose an "obligation to recognize that the Convention be applied to the non-Contracting adverse State, in so far as the latter accepted and applied the provisions thereof").

[8] Indeed, United Nations conference reports addressing the September 11 attacks acknowledged that the "1949 Geneva Conventions, specifying that they apply to the contracting parties, i.e. States, were not designed for a situation in which the chief adversary is a non-state group" such as the terrorist organization al Qaeda. Ho-Jin Lee, *The United Nation's Role in Combating International Terrorism* at 15, presented at U.N. Conference on Disarmament Issues (Aug. 2002) (available at http://disarmament.un.org:8080/rcpd/pdf/5cnfamblee.pdf).

and murdering detained individuals (both soldiers and civilians), and intentionally targeting civilians. The purpose of entering into treaties with foreign powers is for "their mutual protection" and the "common advancement of their interests and the interests of civilization," *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902), a purpose that would be manifestly undermined by according al Qaeda operatives Geneva Convention protections.

C. The District Court Erred In Finding That Hamdan Had A Colorable Claim Of POW Status.

Having found the Geneva Convention judicially enforceable and applicable to al Qaeda, the district court held (JA 386, 398) that trial by military commission would violate Hamdan's rights under Article 102 of the Convention, which provides that "[a] prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power." By its terms, however, that provision is limited to a "prisoner of war." Hamdan is not a POW under the Convention, because he is an al Qaeda operative, and the President has determined that the Convention does not apply to al Qaeda. The district court nevertheless concluded that "it is at least a matter of some doubt as to whether or not Hamdan is entitled to the protections" of the Convention and that, until "the 'competent tribunal' referred to in Article 5" eliminates that doubt, Hamdan must

be treated as a POW. JA 398. Neither the Convention nor U.S. Army regulations supports the district court's conclusion, even assuming, contrary to the President's determination, that the Convention generally applies to al Qaeda.

The Geneva Convention defines in Article 4 the "[p]risoners of war" who are entitled to the Convention's protections. That provision makes clear that its protections apply only if the group to which a combatant belongs displays "a fixed distinctive sign," "carr[ies] arms openly" and "conduct[s] its operations in accordance with the laws and customs of war." Geneva Convention Art. 4(A)(2)(b)-(d). Indeed, the categories set out in Article 4 make clear that the POW status of an enemy fighter depends on his membership in a group that satisfies the Article 4 criteria. See Art. 4(A)(1)-(3); *United States v. Lindh*, 212 F. Supp. 2d 541, 558 n.39 (E.D. Va. 2002) ("What matters for determination of lawful combatant status is not whether Lindh personally violated the laws and customs of war, but whether the Taliban did so.") (citing Article 4).

Al Qaeda fighters such as Hamdan clearly do not meet Article 4's standard, even assuming, contrary to the President's determination, that the Convention generally applies to al Qaeda, because al Qaeda's terrorism is the very antithesis of the regular military warfare to which the Geneva Convention was intended to apply. *See, e.g.*, S. Exec. Rep. No. 84-9, at 5 ("extension of [the treaty's]

protections to 'partisans' does not embrace that type of partisan who performs the role of farmer by day, guerilla by night").

Hamdan has never claimed that he belongs to an armed force that would qualify for POW protection. Rather, his claim all along has been that, despite his close association with and work for bin Laden, he is an innocent civilian. Petition ¶¶ 15-16, 19. To be sure, the Geneva Convention does protect civilians who accompany "armed forces," but this protection applies only to those who "have received authorization from the armed forces, which they accompany," and who carry an authorized identity card. Article 4(A)(4). What is more, "armed forces" under the Geneva Convention means only organizations that satisfy the criteria for lawful combatancy, such as responsible command, a fixed distinctive sign, carrying arms openly, and compliance with the laws of war. These conditions plainly do not apply here.

Moreover, Hamdan's claim that he is a civilian has been considered and rejected by the military numerous times, as reflected by, *inter alia*, his transfer to Guantanamo, the July 2003 finding by the Commander in Chief that Hamdan is a member of al Qaeda or otherwise involved in terrorism against the United States, the referral of the al Qaeda conspiracy charge against Hamdan to a military

commission, and the finding by the Combatant Status Review Tribunal (CSRT)[9] that Hamdan is an enemy combatant who is a member or affiliate of al Qaeda. Hamdan can raise his factual innocence claim once again, but the proper place to do so is before the military commission as a defense to the Charge.

The district court nevertheless reasoned that Hamdan was entitled to yet another pre-trial proceeding under Article 5 of the Convention, which provides that certain detainees are entitled to be treated as prisoners of war "until such time as their status has been determined by a competent tribunal." That provision applies, however, only if "doubt arise[s] as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy," meet the Convention's definition of POWs. Art. 5.

The district court reasoned that a detainee's claim of entitlement to POW status is itself sufficient to establish doubt. Nothing in the text or the history of

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[9] The CSRT was patterned after the sort of "competent tribunal" referred to in Geneva Convention Article 5 and Army regulation 190-8. In that vein, the CSRT provided Hamdan with the rights to, *inter alia*, call reasonably available witnesses; question witnesses called by the tribunal; testify or otherwise address the tribunal; not be compelled to testify; a decision by a preponderance of the evidence by commissioned officers sworn to execute their duties impartially; and review by the Staff Judge Advocate for legal sufficiency. See CSRT Implementation memorandum, July 29, 2004 <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf> In addition, unlike the Article 5 or AR 190-8 tribunal, the CSRT guaranteed Hamdan the rights to a personal representative for assistance in preparing his case, to receive an unclassified summary of the evidence in advance of the hearing, and to introduce relevant documentary evidence.

the Convention, however, supports this sweeping and counterintuitive interpretation of Article 5. Notably, the contracting parties apparently believed it necessary to adopt such a requirement in a subsequent protocol — one that the United States has not ratified, and thus is not bound by as a matter of international law.[10] Because, as explained above, the Convention at issue here provides that protections will be afforded (or denied) to all members of a particular militia or other fighting forces, depending on the status of that *group*, a competent tribunal is necessary to resolve doubts only as to whether particular persons "belong" to a fighting force falling within one of the enumerated classes. *See* Art. 4(A)(1), (2), Art. 5. In light of the President's categorical determination with respect to al Qaeda, the CSRT's confirmatory finding that Hamdan is a member or affiliate of al Qaeda definitively resolved any possible "doubt" that ever arose about his POW status. The district court dismissed the relevance of the CSRT finding on the ground that the CSRT was established merely to determine whether an individual is an enemy combatant, rather than whether that combatant is entitled to POW status, JA 390. That decision ignores the fact that the CSRT here not only

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[10] Under Article 45 of the Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, which was adopted on June 8, 1977, "[a] person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he *claims* the status of prisoner of war."

confirmed Hamdan's status as an enemy combatant, but made the further finding that he is an al Qaeda combatant. That latter finding is tantamount to a finding by an Article 5 Tribunal, in light of the President's prior, categorical determination regarding al Qaeda or in light of the judicially noticeable fact that al Qaeda does not satisfy the criteria for lawful belligerent status. *See Lindh*, 212 F. Supp. 2d at 552 n. 16 ("[T]here is no plausible claim of lawful combatant immunity in connection with al Qaeda membership."). Accordingly, there cannot possibly be a need for yet another tribunal (other than the Commission itself) to consider Hamdan's claim that he is a civilian.[11]

III. THE PROCEDURES GOVERNING THE MILITARY COMMISSION ARE NOT "CONTRARY TO OR INCONSISTENT WITH" THE UCMJ RULES APPLICABLE ONLY TO COURTS-MARTIAL.

After concluding that the Geneva Convention requires that Hamdan may only be tried by court-martial unless and until a "competent tribunal" determines

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[11] The district court also relied on Army Regulation 190-8, Section 1-6, which, like Article 5 of the Geneva Convention, calls for a competent tribunal to determine the POW status of a detained person when "doubt arises." Because the CSRT has effectively confirmed Hamdan's non-POW status, there is no basis under the Army Regulation for any further proceedings. The district court misplaced reliance on the Army Regulation for the additional reasons that it provides no greater protection than the Geneva Convention itself, see § 1-1(b)(4) ("In the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence."), and because it is not judicially enforceable, see § 1-1(a) (regulation establishes internal policies and planning guidance).

that he is not entitled to POW status, the district court went on to hold that, when and if that determination is made, the UCMJ requires that any military commission proceeding conform to the rules for courts-martial.

There is no basis for the district court's conclusion that 32 C.F.R. § 9.6(b) — which permits the Commission to exclude Hamdan from portions of the proceedings in order to protect classified information and other national security interests — violates UCMJ Article 39, which mandates that "a *court-martial*" be conducted "in the presence of the accused." 10 U.S.C. § 839(b) (emphasis added); see JA 405. The court arrived at this conclusion by reading 10 U.S.C. § 836(a) — which provides that rules established for military commissions in cases arising under the UCMJ may not be "contrary to or inconsistent with" the UCMJ — to require that military commission rules not only conform to UCMJ provisions applicable to military commissions, but also to UCMJ provisions that apply solely to courts-martial. The district court's ruling cannot stand, because, just as the court did with respect to Article 21, it fundamentally misconstrues Article 36 to impose substantial restrictions on the President's authority to use military commissions. Indeed, if the district court's reading is correct, it is the death knell for military commissions, whose raison d'etre is to provide the President with a flexible war-time forum in which to prosecute enemy fighters.

The district court concluded that Article 36 mandates that the rules the President chooses to promulgate for military commissions be consistent not only with the UCMJ provisions governing military commissions, but also with the UCMJ provisions, such as Article 39, expressly limited to courts-martial. That theory rests on a fundamental misunderstanding of the UCMJ, which is directed almost exclusively to the procedures governing *courts-martial.* The UCMJ does not purport to establish similarly uniform procedures for *military commissions*; indeed, only nine of the statute's 158 articles even mention these latter tribunals, which, as explained above, predated the UCMJ and have tried enemy combatants since the earliest days of the Republic under such procedures as the President has deemed fit.

In interpreting Article 36 to constrain the President to prescribe only such *commission* procedures as are "consistent with" the UCMJ protections accorded to *court-martial* defendants, the district court erroneously conflated the two types of tribunals, effectively negated the relatively few express references to military commission rules in the relevant "chapter," and ignored long-settled Supreme Court precedent, the UCMJ's plain language, its legislative history, and several canons of statutory construction. In context, it is clear that the last clause of Section 836(a) simply preserves, with respect to courts-martial, the specific rules

in the chapter for courts-martial, and, with respect to military commissions, the few specific rules in the chapter for military commissions. It did not intend to obliterate the distinction between the two or superimpose all the courts-martial rules on military commissions.

The Supreme Court's decisions in *Yamashita* and *Madsen* confirm that the Commission convened to try Hamdan need not afford him all of the protections that the UCMJ provides in court-martial proceedings. In *Yamashita*, a military commission was convened to try General Yamashita, an enemy combatant, for violations of the law of war. Yamashita petitioned for a writ of habeas corpus on grounds that, *inter alia*, the commission's ability to consider certain hearsay and opinion evidence violated the Articles of War (the UCMJ's statutory predecessor), including Article 38 (the precursor provision to UCMJ Article 36).[12] 327 U.S. at 6, 18. The Court rejected Yamashita's procedural objections, reasoning in part that "the military commission before which he was tried * * * was not convened by virtue of the Articles of War, but pursuant to the common law of war." *Id.* at 20. A similar result should obtain in this case, because the Commission is convened to try Hamdan for an offense against the law of war as opposed to an

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[12] Article 38 was identical in all material respects to the current version of UCMJ Article 36. *Compare Yamashita*, 327 U.S. at 18 n.6 (providing text of Article 38) *with* 10 U.S.C. § 836(a).

offense "arising under" the UCMJ's specific prohibitions. 10 U.S.C. § 836(a); *see generally* 10 U.S.C. §§ 877-934.

The district court attempted to distinguish *Yamashita* on the basis that the UCMJ, which was enacted on May 5, 1950, was not yet in effect at the time of the Supreme Court's decision. It obviously was in effect, however, by the time the Court observed in *Madsen* that UCMJ Article 21 specifically preserved the military commissions' common-law-of-war jurisdiction and procedures. *Madsen*, 343 U.S. at 346-348, 351 n.17; *see supra* Part II(A)(5). To be sure, as the district court pointed out (JA 408-409), the petitioner in *Madsen* did not raise any specific procedural objection under the UCMJ. It is equally true, however, that the Court would not have confirmed so emphatically, and without qualification, the President's prerogative to establish procedures for "our commonlaw war courts" if the UCMJ had just two years earlier constrained the President's war-time authority in as dramatic a fashion as the district court here believed. *Madsen*, 343 U.S. at 346-347.

The Supreme Court's failure to perceive the significance that the district court here perceived in Article 36 stems not from the absence of a procedural claim in *Madsen*, but from the implausibility of the district court's reading. The UCMJ takes pains to distinguish between "military commissions" or "military

tribunals" on the one hand, and "courts-martial" on the other, using these distinct terms to connote discrete, rather than equivalent, types of tribunals. *See* 10 U.S.C. §§ 821, 828, 836, 847-850, 904, 906. Settled canons of construction "caution[ ] the court to avoid interpreting a statute in such a way as to make part of it meaningless." *E.g.*, *Abourezk* v. *Reagan*, 785 F.2d 1043, 1054 (D.C. Cir. 1986); *see Williams* v. *Taylor*, 529 U.S. 362, 404 (2000). Yet if the "court-martial" articles of the UCMJ were meant to apply to "military commissions," the specific use of the latter term — in no less than nine of the UCMJ's provisions, *see* Arts. 21, 28, 36, 47(a)(1), 48, 49(d), 50(a), 104 and 106 — would be superfluous. For that reason, a given Commission procedure cannot be "contrary to or inconsistent with" articles that are applicable exclusively to courts-martial.

IV. THE PRESIDENT HAS INHERENT POWER TO CONVENE MILITARY COMMISSIONS.

The district court's reading of Article 21 of the UCMJ to bar Hamdan's trial by military commission and of Article 36 to require that any military commission proceeding that is ultimately conducted provide the functional equivalent of a court-martial should be rejected not only because it is contrary to the text, structure, and history of those provisions, but also because, by interpreting the provisions to reflect congressional intent to limit the President's authority, it creates a serious constitutional question. *Cf. Quirin*, 317 U.S. at 47 (declining to

"inquire whether Congress may restrict the power of the Commander-in-Chief to deal with enemy belligerents" by restricting use of military commissions). A clear statement of Congressional intent would be required before a statute could be read to effect such an infringement on core executive powers. *See, e.g., id.* at 9 ("[T]he detention and trial of petitioners – ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger – are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted."); *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 466 (1989); *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991).

The district court brushed this concern aside by stating without any elaboration that "[i]f the President does have inherent power in this area, it is quite limited." JA 384. That statement is incorrect. The President has inherent constitutional authority to create military commissions in the absence of Congressional authorization. This authority, which has been exercised as an inherent military power since the founding of the Nation, is derived from the Commander-in-Chief Clause, which vests in the President the full powers necessary to prosecute a military campaign successfully. U.S. Const. Art. II, Sec. 2, cl. 1. As the Supreme Court explained in *Eisentrager*, 339 U.S. at 788, "[t]he

first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And, of course, grant of war power includes all that is necessary and proper for carrying these powers into execution." In particular, that war power includes "the power * * * to punish those enemies who violated the law of war." *Hirota v. MacArthur*, 338 U.S. 197, 208 (1948) (Douglas, J., concurring) (citations omitted), because such punishment power is "directed to a dilution of enemy power and [to] retribution for wrongs done." *Id.* at 208; *see also Yamashita*, 327 U.S. at 11.

It was well recognized when the Constitution was written and ratified that one of the powers inherent in military command was the authority to institute tribunals for punishing enemy violations of the laws of war. For example, during the Revolutionary War, George Washington, as Commander in Chief of the Continental Army, appointed a "Board of General Officers" to try the British Major Andre as a spy. *See Quirin*, 317 U.S. at 31 n.9; *Proceedings of a Board of General Officers Respecting Major John Andre, Sept. 29, 1780* (Francis Bailey ed. 1780). At the time, there was no provision in the American Articles of War providing for jurisdiction in a court-martial to try an enemy for the offense of spying. *See* George B. Davis, *A Treatise on the Military Law of the United States* 308 n.1 (1913). In investing the President with full authority as Commander in

Chief, the drafters of the Constitution surely intended to give the President the same authority that General Washington possessed during the Revolutionary War to convene military tribunals to punish offenses against the laws of war.

The executive practice of using military commissions bears out this conclusion. Throughout this country's history, Presidents have exercised their inherent authority as Commanders in Chief to establish military commissions, without any authorization from Congress. In April 1818, for example, military tribunals were convened, without Congressional authorization, to try two British subjects for inciting the Creek Indians to war with the United States. *See* William Winthrop, MILITARY LAW AND PRECEDENTS 464, 832 (2d ed. 1920); William E. Birkhimer, MILITARY GOVERNMENT AND MARTIAL LAW 353 (3d ed. 1914). Similarly, during the Mexican War, tribunals called "council[s] of war" were convened to try offenses under the laws of war, and other tribunals, called "military commission[s]," were created to serve essentially as occupation courts administering justice for occupied territory. *See, e.g.*, Winthrop, *supra* at 832-33; Davis, *supra* at 308. Likewise, after the outbreak of the Civil War, military commissions were convened to try offenses against the laws of war. *See* Davis, *supra* at 308 n.2; Winthrop, *supra,* at 833. It was not until 1863 that military commissions were even mentioned in a statute enacted by Congress. In that year,

Congress specifically authorized the use of military commissions to try members of the military for certain offenses committed during time of war. *See* Act of March 3, 1863, § 30 (12 Stat. 731, 736). That statute, moreover, did not purport to *establish* military commissions. Rather, it acknowledged their pre-existence and provided that they could be used as alternatives to courts-martial in some cases.

That history of military practice is legally significant. As the Supreme Court repeatedly has explained, "'traditional ways of conducting government * * * give meaning' to the Constitution." *Mistretta v. United States*, 488 U.S. 361, 401 (1989). This principle of construction applies as well to the process of interpreting statutes. *See United States v. Midwest Oil Co.*, 236 U.S. 459, 473 (1915) ("in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself — even when the validity of the practice is the subject of the investigation").

The district court believed that *Quirin* "stands for the proposition that the authority to appoint military commissions is found, not in the inherent power of the presidency, but in the Articles of War * * * by which *Congress* provided rules for the government of the army." JA 381. In fact, *Quirin* expressly declined to decide "to what extent the President as Commander-in-Chief has constitutional power to create military commissions without the support of Congressional

legislation." 317 U.S. at 29. And, in later cases, the Supreme Court has not questioned the President's inherent authority. *See, e.g., Madsen*, 343 U.S. at 348 ("In the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions[.]").

Thus, contrary to the view of the district court, the text and history of the Constitution demonstrate that the President has broad inherent constitutional powers as Commander in Chief to create military commissions to try enemy belligerents for offenses against the laws of war. That text and history counsel against reading Articles 21 and 36 to curtail the President's authority, especially where, as explained above, a reading of the provisions that does not accomplish that result and that reflects a more faithful application of the text, structure, and history of those provisions is available.

CONCLUSION

For the foregoing reasons, the district court ruling should be reversed, and Hamdan's action should be denied.

Respectfully submitted,

PAUL D. CLEMENT
Acting Solicitor General

CHRISTOPHER A. WRAY
Assistant Attorney General

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
Acting United States Attorney

GREGORY G. KATSAS
Deputy Assistant Attorney General

JONATHAN L. MARCUS
Assistant to the Solicitor General

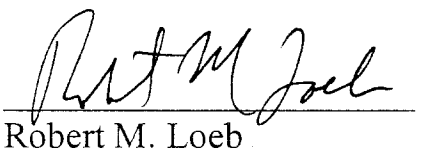
DOUGLAS N. LETTER
(202) 514-3602
ROBERT M. LOEB
(202) 514-4332
AUGUST FLENTJE
SHARON SWINGLE
ERIC MILLER
Attorneys, Appellate Staff
Civil Division, Room 7268
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

STEPHAN E. OESTREICHER, JR.
Criminal Division, Appellate Section

DECEMBER 8, 2004

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 13,930 words (which does not exceed the applicable 14,000 word limit).



Robert M. Loeb

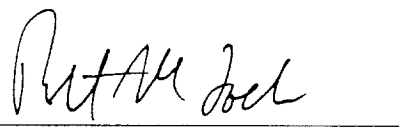
CERTIFICATE OF SERVICE

I hereby certify that on this December 8, 2004, I caused copies of the foregoing brief to be sent by hand delivery to the Court and the following counsel of record:

Kelly A. Cameron
PERKINS COIE, LLP
607 Fourteenth Street, NW
Suite 800
Washington, DC 20005
(202) 434-1652

Neal Katyal
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue
Washington, DC 20001
(202) 662-9000

Charles Swift
OFFICE OF CHIEF DEFENSE COUNSEL FOR MILITARY COMMISSIONS
1851 South Bell Street
Suite 103
Arlington, VA 22202
(703) 607-1521 Ext. 191



Robert M. Loeb

ADDENDUM

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