UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SALIM AHMED HAMDAN,
Military Commission Detainee,
Camp Echo,
Guantanamo Bay Naval Base,
Guantanamo Bay, Cuba,

Petitioner,

v.

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,

Respondents.

CIVIL ACTION NO. 1:04-cv-01519-JR

PETITIONER'S CONSOLIDATED REPLY TO RESPONDENTS' RETURN AND OPPOSITION TO CROSS MOTION TO DISMISS

CONTENTS

I. PRELIMINARY STATEMENT

This case challenges an unprecedented and dangerous expansion of Executive Branch authority cloaked in the exercise of the President's war powers. Far from the battlefield and remote from any zone of military occupation, the President has unilaterally created a military commission, justified by a so-called "war on terrorism." But the war cannot be defined as being against a nation state or having an identifiable enemy, as having any geographic arena of conflict, as having a date when hostilities began, as having a means of determining when hostilities may end, or as having been declared by Congress. In an undeclared war, unbounded by time, place, or the identity of the enemy, the President has relied on precedents of conventional wars to designate Petitioner Hamdan an enemy combatant and to prefer war crimes charges. The application of concepts of conventional war to the present conflict raises profound legal issues that must be addressed by the judiciary.[1]

The military commission in this case was created without Congressional authorization, in a place far removed from hostilities, to try a civilian who denies he was a combatant, for an offense unknown to the laws of war and not authorized to be tried by commission, under procedures that flout basic tenets of military justice, pursuant to a Presidential Order that discriminates against aliens. *See* Presidential Military Order, 66 Fed. Reg. 57833 (Nov. 13, 2001) (the "PMO"). For all of these reasons, the commission is not appropriately authorized or properly constituted.

II. THE COURT MUST DECIDE THESE MATTERS NOW

Respondents do not contend that an Article III court is without jurisdiction to hear Hamdan's case. Instead, Respondents ask this Court for prudential reasons not to exercise its jurisdiction. But at the time of filing, Hamdan had done everything possible to exhaust his

[1] Petitioner is filing a consolidated brief of the two documents mentioned in Judge Green's September 24, 2004 Order, i.e., a Reply to Respondents' Return, and an Opposition to their Cross Motion to Dismiss, and is availing himself of the page limits for each document.

other remedies, including requesting charges and a speedy trial. Now, after the Supreme Court's June *Rasul* decision, Respondents are maneuvering once again to evade judicial review, this time not through geography, but rather with *post-hoc* charges against Petitioner.[2] Not a single precedent justifies Respondents' position that Hamdan must wait, potentially for years, while the commission process runs its course. Respondents' only support is the very same court-martial jurisprudence that they elsewhere (in the same brief) label irrelevant. That latter claim makes clear that the commission to which the Court is asked equitably to defer simply does not accord Petitioner the procedural benefits and fairness that form the predicate of concepts of exhaustion and abstention.

The abstention and exhaustion doctrines, by their terms, defer judicial intervention to a better and later time. But under the PMO, there is no better or later time – Respondents would preclude judicial review at any time. Moreover, Petitioner, who is not a soldier, makes a serious challenge to the constitutionality of the commission itself. These are issues for which the judiciary, not the military, has superior expertise, and therefore they are recognized exceptions to judicial abstention during military proceedings. And apart from those challenges, Petitioner contends that the commission lacks jurisdiction over him personally, and the Supreme Court has held that such challenges fall within an exception to exhaustion and abstention rules, even in the more protective courts-martial context. For all these reasons, the Court's abstention is singularly unwarranted in this case, and now is surely the best time, and may be the only time, for judicial review.

A. *Quirin* Conclusively Establishes that Abstention Is Wrong

Respondents' argument is completely rebutted by its leading precedent, *Ex parte Quirin*, 317 U.S. 1 (1942). In that case, Attorney General Biddle explained why abstention

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[2] As Respondents have acknowledged in their July 27 filing in this case, "the jurisdiction of the Court depends upon the state of things at the time of the action brought." *Grupo Dataflux v. Atlas Global Group, L.P.*, 124 S. Ct. 1920, 1924 (2004). Events after the April 2004 filing of the Petition do not go to jurisdiction.

and exhaustion would be futile. Responding to the defense's claim that "the order of the President of the United States…creating this court is invalid and unconstitutional," Biddle opened the commission proceedings:

> In the first place, I cannot conceive that a military commission composed of high officers of the Army, under a commission signed by the Commander-in-Chief, would listen to argument on the question of its power under that authority to try these defendants.
>
> In the second place, let me say that the question of the law involved is a question, of course, to be determined by the civil courts should it be presented to the civil courts.
>
> Thirdly, …I cannot think it conceivable that any commission would listen to an argument that armed forces entering this country should…have any civil rights that you can listen to in this proceeding.

Proceedings Before the Military Commission ("Saboteur Tr.") at 5-6 (emphasis added), available at http://www.soc.umn.edu/~samaha/nazi_saboteurs/nazi01.htm. Biddle's claims about the futility of exhaustion were integral to *Quirin*. Indeed, the commission was halted so that the federal case could be filed, argued, and decided.[3]

In *Quirin*, the parties recognized that it would be inappropriate, even during a World War, to have a commission pronounce guilt when a legal cloud of uncertainty existed over the proceedings. Antecedent civilian review avoided the problem of asking a court to set aside a military verdict, which would have truly threatened comity. That is precisely why a Nixon administration Department of Defense Report [hereinafter "Nixon Pentagon Report"], in the midst of thousands of casualties in Vietnam, concluded that an early adjudication would *benefit* the Government. *Cf.* Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 2-3 (2001). In the years since 1942 and 1970, the legal problems with commissions have grown. To proceed under this state of affairs, one

[3] *See* William H. Rehnquist, *All The Laws But One* 137 (1998); Saboteur Tr. at 2765 (adjourning commission for a number of days so that defendants could proceed in Supreme Court); *id*. at 2935 (remarks of the lead prosecutor, the Judge Advocate General, that the Supreme Court "probably will straighten out the question as to whether this is a theater of operation"); *id.* at 2963 (remarks of Judge Advocate General).

completely unlike that of our honorable system of courts martial, contravenes precedent as well as the interests of both the United States and Hamdan.

B. *Councilman* Did Not Change the Law

Respondents try to distinguish *Quirin* on the ground that it was decided before abstention rules announced in *Councilman* and *Younger*. However, *Councilman* was built on exhaustion cases decided at the time of *Quirin*. *See Schlesinger v. Councilman*, 420 U.S. 738, 754 (1975) (citing *Douglas v. City of Jeannette*, 319 U.S. 157 (1943)); *id.* at 756 (citing *Fenner v. Boykin*, 271 U.S. 240, 243 (1926)); *id.* (citing *Ex parte Royall*, 117 U.S. 241, 252 (1886)); *id.* (citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938)); *id.* at 755 (referring to the "maxim that equity will not enjoin a criminal prosecution [that] summarizes centuries of weighty experience").[4] As *Younger* recognized, it is difficult to imagine another time when abstention and exhaustion were so firmly engrained in the legal fabric as 1942.[5]

If anything, *Councilman* watered down the preexisting abstention precedents with its very limited holding and rationale.[6] The Court held that it is "especially unfair to require exhaustion…when the complainants raised substantial arguments denying the right of the military to try them at all." 420 U.S. at 759 (quoting *Noyd v. Bond*, 395 U.S. 683, 696 n.8

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[4] Respondents' other attempts to distinguish *Quirin* fare no better. The citizenship of one of the eight defendants was never mentioned as a basis for not applying exhaustion, nor was the matter of the death penalty or its supposed "imminence" at the time the case was being decided. And such an argument was rejected in *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960).

[5] *See Younger v. Harris*, 401 U.S. 37, 45-46 (1971) ("[I]t has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions. In *Fenner v. Boykin*, 271 U.S. 240 (1926) . . . [t]he Court, in a unanimous opinion made clear that such a suit, even with respect to state criminal proceedings not yet formally instituted, could be proper only under very special circumstances . . . These principles, made clear in the Fenner case, have been repeatedly followed and reaffirmed in other cases involving threatened prosecutions. *See, e.g.*, Spielman Motor Sales Co. v Dodge, 295 U.S. 89 (1935); Beal v Missouri Pac. R. Co., 312 U.S. 45 (1941); Watson v Buck, 313 U.S. 387 (1941); Williams v Miller, 317 U.S. 599 (1942); Douglas v City of Jeannette, 319 U.S. 157 (1943)."). Administrative abstention was similarly entrenched in 1942, *see Myers*, *supra* (1938); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 230 (1908).

[6] *Councilman* did not adopt a "rule." Rather, it made clear that the decision was limited and based on the specific facts before it. 420 U.S. at 761.

(1969)). It noted that earlier decisions rejecting exhaustion "turned on the status of the persons as to whom the military asserted its power" and also that "the expertise of military courts" did not extend to "the consideration of constitutional claims." *Id.* These criteria militating against exhaustion are present here, where substantial challenges to the jurisdiction and legality of the military commission have been advanced. In this case, Hamdan contends that (1) he is a civilian innocent of any wrong-doing, (2) the PMO violates Equal Protection and Separation of Powers, and (3) the charge against Hamdan fails to state a violation of the laws of war, but instead represents an ex post facto law promulgated by Executive fiat.[7]

By contrast, in *Councilman*, the accused was a U.S. Army captain "on active duty when the charges against him were brought. There [was] no question that he [was] subject to military authority and in proper cases to disciplinary sanctions levied through the military justice system." *Id*. In addition, the alleged offense – possession and sale of marijuana – affected military discipline and fitness for duty, and impacted "the primary business of armies and navies to fight or be ready to fight wars." Under these circumstances, the Court saw "no injustice in requiring [the accused officer] to submit to a system [court martial] *established by Congress and carefully designed* to protect not only military interests but his *legitimate interests* as well." *Id.* at 759-60 (emphasis added).[8] In this case, none of these

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[7] Amicus for Respondents argues that the possibility that a commission might find innocence requires abstention, but the very language it quotes from *Councilman* makes clear that it is referring to a "criminal proceeding brought lawfully," 420 U.S. at 754 (quoting *Douglas v. Jeannette*, 319 U.S. 157 (1943)), where Congress has set up a fair scheme. Separately, *Yamashita* suggests that challenges should be brought before the trial, stating that Congress "has not foreclosed" the accused their "right to contend that the Constitution or laws of the United States withhold authority *to proceed* with the trial." *In re Yamashita*, 327 U.S. 1, 9 (1946) (emphasis added).

[8] The limitations identified in *Councilman* have been recognized in numerous other reported decisions, from both civilian and military courts. "[A] person need not exhaust remedies in a military tribunal if the military court has no jurisdiction over him." *New v. Cohen*, 129 F.3d 639, 644 (D.C. Cir.1997). *See also Hammond v. Lenfest*, 398 F.2d 705, 714 (2d Cir. 1968) ("although the government maintains that [the plaintiff] should present his claim as a defense to a court martial, it fails to explain wherein lies its power to convene the court martial that is supposedly to judge him"); *Andrews v. Heupel* 29 M.J. 743, 747 (AFCMR 1989) ("petitioner has raised a substantial argument denying the right of the military to try him at all. Thus, the normal procedures for appellate review within the military justice system may be bypassed."); *U. S. ex rel.*

criteria is satisfied: (1) as a civilian, Hamdan is not subject to military authority, (2) the interest in preserving the war-fighting capability of U.S. Armed Forces is not present, (3) a constitutional challenge to the PMO does not require the expertise of military officers to resolve; on the contrary, it requires the expertise of the judiciary, and (4) the commission has not been authorized by Congress and does not provide the fairness and protection of a court martial; indeed, by spurning the UCMJ, the commission violates the very statute that Respondents claim provides Congressional authorization for its existence (10 U.S.C. § 836). *See also Machado v. Commanding Officer, Plattsburgh Air Force Base*, 860 F.2d 542, 545-546 (2d Cir. 1988) ("[I]t is well established that a civilian – and that is what Machado colorably claims he is – may collaterally attack court-martial jurisdiction in the district court without exhausting military remedies") (citing *Councilman* and *Toth*).

Hamdan is afforded none of the protections of the rule of law that accompany legitimate military proceedings. Normally "it must be assumed that the military court system will vindicate servicemen's constitutional rights." *New*, 129 F.3d at 643. Respondents argue that this case is different because Hamdan has no constitutional rights. *Compare Councilman*, 420 U.S. at 759-60, *with* Resp.'s brief at 21 n.13. Respondents' position raises serious questions about whether commissions are entitled to the deference normally accorded to tribunals bound by the Constitution. It is striking that Respondents would borrow from our honorable court-martial jurisprudence, a jurisprudence that they reject at every other turn. To the extent that jurisprudence requires abstention, it is built on the rock of a fair system established by Congress. Those key features are lacking here.

Guagliardo v. McElroy, 259 F.2d 927, 928 (D.C. Cir. 1958) (stating that cases requiring exhaustion from the military are "inapposite, for there court-martial jurisdiction over the accused unquestionably existed since he was a member of the United States Army" and "[h]ere, in contrast, the question is whether appellant is subject to court-martial jurisdiction at all"), *aff'd* 361 U.S. 281 (1960).

C. Petitioner has Exhausted the Military Process

With the hopes of avoiding this very litigation, Petitioner requested a speedy trial under the UCMJ in February of this year. Petitioners' request was denied in a binding legal opinion by Respondent Hemingway. The Hemingway legal opinion necessarily had to reject the prior Nixon Pentagon Report conclusion that the statutes and Constitution apply to commissions. Indeed, as that Report stated:

> [T]he specific protections of the Bill of Rights, unless made inapplicable to military trials by the Constitution itself, have been held applicable to courts-martial. Both logic and precedent indicate that a lesser standard for military commissions would not be constitutionally permissible. In this regard, Winthrop stated: "Military commissions… are commonly conducted according to the rule and forms governing courts-martial."… Congress directed the President to establish procedures for courts-martial or other military tribunals which follow, to the extent practicable, the principles of law and the rules of evidence generally followed in United States district courts.

Nixon Pentagon Report, quoted in Paust, *supra*, 1 MICH. J. INT'L L. 3-4.[9] Respondents have issued a legal opinion concluding that the UCMJ does not apply. In so doing, they rejected Petitioner's statutory and constitutional claims. While that legal opinion is deeply suspect, it establishes that whatever need for exhaustion may exist in this case has been satisfied.

D. Further Abstention and Exhaustion Are Inappropriate

For exhaustion to be *required*, Congress must state "'in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision.'" *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1248 (D.C. Cir. 2004) (citation omitted). Congress has not said one word about precluding pre-exhaustion review, and certainly not in the "'[s]weeping and direct' statutory language" that courts require. *Id.*

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[9] *See also* Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1361 (2004) (stating that commissions are not "regularly constituted" due to failure to observe UCMJ).

(internal quotations and citations omitted). *See also Darby v. Cisneros*, 509 U.S. 137, 154 (1993) ("[c]ourts are not free to impose an exhaustion requirement as a rule of judicial administration" when it conflicts with Congress' provision for prompt judicial review).

Instead, the Government relies on judicially created *prudential* doctrines of abstention from court-martial cases such as *Councilman*. Yet courts have repeatedly cautioned that this is an "intensely practical" judgment where "attention is directed to both the nature of the claim presented and the characteristics of the particular administrative procedure provided." *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992).[10] *McCarthy* charted out "three broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion." *Id*. Any one of these circumstances would counsel permitting a plaintiff to proceed with his challenge first. Hamdan's case implicates all three.

First, "exhaustion has not been required where the challenge is to the adequacy of the agency procedure itself, such that "'the question of the adequacy of the administrative remedy . . . [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit.'" *Id.* at 148 (citation omitted). Petitioner does not merely contest the fact-finding and judgments of the commission—he seeks to have the Military Order that created it declared unconstitutional both as applied to him and on its face. Moreover, because it is doubtful that the commissions have the authority to declare their own existence unconstitutional or to judge the validity of their underlying Executive mandate, as Attorney General Biddle said in *Quirin*, the tribunals would "lack authority to grant the type of relief requested." *Id. Cf. Johnson v. Robison*, 415 U.S. 361, 368 (1974) ("[A]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies") (internal quotations and citation omitted); *McNeese v. Bd. of Ed. for Cmty. Unit Sch. Dist. 187*, 373

[10] Although in 1996 Congress superceded the specific holding of *McCarthy* by imposing a mandatory exhaustion requirement in the prison litigation context, the Court continues to apply *McCarthy*'s exhaustion framework. *See, e.g., Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998).

U.S. 668, 675 (1963) (students seeking to integrate public school need not file complaint with school superintendent because the "Superintendent himself apparently has no power to order corrective action" except to request the Attorney General to bring suit).

Exhaustion is particularly inappropriate because Respondents claim that Hamdan must first exhaust not only pre-trial motions and the trial itself, but also the layers of the appointing authority, civilian review board, Secretary of Defense, and the President. Resp.'s brief at 17.[11] Seeing as Hamdan's trial alone will take place at least three years after his confinement, at the earliest, it is very hard to believe that these other processes, particularly the time of the President, will be immune from similar delays.

It is also notable that these layers of review have already prejudged the very constitutional and international law questions at issue in this case by promulgating a Military Order and accompanying regulations. The reviewing authorities apparently rely on a binding Office of Legal Counsel opinion, which speaks for the entire federal government, that evidently states commissions are constitutional. *See* Memorandum for Alberto Gonzales, Counsel to the President, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Legality of the Use of Military Commissions to Try Terrorists* (Nov. 6, 2001). A Presidential Order establishes that the Geneva Conventions do not apply either. *See* February 7, 2002, Presidential Order, available at http://www.library.law.pace.edu/research/020207_bushmemo.pdf.[12] Tellingly, the one body

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[11] One need not speculate about why Respondents provide no citation to these procedures in the Code of Federal Regulations or otherwise, it is because, unlike a court-martial, they have not even established such layers of review to review legal questions. The Regulations adopted by the Defense Department *only* give one body, the Review Board, the power to review any legal questions, and even there, the Board is instructed: "The Review Panel shall disregard any variance from procedures specified in this part or elsewhere that would not materially have affected the outcome of the trial before the Commission." 32 C.F.R. 9.6(h)(4). This part of the regulation is not mentioned by Respondents despite their quotations from the surrounding sentences. Yet none of the claims advanced in this Petition would have "affected the outcome of the *trial*." And even if the Review provision were stretched to mean something else (which justice should require), that review would occur far too late in the process.

[12] It is of course possible that the President or Secretary of Defense may change his mind about the

that has the power to review legal questions (though evidently not the power to second-guess OLC and Presidential determinations) does not even take an oath to uphold the Constitution and laws, unlike civilian courts or the Court of Appeals for the Armed Forces. *See* Secretary Rumsfeld Swearing-In of Military Commission, Sept. 21, 2004, available at http://www.defenselink.mil/transcripts/2004/tr20040921-secdef1323.html.; Bruce Ackerman, *The Rumsfeld Oath*, THE AMERICAN PROSPECT ONLINE, Sept. 29, 2004.

Second, exhaustion is not appropriate when "requiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action." *McCarthy* 503 U.S. at 146-47. This exception is usually satisfied by "an unreasonable or indefinite timeframe for administrative action." *Id.* at 147. The Government has kept Hamdan in solitary confinement for over nine months, while denying him the UCMJ and Geneva Conventions' protection of a speedy trial. The Government has only recently filed formal charges—and only after Hamdan filed this federal suit—and even if those charges were resolved in a timely way, the commission's review process (including the time of the President himself) has an "indefinite timeframe."[13] As *McCarthy* and the cases it cites illustrate, the Government cannot keep a plaintiff in permanent limbo by requiring him to exhaust remedies that it has failed to provide in a timely manner.[14] In fact, the PMO and implementing regulations permit an infinite loop of claims and remands, meaning that even if

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constitutional and legal questions. But that speculative possibility will always exist, even *after* the President and Secretary complete review of Hamdan's file should he be convicted in a commission.

[13] The Review Panel "shall complete its review…within 30 days of receipt of the record of trial." Mil. Comm. Instr. No. 9, §§ 3, 4(C)(3). However, no rules, standards, or timing limits of any kind govern review by the Secretary of Defense or the President. As with the "conspiracy" charge, the elements of which were drafted in 2003 while Hamdan was in custody, Respondents are literally making up the rules as they go.

[14] *See Gibson v. Berryhill*, 411 U.S. 564, 575 n.14 (1973) (administrative remedy deemed inadequate "[m]ost often . . . because of delay by the agency"); *Coit Ind. Jt Venture v. FSLIC*, 489 U.S. 561, 587 (1989) ("Because the Bank Board's regulations do not place a reasonable time limit on FSLIC's consideration of claims, Coit cannot be required to exhaust those procedures."); *Walker v. Southern Ry. Co.*, 385 U.S. 196, 198 (1966); *Smith v. Il. Bell Tel. Co.*, 270 U.S. 587, 591-92 (1926) (claimant "is not required indefinitely to await a decision of the rate-making tribunal before applying to a Federal court for equitable relief").

Hamdan prevailed in a commission (or any other proceeding), the case would not end.[15]

Third, "an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it." *McCarthy*, 503 U.S. at 148. In this case, even if there has been no prejudgment of Hamdan's guilt, Respondents have certainly pre-judged the issues before this Court, namely, the legality and constitutionality of military commissions. *See* Remarks of President Bush, Nov. 19, 2001, at http://www.globalsecurity.org/military/library/news/2001/11/mil-011119-usia03.htm ("It's our national interests, it's our national security interests we have a military tribunal available. It is in the interests of the safety of potential jurors that we have a military tribunal…. This government will do everything we can to defend the American people within the confines of our Constitution. And that's exactly how we're proceeding. And so, to the critics, I say, I made the absolute right decision"); Remarks by Secretary of Defense to Greater Miami Chamber of Commerce, Feb. 13, 2004, at http://www.defenselink.mil/transcripts/2004/tr20040213-0445.html (justifying the legality of commissions and stating that "the people in U.S. custody are. . . enemy combatants and terrorists who are being detained for acts of war against our country"); *Houghton v. Shafer*, 392 U.S. 639, 640 (1968) (in view of Attorney General's submission that the challenged rules of the prison were "validly and correctly applied to petitioner," requiring administrative review through a process culminating with the Attorney General "would be to demand a futile act"). *See also JMM Corp. v. District of Columbia*, 378 F. 3d 1117, 1123 (D.C. Cir. 2004) (applying *Younger* because "there is no reason to presume that the courts of the District cannot be trusted to adequately protect federal constitutional rights"); *American Council of the Blind v. Snow*, 311 F. Supp. 2d 86, 89-90 (D.D.C. 2004).

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[15] While the Review Panel cannot directly turn a finding of not guilty into a finding of guilty, the rules unjustly permit them to return the case for further proceedings simply because they are unhappy with a finding of not guilty. Under the UCMJ art. 44, by contrast, defendants are clearly shielded from double jeopardy. *See* 10 U.S.C. § 844(a). *See also* 10 U.S.C. § 862(a)(1)

In addition, the military officers comprising the military commission (all hand-picked by Respondents) lack the necessary independence and detachment:

> Courts-martial are typically ad hoc bodies appointed by a military officer from among his subordinates. They have always been subject to varying degrees of "command influence." In essence, these tribunals are simply executive tribunals whose personnel are in the executive chain of command. Frequently, the members of the court-martial must look to the appointing officer for promotions, advantageous assignments and efficiency ratings – in short, for their future progress in the service. Conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, the members of a court-martial, in the nature of things, do not and cannot have the independence of jurors drawn from the general public or of civilian judges.

Reid, 354 U.S. at 36 (plurality); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955) ("from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals"). Most of the commission members have no formal legal training. Under these circumstances, bias arises simply from lack of expertise in evaluating legal arguments. In the absence of legal training, officers can be expected to fall back on their own training, and resolve issues in a manner to promote order and efficiency:

> Traditionally, military justice has been a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks. Because of its very nature and purpose the military must place great emphasis on discipline and efficiency. Correspondingly, there has always been less emphasis in the military on protecting the rights of the individual than in civilian society and in civilian courts.[16]

While Hamdan's interest in "prompt access to a federal judicial forum" is at its peak, the "countervailing institutional interests favoring exhaustion" are at their nadir. As explained above, Hamdan has "raised substantial arguments denying the right of the military

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[16] *Reid*, 354 U.S., at 35-36 (plurality). The truth of these observations is evident from history. *See, e.g.*, Michael R. Belknap, "*Alarm Bells from the Past: The Troubling History of American Military Commissions*," 28 J. S. CT. HIST. 300 (2003).

to try [him] at all." *Noyd*, 395 U.S. at 696 n.8. Courts also do "not believe that the expertise of military courts extend[] to the consideration of constitutional claims," *id*.[17] Because Hamdan seeks to have the PMO declared unconstitutional both as applied *and on its face*, moreover, exhaustion is unnecessary. *See McKart v. United States*, 395 U.S. 185, 197-98 (1969). Finally, the rationale for exhaustion does not apply here. Exhaustion is justified out of respect to the military's requirements of discipline and order that are "without counterpart in civilian life." *Councilman*, 420 U.S. at 757. *See also Toth*, 350 U.S. at 22. When the fighting function is not implicated, neither are doctrines of abstention. *See Doe v. Rumsfeld*, 297 F. Supp.2d 119, 128 (D.D.C. 2003).

To avoid this precedent, Respondents try to manufacture an analogy to *Ludecke v. Watkins*, 335 U. S. 160 (1948), claiming that courts cannot review the "determination whether an individual is an enemy combatant." Resp.'s brief at 20 n.11. But whether Hamdan can be detained as an *enemy* combatant is irrelevant to whether he can be tried as an *unlawful* combatant before a commission. Lawfulness is a quintessentially legal determination.[18]

Without refuting Hamdan's right to immediate review of his facial challenge, Respondents contend that his as-applied speedy-trial claim must wait. To discourage

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[17] The Supreme Court has consistently held that fighting wars and staging trials are discrete tasks. "Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should occasion arise." *Toth*, 350 U.S. at 17. *See also id.*, at 22-23 ("Army discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier who has been wholly separated from the service for months, years or perhaps decades. Consequently considerations of discipline provide no excuse for new expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury"); *Reid v. Covert*, 354 U.S. 1, 35 (1957) (plurality).

[18] Respondents also omit the key fact that *Ludecke* was based on an Act of Congress that specifically allowed for deportation of dangerous aliens "[w]henever there is a declared war between the United States and any foreign nation or government." 335 U.S. at 161. This actual predicate is obviously lacking. Indeed, when a party had argued that the formality of the declaration of war is irrelevant, the Court rejected the claim: "We do not believe that the paraphrased expressions of a few members of the Fifth Congress could properly sanction at this late date a judicial reading of the statutory phrase 'declared war' to mean 'state of actual hostilities.'" *Id.* at 166 n.11. Here, Respondents try to appropriate the full war power when Congress has not given it to them.

"interlocutory or 'piecemeal' appeals," *United States v. Macdonald*, 435 U.S. 850, 853 (1978), suggested that the Sixth Amendment speedy trial guarantee could be vindicated after trial on harmless error analysis. The Court cautioned that its holding "is not to be confused with the quite distinct proposition that certain claims (because of the substance of the rights entailed, rather than the advantage to a litigant in winning his claim sooner) should be resolved before trial," *id.* at 861 n.7. Because Hamdan challenges more than the accuracy of the fact-finding process, his case is far more similar to *Abney v. United States*, 431 U.S. 651 (1977). Like the defendant who brought a double jeopardy claim in *Abney*, Hamdan asserts a "right not to be tried." *MacDonald*, 435 U.S. at 861. He "is contesting the very authority of the Government to hale him into court to face trial on the charge against him." *Abney*, 431 U.S. at 659.[19] In *MacDonald*, by contrast, no question existed as to the facial validity of the tribunal against which the speedy trial claim was brought.

Finally, because exhaustion is not only futile, but also lengthy and uncertain, it is unnecessary. "Under accepted principles of comity, the court should stay its hand only if the relief the petitioner seeks . . . would also be available to him with reasonable promptness and certainty through the machinery of the military judicial system in its processing of the court-martial charge." *Parisi v. Davidson*, 405 U.S. 34, 41-42 (1972). In *Parisi*, the Petitioner brought his habeas action prior to the court-martial.[20] The district court deferred consideration of his habeas action, and a court-martial was instituted. *See id.* at 36-37. The Supreme Court found that there was no need to wait for the court-martial before the habeas court could intervene because the Court was "not persuaded that such relief would be even potentially available, much less that it would be either prompt or certain." *Id.* at 42.

Just as *Parisi*, this action does "not concern a federal district court's direct

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[19] Furthermore, *MacDonald*'s analysis of the Sixth Amendment does not control the specific *statutory* rights in the UCMJ and Geneva Conventions. *Cf. United States v. Ferebe*, 332 F.3d 722, 727 (4th Cir. 2003).

[20] At the time of the Supreme Court case, a military appeal was pending. *See id.* at 36 n.1.

intervention in *a case* arising in the military court system." *Id.* at 41 (emphasis added). The *post hoc* maneuvering of Respondents to manufacture a case is plainly not sufficient.

E. Even if Abstention Were Ordinarily Required, It Is Not Required Here

The cases cited by Respondents are all inapposite, for exhaustion is not necessary when "a particular plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim." *McCarthy*, 503 U.S. at 147. The only evidence on this point is Petitioner's, that his extended period of solitary confinement has taken a severe physical and psychological toll.[21] Indeed, Judge Lasnik has already made a finding that "based on evidence currently before the Court, Hamdan is at risk of harm from continued detention at Camp Echo." *See* Order Granting Abeyance, May 11, 2004, at 7.

Psychological harm, in and of itself, has been recognized as the type of non-compensable, irreparable injury for which immediate judicial intervention is an appropriate remedy.[22] Furthermore, such psychological injury could impair Hamdan's ability to pursue his rights in the future. Respondents' generic legal arguments do not address this specific case, and they have presented no evidence on irreparable harm to the contrary.

One final point: Respondents claim that the allegations of psychological harm are "speculative" and "generalized." Resp.'s brief at 28. To the extent that the affidavit of the

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[21] The Government quotes *Councilman* for the proposition that "[c]ertain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, [can] not by themselves be considered 'irreparable' in the legal sense of that term." Resp.'s brief at 15. True enough. But given the evidence in the record, coupled with his now-prolonged solitary confinement, Hamdan is suffering far more tangible injury than the typical "cost, anxiety, and inconvenience" of litigation.

[22] *See Thomas v. County of Los Angeles*, 1993 U.S. App. LEXIS 2165, at *22 (9th Cir. 1993) (emotional and physical injury resulting from violations of rights amounted to irreparable harm); *Chalk v. United States Dist. Court Cent. Dist.*, 840 F.2d 701 (9th Cir. 1988) (finding that the plaintiff's "emotional and psychological" harm constituted irreparable injury which warranted issuing preliminary injunction); *Vencor Nursing Ctrs., L.P. v. Shalala*, 63 F. Supp.2d 1, 12 (D.D.C. 1999) ("The court may consider subjective, psychological harm in its irreparable-harm analysis."); *Petties v. District of Columbia*, 881 F. Supp. 63, 70 (D.D.C. 1995) ("[T]he Court finds that the uncertainty over the consequences of the DCPS' actions is exacting a psychological, emotional and physical toll on many of the students in the plaintiff class. Irreparable harm has been demonstrated clearly and dramatically").

Army's own former Guantanamo psychiatrist is speculative, it is only so because *Respondents have forbidden any independent medical or psychiatric examination of Hamdan*, including by that psychiatrist. The only psychiatrist Hamdan can meet with is one picked by the Government who can testify against him at his military commission trial.

F. Respondents Distort the Holding in *Hamdi v. Rumsfeld*

In making their exhaustion argument, Respondents distort the plurality opinion in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). Respondents contend that *Hamdi* "rejected any notion that the President is disabled from exercising Commander-in-Chief authority over a person detained as an enemy combatant merely because the detainee disputes his status as such." Resp.'s brief at 21-22. In reality, the Court expressly declined to rule on the scope of the President's authority: "The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not reach the question whether Article II provides such authority, however, because we agree…that Congress has in fact authorized Hamdi's detention, through the AUMF." *Hamdi*, 124 S. Ct. at 2639.

If anything, the plurality rejected a similar exhaustion/separation of powers claim:

> [W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances…[The Government's] approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.[23]

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[23] *Id.* at 2650 (emphasis added). *See also id.* at 2649-50 ("While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war…it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here."); *id.* at 2648, 2650-51.

The Court did not require Hamdi's case to be brought first to a military tribunal, rather it said that the habeas court could hear the evidentiary challenges to the enemy combatant determination. *See id.* at 2652 ("a habeas court in a case such as this may accept affidavit evidence like that contained in the Mobbs Declaration, so long as it also permits the alleged combatant to present his *own factual case to rebut the Government's return*") (emphasis added).

Respondents further attempt to shroud their loss in *Hamdi* by mixing two completely different ideas from two different paragraphs into one sentence to manufacture an impression that *Hamdi* upheld the authority of military commissions. Resp.'s brief at 44. But the plurality's analysis began by stating that "for purposes of this case, the enemy combatant that [the Government] is seeking to detain is an individual who, it alleges, was part of or supporting forces hostile to the United States or coalition partners in Afghanistan *and who engaged in an armed conflict against the United States there*. We therefore answer *only* the *narrow* question before us: whether the *detention* of citizens falling within *that* definition is authorized." *Id.* at 2639 (emphasis added); *see also id.*, at 2645 (similar). Thus, *Hamdi* does not reach outside detention, particularly not to those who deny engaging in armed conflict. *Compare id.* at 2462 (describing enemy combatancy as "carrying a rifle against Union troops") *with* Hamdan Affidavit (stating that he was employed as a driver). The only evidence before this Court is that Petitioner has not been engaged in any such conflict. Indeed, the Government's vague accusations against Hamdan do not even meet their own definition of enemy combatancy.

There are at most two references to military tribunals in *Hamdi*, one is historical, the other supports Petitioner. The first is "The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.' *Quirin*, 317 U.S. at 28." *Id.* at 2460. This description of past history is not in dispute. However, this does not answer the question of

what body must try unlawful combatants. *See id.* (referring to "mere detention"); *id.* at 2643 (stating that *Quirin* is "the most apposite precedent that we have on the question of whether citizens may be *detained* in such circumstances") (emphasis added).

The only other reference is *Hamdi*'s statement: "There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal." *Id.* at 2651. This establishes the authority of this Court to review military commission proceedings.[24] The entire focus of this case is that the Commission is not appropriately authorized or properly constituted. *Hamdi*'s plurality posed, but did not decide, these questions. Even its detention holding was anchored to proven combatants: "To be clear, our opinion *only* finds legislative authority to detain under the AUMF once it is sufficiently clear that the individual is, *in fact*, an enemy combatant." *Id.* at 2643; *see also id.* at 2642 ("legitimately determined to be Taliban combatants").[25]

Furthermore, Respondents' brief is notable for what it omits, such as the *Hamdi* plurality's rejection of Respondents' Equal Protection argument:

> Nor can we see *any reason* for drawing such a line here. A citizen, no less than an alien, can be 'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States,' Brief for Respondents 3; such a citizen, if released, would pose *the same threat* of returning to the front during the ongoing conflict.

Id. at 2460-61. Further, the plurality repeatedly looked to the GPW to outline the powers of the Government. *See id.* at 2641 (citing Art. 118 and article mentioning Arts. 85, 99, 119, 129); *id.* (stating that "our understanding is based on longstanding law-of-war principles").

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[24] The *Hamdi* plurality words mirrored precisely the arguments made by Commander Swift and his JAG colleagues as Amicus in *Rasul*, that a commission must be (1) legally constituted; (2) have personal jurisdiction over the accused; and (3) have subject-matter jurisdiction to hear the offense charged. *See* Brief of Military Attorneys in *Rasul*, available at www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/91/AmicusCuriae_Military_Attorneys.pdf

[25] As such, it cannot be said that *Hamdi*'s views on the AUMF with respect to prospective "detention" have anything to do with the question presented here about retrospective power to punish. Detention is of course a subset of "force," but meting out justice is a different concept altogether.

Indeed, only one Justice argued that the Geneva Conventions did not apply. *Id.* at 2679 (Thomas, J., dissenting). The case for GPW application is even stronger here than in *Hamdi*, because international law is the source of authority for a commission. *See infra* 30-31.

At bottom, the only comfort Respondents might derive from their loss in *Hamdi* is the plurality's belief in "the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States." *Id.* at 2467. But that interest is irrelevant to this case. Petitioner is not challenging the President's detention power. If the Government is right that Hamdan is an enemy combatant, it may still detain him. As such, there are no national security implications whatsoever should this Court declare the military commission unlawful. *See Ex parte Milligan*, 71 U.S. 2, 127 (1866) ("It is difficult to see how the *safety* of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them.") (emphasis added). To the extent that there is some amorphous national security interest in prosecution, as opposed to detention, courts-martial are available. *See* 10 U.S.C. § 818 ("General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war").

Respondents go on to distort Justice Thomas' dissent in the hope of creating a fifth vote. But they point to no statement that concerns anything but "detention." This is so because Justice Thomas carefully wrought his opinion to deal only with that question, mentioning detention at least forty-six times in his opinion. *See id.* at 2674, 2677-85. Indeed, Justice Thomas acknowledged that *punishment* stands on an entirely different footing than detention, specifically isolating the *Milligan* case: "More importantly, the Court referred frequently and pervasively to the criminal nature of the proceedings instituted against Milligan…the punishment-nonpunishment distinction harmonizes all of the precedent." *Id.*

at 2682 (citations omitted).[26] In the end, Respondents confuse the detention power with the ability to punish. The former is well-established, and not in dispute.

III. HAMDAN'S LENGTHY PRE-TRIAL CONFINEMENT VIOLATES THE UCMJ

A. The UCMJ Applies to Hamdan

Respondents argue that the UCMJ does not apply in this case. However, because their interpretation of 10 U.S.C. § 802(a)(12) is inconsistent with its language and intent, and with military regulations interpreting the scope of the UCMJ, their argument fails. In fact, the Government is trying to forge new law by restricting the reach of this fundamental statute.

The 1950 UCMJ changed military law by adding paragraph 12 to Article 2, thereby expanding the list of persons "subject to this chapter" to include "persons within an area leased by" the United States. *See* Petr.'s Mem. at 29. Respondents do not dispute that this language applies to Guantanamo, and provide no authority for their claim that the UCMJ is limited to courts martial.

Respondents' reliance on *Yamashita* is also misplaced. That case occurred five years before the UCMJ took effect. The Court found that Congress "did not thereby make subject to the "Articles of War persons other than those defined by Article 2 as being subject to the Articles, nor did it confer the benefits of the Articles upon such persons." 327 U.S. 20. General Yamashita, the Court held, is "not a person made subject to the Articles of War by Article 2." Today, however, Article 2 has been expanded in a way that the Army JAG feared in 1950. *See* Petr.'s Mem. at 30.[27] The effect of paragraph 12 is to codify a distinction

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[26] Indeed, Justice Thomas even altered a quotation from *Quirin* to cite it only for the proposition that "detention" is justified when *Quirin*'s original sentence affirmed both the detention and military commission. *Compare id.* at 2682 (Thomas, J., dissenting) *with Ex parte Quirin* 317 U.S. 1, 25 (1942) at 25 (referring to "the detention and trial of petitioners").

[27] Respondents' selective reading disregards what *Yamashita* said about the reach of Article 2, and isolates the phrase "pursuant to the common law of war" to give the Government *carte blanche*. But that phrase only rebuts Gen. Yamashita's argument that Article 15 of the Old Articles of War forced the commission to follow the entire Articles of War. Here, Petitioner is advancing a completely different argument – not based on

between commissions in occupied territory at or near a battlefield and tribunals on leased territory. In the latter, there is no doubt that the UCMJ applies.

Petitioner's argument that the UCMJ applies to Hamdan is supported by 10 U.S.C. § 836, upon which the Government relies. That section of the UCMJ gives the President the ability to adopt "pretrial, trial and post-trial procedures…for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals…which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, *but which may not be contrary to or inconsistent with this chapter*." (Emphasis added.) Respondents now propose the power to do away with that very restriction, despite it being the slender source of authority that they rely on to launch the commissions in the first place.

Respondents advance not one piece of evidence after the UCMJ to support their theory that it does not apply. And the Pentagon specifically concluded the reverse both in Vietnam, *see supra* p. 7, and Korea, *see* U.N. Supplemental Rules of Criminal Procedure for Military Commissions, Korea (1951) (providing a variety of rights and stating compliance with "the rules of evidence prescribed in the Manual for Courts-Martial, United States, 1951"). The historic and uncontroverted Pentagon approach to the UCMJ is not surprising. After all, had Congress wanted to carve commissions out of the reach of the UCMJ, it knew how to do so. Congress had already done it in 18 U.S.C. 3172, stating that "an offense triable by . . . military commission" is not subject to the Speedy Trial Act. Yet Congress did no such thing in insulating commissions from the UCMJ. This tracks the "general rule, that military commissions are constituted and composed, and their proceedings are conducted, similarly to general courts-martial." William Winthrop, *Military Law and Precedents* 835 n.81 (2d ed. 1920) (citations omitted); Act of July 2, 1864, 13 Stat. 356 (extending court-

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Article 15 or its modern equivalent, but rather on the new Article 2. In addition, unlike the petitioner in *Yamashita* who was unquestionably a Commanding General in the Japanese Army, Hamdan contests his designation as a combatant.

martial provisions to commissions).[28]

Furthermore, irrespective of whether the UCMJ applies via § 802(a)(12) or § 836, the UCMJ also applies because it governs the treatment and trial of prisoners of war. *See* 10 U.S.C. § 802(9) (defining "persons subject to this chapter" to include "Prisoners of war in custody of the armed forces"). As argued below, Hamdan must be treated as a prisoner of war, and this provides a third and independent reason to apply the UCMJ to him.

Finally, U.S. military regulations also require consistency with the UCMJ in all military proceedings. *See* Army Regulation 190-8, § 1-5(a)(3) ("The punishment of Enemy Prisoners of War . . . known to have, or suspected of having, committed serious offenses will be administered . . . under legally constituted authority per the . . . Uniform Code of Military Justice and the Manual for Courts Martial"). Although the President has flexibility with regard to conforming the commissions to criminal procedure in civilian courts, he is *not* at liberty to deviate from the statutory baseline of the UCMJ. *See United States v. Johnson*, 19 U.S.C.M.A. 464, 466 (C.M.A. 1970) ("Rules prescribed under this authority [§836] have the force of law unless they conflict with other provisions of the Code or Manual or another recognized principle of military law"); *United States v Villasenor*, 6 U.S.C.M.A. 3 (1955).

B. Hamdan's Treatment Violates the UCMJ

The UCMJ could not be more plain: "When *any* person *subject to this chapter* is placed into arrest or confinement prior to trial," the Government must take "immediate steps" to "try him or to dismiss the charges and release him." 10 U.S.C. § 810 (emphasis added). And § 802(12) states that those at Guantanamo, including Hamdan, are "subject to this chapter."[29]

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[28] In addition, Respondents offer no support for the claim that Hamdan is unable to challenge the oppressive conditions of his confinement. Such challenges are routinely accepted by the courts. *See* Petr.'s Opp. to Resp.'s Motion, July 23, 2004, at 11-17 (discussing cases).

[29] Indeed, the authors of § 810 distinguished between the rules governing offenses charged under the UCMJ itself and the rules governing offenses charged under other bodies of law. The former category – "[a]ny

Section 810 "imposes a more stringent speedy-trial standard than that of the Sixth Amendment." *United States v. Kossman*, 38 M.J. 258, 259 (C.M.A. 1993). Its clock begins to run the moment a defendant is placed in confinement. *See* 10 U.S.C. § 810; *United States v. Reed*, 41 M.J. 449, 451 (C.A.A.F. 1995) ("Article 10…[is] triggered either by pretrial restraint or preferral of charges."); RCM 707(a) ("The accused shall be brought to trial within 120 days after the earlier of: (1) Preferral of charges; [or] (2) The imposition of restraint").

Respondents argue that, even if the UCMJ applies, Hamdan's confinement has not violated § 810. However, Hamdan's confinement has exceeded all proper boundaries and has significantly prejudiced him in his ability to prepare his defense.[30] It is far longer than the acceptable maximum in courts-martial. *Kossman*, 38 M.J. at 261 (observing that "3 months is a long time to languish in a brig awaiting the opportunity to confront one's accusers," and "[f]our months in the brig is even longer"); *United States v. Hatfield*, 44 M.J. 22, 23 (C.A.A.F. 1996) (observing same in affirming a speedy trial dismissal for 106 days of confinement).[31]

United States v. Cooper, which the government cites as support for its overly limited

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person subject to this chapter *charged with an offense under this chapter*" must be mandatorily arrested or confined. The latter category – those "subject" to the chapter either from the UCMJ or some other offense, are guaranteed rights to speedy charging.

[30] *United States v. Tibbs*, 15 C.M.A. 350, 353, 35 C.M.R. 322, 325 (1965); *see also Kossman*, 38 M.J. at 262.; *United States v. Birge*, 52 M.J. 209, 212 (C.A.A.F. 1999) (looking to the four factors outlined by the Supreme Court in the Speedy Trial case of *Barker v. Wingo*, 407 U.S. 514 (1972)); *United States v. Mizgala*, 2004 C.C.A. LEXIS 24 at *8 (A.F.C.C.A. Jan. 23, 2004). As Justices Scalia and Stevens said in unchallenged words, under the Habeas Corpus Act in England, "a second magna charta, and a stable bulwark of our liberties," "imprisonment without indictment or trial for felony or high treason…would not exceed approximately three to six months." *Hamdi*, at 2662 (Scalia, J, dissenting).

[31] Hamdan's pretrial detention also far exceeds the 120 day requirement established by the Rules for Court-Martial, promulgated by the President to guide court-martial proceedings. *See* RCM 707(a); *see also Kossman*, 38 M.J. at n.3 (noting that in determining when an Article 10 violation has occurred, RCM 707 "provide[s] good guidance to both the Bench and Bar"); *Andrews v. Heupel*, 29 M.J. 743, 749 (AFCMR,1989) (issuing an extraordinary writ and overturning a lower court because "since more than 120 days elapsed from the date the pretrial restraint began, triggering the speedy trial clock, and petitioner had not been brought to trial, the clear mandates of R.C.M. 707(a)(2) and 707(e), require the charges to be dismissed.").

conception of the speedy trial clock, in fact stands for the opposite proposition – that Article 10 should be applied expansively to "the entire period up to trying the accused." 58 M.J. 54, 60 (C.A.A.F. 2003) (rejecting "a restrictive reading of Article 10"). In addition, *Cooper* identified the Sixth Amendment standard embodied in the Speedy Trial Act, which requires filing charges within *thirty days* after arrest, as a relevant "baseline" for its inquiry. *Id*; Speedy Trial Act, 18 U.S.C. §3161(b). *See also United States v. Earls*, 2003 CCA LEXIS 92 (A.F. C.C.A. Mar. 24, 2003) (all time after confinement counts for speedy trial purposes under Article 10, and should be examined for due diligence under the *Barker* factors); *United States v. Wilkinson*, 27 M.J. 645 (A.C.M.R. 1988) (same).

Although it is true that a long delay, on its own, does not automatically create a speedy trial violation, *United States v. Goode*, 54 M.J. 836 (2001), there must be a showing of good faith by the Government to prevent a dismissal of charges. In *Goode*, not only was the delay in trial due to a defense request, but it actually *helped* the defendant, rather than hurt him. 54 M.J. at 840 ("We further find that any delay inured to the benefit of the appellant who used the time to prepare his case and resolve issues related to his counsel"). The charges had been preferred in that case within 15 days of the alleged crimes. *See id.* at 839. Moreover, the court in *Goode* found that the prosecution demonstrated its good faith by trying to reduce the delay and to sever a charge so that trial on the rest of the case could begin more quickly. *See id.* at 839-40.

By contrast, no such showing of good faith has been made by Respondents here. They did not need two and a half years to gather evidence. When an accused asserts that he has been denied a speedy trial, the burden is on the Government to establish that it has taken the "immediate steps" that 10 U.S.C. § 810 requires. *United States v. Laminman*, 41 M.J. 518, 520-21 (C.G. Ct. Crim. App. 1994); *United States v. Brown*, 520 F.2d 1106, 1110 (D.C. Cir. 1975) ("The longer the time between arrest and trial, the heavier the burden of the Government in arguing that the right to a speedy trial has not been abridged"). In the present

case, Respondents have failed to offer any evidence that they took "immediate steps" to safeguard Hamdan's right to a speedy trial.

The unreasonable and lengthy delay, moreover, has prejudiced Hamdan. A speedy trial guarantee is designed to protect three interests of the defendant: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the accused's defense will be impaired. *See Barker*, 407 U.S. at 532; *United States v. Plants*, 57 M.J. 664, 667 (A. F. Ct. Crim. App. 2002) (same).

Of these harms, the impact on an accused's ability to mount a defense is the most grave. *See Barker*, 407 U.S. at 532 (noting that "the inability of a defendant adequately to prepare his case skews the fairness of the entire system"). It is also the most difficult form of prejudice to prove, "because time's erosion of exculpatory evidence and testimony can rarely be shown." *Doggett v. United States*, 505 U.S. 647, 655 (1992) (citing *Barker*, 407 U.S. at 532); *id*. at 655-56 (also noting that "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or for that matter, identify"). While the Government has been free, throughout this time, to conduct an investigation, contact witnesses, and preserve evidence, Hamdan has been in solitary confinement, "powerless to exert his own investigative efforts to mitigate these erosive effects of the passage of time." *Smith v. Hooey*, 393 U.S. 374, 380 (1969). These prejudicial effects have been aggravated by Hamdan's limited access to counsel.[32]

Furthermore, Hamdan's solitary confinement certainly qualifies as "oppressive pretrial incarceration." *Barker*, 407 U.S. at 532; *United States v. West*, 504 F.2d 253, 256 (D.C. Cir. 1974). His extended confinement has engendered "anxiety and concern" rising to

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[32] The amorphous claim that conspiracy charges take years to investigate lacks credulity, since any number of complex conspiracies in the American criminal and military courts do not require nearly three years of incarceration before charges are brought. As a result of its failure to explain the delay, the government's actions constitute the kind of "deliberate attempt to delay the trial" that *Barker* identified as weighing most heavily against the government. 407 U.S. at 531. Article 10 was intended to prohibit precisely this kind of "foot-dragging" in the military justice system. *Kossman*, 38 M.J. at 262.

the level of psychological injury. Such anxiety is one of the evils against which the speedy trial guarantee is designed to protect. *See United States v. Marion*, 404 U.S. 307, 320, (1971); *see United States v. Calloway*, 505 F.2d 311, 319 (D.C. Cir. 1974) (finding "numbness to the needs" of psychologically damaged defendant languishing in pretrial detention "intolerable").

C. Dismissal With Prejudice is the Appropriate Remedy

The remedy for a violation of speedy trial rights is dismissal of the charges. *See United States v. Rowsey*, 14 M.J. 151, 153 (Ct. Mil. App. 1982) ("For denial of the right to speedy trial, only dismissal is compensatory."); *United States v. Becker*, 53 M.J. 229, 232 (C.A.A.F. 2000) (dismissal "is appropriate in the usual case of a speedy-trial violation that occurs prior to the trial at which an accused's guilt is to be decided"); *United States v. Hatfield*, 44 M.J. 22 (C.A.A.F. 1996) (dismissing charges for speedy trial violation). Though dismissal is severe, it is the "only possible remedy" when the speedy trial right has been deprived. *Barker*, 407 U.S. at 522; *United States v. Johnson*, 17 M.J. 255 (C.M.A. 1984) (citing *Barker*); s*ee Strunk v. United States*, 412 U.S. 434 (1973) (dismissal is only proper remedy for Speedy Trial Clause violation). The Manual for Courts-Martial specifies that the charges must be dismissed with prejudice when the accused has been deprived of his constitutional right to a speedy trial. *See* RCM 707(d). Though in many cases this inquiry will turn on application of *Barker*, military courts have also examined such factors as "truly neglectful" government "attitudes," *United States v. Edmond*, 41 M.J. 419, 421 (1995) (citing *United States v. Taylor*, 487 U.S. 326, 338-39 (1988)), and "intentional dilatory conduct," *id.* (citing *United States v. Kottmyer*, 961 F.2d 569, 573 (6th Cir. 1992)). The Government's conduct in this case fits both descriptions; as a result, the charge should be dismissed with prejudice.

IV. HAMDAN'S CONFINEMENT AND TRIAL VIOLATES THE GENEVA CONVENTIONS

Respondents argue that the Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 (1955) ("GPW"), (1) is not self-executing, (2) does not apply to "this conflict," and (3) is inapplicable because Hamdan is not a prisoner of war. These arguments lack merit.

A. Whether the GPW Is Self-Executing Is Irrelevant Because the Provisions at Issue Have Been Implemented

The provisions of the GPW primarily at issue are Article 5, which provides that GPW protections must be afforded to any detainee if any doubt exists as to whether he is protected by the Convention, and Article 103, which imposes a 3 month limit on pretrial confinement.

Respondents' self-execution argument is irrelevant because Articles 5 and 103 have been implemented in the domestic law of the United States through binding regulations promulgated by every department of the U.S. Military:

> *All persons* taken into custody by U.S. forces will be provided with the protections of the GPW *until* some other legal status is determined by competent legal authority.

Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* § 1-5(a)(2) (1997), http://www.apd.army.mil/pdffiles/r190_8.pdf [hereinafter AR 190-8] (emphasis added).[33] In addition to this general implementation of the GPW, both Article 5 and Article 103 are the subject of specific, detailed sections of AR 190-

[33] This regulation was jointly promulgated by the Headquarters of the departments of the Army, Navy, Air Force, and Marine Corps in Washington, D.C. on October 1, 1997. The regulation itself explicitly states that its purpose is to implement international law as set forth in the GPW: "This regulation implements international law, both customary and codified, relating to EPW [enemy prisoners of war], RP [retained personnel], CI [civilian internees], and ODs [other detainees], which includes those persons held during military operations other than war. The principal treaties relevant to this regulation are:…(3) The 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW)." AR 190-8 § 1-1(b). The provisions that follow, § 1-6 (c)-(g), describe in detail the procedures to implement GPW Article 5. In his concurring opinion in *Hamdi v. Rumsfeld*, Justice Souter, joined by Justice Ginsburg, correctly noted that these regulations were "***adopted to implement the Geneva Convention***." 124 S. Ct. 2633, 2658 (June 28, 2004) (emphasis added).

8, which hew to the language of the GPW. AR 190-8 § 1-6 provides (emphasis added):

> **1-6. Tribunals**
>
> *a*. In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.
>
> *b*. A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who ***asserts*** that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

Thus, the mere assertion by the detainee of protected status is sufficient to require the military to provide GPW protection pending a determination by a competent tribunal.

Likewise, AR 190-8 § 3-7(h) tracks almost exactly the language of Article 103:

> *h*. Confinement. A pretrial investigation of an offense alleged to have been committed by a detainee will be conducted as soon as circumstances permit so that trial, if warranted, will take place as soon as possible. A detainee will not be confined while awaiting trial unless a member of U.S. Armed Forces would be so confined if accused of a similar offense, or unless national security would be served. ***In no case will this confinement exceed 3 months***.
>
> *i*. Retention of Geneva Benefits. Persons prosecuted for an act committed before capture will retain, even if convicted, the protections of the Geneva Convention.

Id. (emphasis added). The phrase "Retention of Geneva Benefits" is significant, meaning that detainees receive GPW protections at the beginning of their detention, and do not lose them subsequently.[34] These regulations and their predecessors have long been included in U.S. Military training manuals, which provide further evidence of implementation.[35]

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[34] AR 190-8 § 3-7(i) tracks the language of GPW Article 85.

[35] *See, e.g.*, Dep't of the Army, Field Manual no. 27-10, *The Law of Land Warfare*, ch. 3 § I ¶ 71

The legislative history of the GPW also establishes that the provisions at issue here have been implemented. In its Report recommending that the Senate give its advice and consent to ratification of the 1949 Geneva Conventions, the Senate Committee on Foreign Relations stated: "[I]t appears that very little in the way of new legislative enactments will be required to give effect to the provisions contained in the four conventions." S. Exec. Rep. No. 84-9 (1955) [hereinafter "Ratifying Report"] at 30. The Committee identified only four areas where additional implementing legislation would be required, none of which are relevant here.[36] With respect to the GPW Articles relating to "grave breaches" (which Respondents make much of), the Committee noted:

> The committee is satisfied that the obligations imposed upon the United States by the "grave breaches" provisions are such as can be met by existing legislation enacted by the Federal Government within its constitutional powers. A review of that legislation reveals that no further measures are needed to provide effective penal sanctions or procedures for those violations of the conventions which have been considered in this portion of the report.

Ratifying Report at 27.[37] In short, Respondents' argument that certain provisions of the GPW

(1956) ([Article 5] applies to any person not appearing to be entitled to prisoner-of-war status…who asserts that he is entitled to treatment as a prisoner of war or concerning whom any other doubt of a like nature exists") (unchanged by 1976 revision), www.adtdl.army.mil/cgi-bin/adtl.dll/fm/27-10/Ch.3.htm; Judge Advocate General's School, *Operational Law Handbook* 22 (2003) (instructing judge advocates to "advise commanders that, *regardless of the nature of the conflict*, all enemy personnel should initially be accorded the protections of the GPW Convention (GPW), at least until their status has been determined") (emphasis added).

[36] The implementing legislation deemed necessary was as follows: (1) modification of 18 U.S.C. § 706 relating to the commercial use of the Red Cross emblem, (2) legislation to provide workmen's compensation for civilian internees, (3) legislation to exempt relief shipments from import, customs, and other duties, and (4) appropriate penal measures to enforce provisions that only POW or internment camps be identified by the letters PW, PG, or IC. *See* Ratifying Report at 30-31.

[37] Respondents correctly observe that in the 1990s, Congress updated the implementing legislation by enacting the War Crimes Act of 1996, which was further amended in 1997. However, Respondents then argue that because the "grave breaches" provision of the GPW is non-self-executing, none of the other provisions of the GPW is self-executing. This is a complete *non sequitur*, and is flatly wrong. In fact, it is well established that "[s]ome provisions of an international agreement may be self-executing and others non-self-executing." Restatement (Third) of Foreign Relations Law of the United States ("Restatement") § 111 (1987), cmt. H; *Lidas, Inc. v. United States*, 238 F.3d 1076,1080 (9th Cir. 2001) (citing cases and Restatement § 111); *United States v. Postal*, 589 F.2d 862, 884 (5th Cir. 1979) ("A treaty need not be wholly self-executory or wholly executory"). Thus, if the "grave breaches" section is not self-executing, it sheds no light on Articles 5 and 103.

are non-self-executing is completely irrelevant, and ignores the reality that Article 5 and Article 103 have already been implemented by Executive action in the form of regulations binding on all branches of the U.S. Armed Forces. Because it is undisputed that (1) there has been no determination by an Article 5 tribunal that Hamdan is not entitled to the protection of the GPW, and (2) he has been held in pre-trial solitary confinement for over 9 months (without charges having been preferred against him for 7 months), this Court should find as a matter of law that Respondents have violated the GPW.

B. Self-Execution Is Irrelevant Because the Authorization for Commissions Is Found in the Laws of War, and When Respondents Violate Those Laws, They Lack Authorization

Respondents claim the military commission in this case is authorized by the laws of war and 10 U.S.C. 821. But those very sources of authority also impose constraints on the Government's conduct. Therefore, if the Geneva Conventions, which are the most recent and authoritative pronouncement on the laws of war, forbid the conduct we have seen from Respondents in this case, then they cannot legitimately claim their conduct is authorized by the laws of war, regardless of whether the GPW is self-executing. Respondents lack the authority to pick and choose which provisions of international law they will honor and ignore. Under these circumstances, Hamdan is entitled to a writ of mandamus requiring Respondents to abide by international law as codified in the GPW, and U.S. Military regulations that implement the GPW. *See Hamdi*, 124 S. Ct. at 2658 (Souter, J., concurring) (stating that, in detaining Hamdi, "there is reason to question whether the United States is acting in accordance with the laws of war it claims as authority").

It is also notable that the very statute the government points to, 10 U.S.C. § 821, at

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Furthermore, "[t]here can, of course, be instances in which the United States Constitution, or previously enacted legislation, will be fully adequate to give effect to an apparently non-self-executing international agreement, thus obviating the need of adopting new legislation to implement it." *Id.* As noted above, the Ratifying Report expressly stated that this is precisely the situation in this case, as very little new legislation was deemed necessary to implement the GPW in its entirety. "In fact, Congress has rarely refused to implement an admittedly valid international agreement." Restatement § 111, Rpt.'s Note 7.

most permits a commission to try "offense[s] *that by statute or by the law of war may be tried by military commissions.*" (emphasis added). Thus, this statute mandates that commissions conform to the laws of war. The Geneva Conventions, as universally recognized statements of the laws of war, therefore condition its reach. (Even if § 821's text were ambiguous, longstanding rules of statutory interpretation would counsel the very same result.)[38] As such, not only is the Government bound by the limits of its own sources of authorization, viz., the laws of war, its own statutory authority bars conduct inconsistent with the GPW as well.

C. The Provisions of the GPW at Issue Are Self-Executing

In any event, Articles 5 and 103 are self-executing and should be enforced as required by the Supremacy Clause of the U.S. Constitution (art. IV, cl. 2). "Whether an international agreement is self-executing is a matter of interpretation to be determined by the courts," *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976) (citing Restatement (Second) of Foreign Relations § 154 (1965)). "If a treaty contains language clearly indicating its status as self-executing, courts regard that language as conclusive." *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1107 (D.C. Cir. 2001). "When no right is explicitly stated, courts look to the treaty as a whole to determine whether it evidences an intent to provide a private right of action." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-809 (D.C. Cir. 1984) (Bork, J., concurring) (suggesting that treaties that "speak in terms of individual rights" may be regarded as self-executing). As the Restatement's Notes put it:

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[38] *See Murray v. The Charming Betsy*, 6 U.S. 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains"). Under the last-in-time rule, when a treaty is subsequent to congressional action, the treaty controls. *See Reid*, 354 U.S., at 18 n.34 (plurality op.) ("By the constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. . . . . [I]f the two are inconsistent, the one last in date will control the other." (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)); *Cook v. United States*, 288 U.S. 102 (1933). In *Cook*, the Court found that a treaty negotiated with Great Britain in 1924 about the twelve-mile territorial limit on seas trumped a statute from 1922 (and even though Congress reenacted the statute in 1930). *Cook* also makes clear that statutes enacted after treaties cannot trump those treaties without a clear statement. *Id* at 120.

> Since generally the United States is obligated to comply with a treaty as soon as it comes into force for the United States, compliance is facilitated and expedited if the treaty is self-executing. Moreover, when Congressional action is required but delayed, the United States may be in default on its international obligation. Therefore, if the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by the courts. (This is especially so if some time has elapsed since the treaty has come into force.) In that event, a finding that the treaty is not self-executing is a finding that the United States has been and continues to be in default, and should be avoided.
>
> In general, agreements that can readily be given effect by executive or judicial bodies, federal or State, without further legislation, are deemed self-executing, unless a contrary intention is manifest. ***Obligations not to act, or to act only subject to limitations, are generally self-executing***.

Restatement § 111, Rpt.'s Note 5 (emphasis added).

In an opinion characterized by the Supreme Court as "very able" (*see United States v. Rauscher*, 119 U.S. 407, 427-28 (1886)), one court stated:

> When it is provided by treaty that certain acts shall ***not*** be done, or that certain limitations or restrictions shall ***not*** be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land."

Commonwealth v. Hawes, 76 Ky. (13 Bush) 697, 702-03 (1878) (emphasis added).

The Supreme Court has long recognized that individual rights established by treaty are directly enforceable in federal courts, even in the absence of implementing legislation:

> [A] treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country…. ***A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by***

which the rights of the private citizen or subject may be determined.

The Head Money Cases, 112 U.S. 580, 598 (1884) (emphasis added).[39] In this case, both the plain language and the history of the GPW demonstrate that it (1) was intended to confer rights on private individuals, and (2) is self-executing in many of its provisions, including those at issue here.[40] In revising the Geneva Conventions of 1929, which had failed to provide adequate protection during World War II, the United States sought "to ensure humane treatment of POWs – not to create some amorphous, unenforceable code of honor among the signatory nations." *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992) ("[I]t is inconsistent with both the language and spirit of [the GPW] and with our professed support of its purpose to find that the rights established therein cannot be enforced by individual POWs in a court of law…."). The legislative history of the GPW also bears this out. The 1929 Geneva Convention failed because of its reliance on reciprocity and diplomatic protest, principles that the GPW replaced with legally binding injunctions. As the Ratifying Report noted, "[t]he practices which [the present Conventions] ***bind*** nations to follow impose no burden upon us that we would not voluntarily assume in a future conflict

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[39] *See also Kolovrat v. Oregon*, 366 U.S. 187 (1961) (recognizing claim under a treaty as a defense against state action in taking of property); *Jordan v. Tashiro*, 278 U.S. 123, 130 (1928) (relying on treaty provisions to uphold issuance of a writ of mandamus against state official); *Asakura v. City of Seattle*, 265 U.S. 332, 339-41 (1924) (recognizing private right of action for injunctive relief against enforcement of municipal ordinance in violation of treaty with Japan); *Chew Hong v. United States*, 112 U.S. 536 (1884) (holding that habeas petitioner could properly claim rights to leave the country and return as established by treaty with China); *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833) (holding that private rights established by treaty are enforceable).

[40] For example, GPW Article 5 expressly secures rights to "persons…having fallen into the hands of the enemy" and provides that "such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." 6 U.S.T. at 3324. Article 6 states that no agreement between or among nations "shall adversely affect the situation of prisoners of war, as defined by the present Convention, ***nor restrict the rights that it confers upon them***." *Id.* (emphasis added). Article 7 provides that POWs "may in no circumstances renounce in part or in entirety ***the rights secured to them*** by the present Convention." *Id.* (emphasis added). Article 78 provides that prisoners "shall have the right to make known to the military authorities" their requests and complaints regarding the conditions of their captivity. *Id.* at 3566. This article authorizes prisoners acting directly, not through their nation's diplomats, to bring their claims to the attention of the detaining power. Thus, there can be no serious doubt that the GPW confers rights on private individuals, and not just on nations.

without the ***injunctions*** of a formal treaty obligations." Ratifying Report at 32 (emphasis added). It is also apparent from new language in the 1949 GPW requiring the contracting parties "to ensure respect for the present Convention in all circumstances." This language, absent from the 1929 Convention, was placed in the very first Article of the GPW. As the official ICRC Commentary to the Convention explains:

> By undertaking this obligation at the very outset, the Contracting Parties drew attention to the fact that it is not merely an engagement concluded on a basis of reciprocity…. It is rather a series of ***unilateral engagements*** solemnly contracted before the world as represented by the other Contracting Parties.

Int'l Comm. of the Red Cross, *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* 17-18 (Jean S. Pictet ed., 1958) (emphasis added).

This result is further confirmed by analyzing the criteria for self-execution set forth in Restatement § 111. None of the conditions recognized as characteristic of a non-self-executing provision exists with respect to Article 103 or Article 5. That is, (1) the GPW does not "manifest an intention that it shall not become effective as domestic law without the enactment of implementing legislation," (2) the Senate, in giving consent to the treaty, did not "require implementing legislation" for those Articles, and (3) implementing legislation is not "constitutionally required." Restatement § 111 ¶ 4. Moreover, the right secured to Hamdan by Article 103 is the right ***not*** to be held in pretrial incarceration for more than 3 months. As such, it falls squarely within the *Hawes* category that "certain acts shall not be done, or certain limitations or restrictions shall not be disregarded or exceeded." 76 Ky. (13 Bush) at 702-03. Article 5 is likewise a provision that a certain act ***not*** be done, specifically, a detainee shall not be stripped of the protections of the GPW unless a competent tribunal determines that the detainee is not a protected person under the terms of the Convention. Here again, no implementing legislation is required to give effect to this provision. *See The Head Money Cases*, 112 U.S. at 598; *Asakura*, 265 U.S. at 341 ("The rule of equality established by [the treaty] cannot be rendered nugatory in any part of the United States by

municipal ordinance or state laws. . . . It operates itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.").

The cases Respondents rely upon do not establish that Articles 5 and 103 are non-self-executing. The Fourth Circuit's ruling in *Hamdi* was vacated by the Supreme Court, 124 S. Ct. 2686 (2004).[41] The D.C. Circuit's ruling in *Al Odah v. United States* did not include the views of Judge Randolph, who expressed his opinion on self-execution in a concurrence. In any event, *Al Odah* was overruled in *Rasul*, *supra*.[42] Respondents' reliance on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and *Handel v. Artukovic*, 601 F. Supp. 1421 (C.D. Cal. 1985), is similarly misplaced, as those cases involve the GPW's predecessor, the 1929 Convention. As discussed above, the language of that treaty, and the intent of its signers, differ markedly, and cases interpreting that earlier Convention do not govern the GPW.

D. The GPW Applies to the Conflict in Afghanistan

Respondents are also wrong in arguing that the GPW does not apply in this case. Article 2(2) of the GPW states that the Convention applies "to all cases of total or partial occupation of the territory of a High Contracting Party." Afghanistan is a High Contracting Party to all four of the Geneva Conventions, as is the United States.[43] United States Armed Forces invaded and occupied portions of Afghanistan in October 2001 "to wage a military

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[41] In the plurality opinion, Justice O'Connor stated that "we need not address at this time whether any treaty guarantees [Hamdi]…access to a tribunal for a determination of his status." *Id.* at 2649 n.2. Elsewhere, Justice O'Connor has observed that "domestic courts should faithfully recognize the obligations imposed by international law. The Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations." Sandra Day O'Connor, "Federalism of Free Nations", in *International Law Decisions in National Courts* 13, 18 (Thomas M. Franck & Gregory H. Fox, eds., 1996).

[42] Respondents also rely on Judge Bork's concurring opinion in *Tel-Oren*, but here again, his summary view that the GPW is non-self-executing – apparently in its entirety – did not command the assent of a majority of the panel. In any event, Judge Bork's discussion of the GPW is extremely cursory and considers the question of self-execution in the context of a claim for damages. Judge Bork was not in any way commenting on Articles 5 or 103, and stated that it was "unnecessary to decide whether any of the treaties imposes duties on parties such as appellees here."

[43] *See* States Party to the Geneva Conventions (February 6, 2004), *available at* www.icrc.org/web/eng/siteeng0.nsf/htmlall/party_gc.

campaign against al Qaeda and the Taliban regime that had supported it." *Rasul*, 124 S. Ct., at 2690. The "Taliban regime" controlled the Afghan state. Thus, the U.S. was in conflict with a High Contracting Party, and occupied its territory. Hamdan was seized and sold for a bounty to U.S. military personnel in that campaign. Thus, the GPW clearly applies.

Respondents try to avoid this result by disingenuously characterizing the context as simply "armed conflict between the United States and al Qaida." Resp.'s brief at 33. However, elsewhere, when expedient for the purposes of a different legal argument, they acknowledge that Hamdan was seized in the context of a "war against al Qaida ***and the Taliban***." *Id.* at 13 (emphasis added). Accordingly, Respondents argument that the GPW does not apply to "this conflict" should be rejected.

E. Hamdan Must Be Afforded POW Status Until a Competent Tribunal Determines He is Not a POW

Respondents' also argue that the GPW does not apply because Hamdan is not a prisoner of war ("POW") as defined by the criteria set out in GPW Article 4. But this argument fails on at least two separate counts. First, in discussing who qualifies as a POW under Article 4, Respondents inexplicably confine their analysis to Article 4, section A(2), which relates to "Members of other militias and members of volunteer corps." The Government's exclusive focus on that section ignores Article 4, A(4), which provides that POW status shall be accorded to:

> Persons who accompany the armed forces without actually being members thereof, such as…members of labour units or of services responsible for the welfare of the armed forces.

This section applies to Hamdan, who denies he was a combatant, but acknowledges that he was employed as a driver to transport agricultural workers to and from a farm owned by Osama bin Laden. *See* Hamdan Affidavit, filed in support of Petition. Even the Government's charge sheet supports the applicability of POW status based on this section of Article 4. The culpable conduct alleged in the charge sheet relates solely to support activity

such as the transportation of materials and individuals. *See* Charge Sheet, attached as Ex. A to Resp.'s brief; Resp.'s brief at 12. Indeed, Respondents do not allege that Hamdan ever engaged in hostilities against anyone, or that he was captured with al Qaida forces. Thus, POW status based on Article 4, section A(4), is appropriate based on Respondents' own allegations.

Second, as noted above, GPW Article 5 and the U.S. Military Regulations implementing the GPW both provide that ***all*** detained personnel are to be afforded the protections of the GPW whenever they assert that doubt exists as to a detainee's status, until a competent tribunal determines whether POW status is appropriate.[44]

F. Respondents Have Violated the GPW

Article 103 of the GPW prohibits pretrial confinement of a POW for a period greater than three months. In this case, Hamdan has been in solitary confinement in Camp Echo awaiting charges and trial as an alleged war criminal since December 2003. This far exceeds the maximum three-month period permitted, and constitutes a violation of Article 103.

Respondents have also violated Common Article 3, which prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." GPW, Art. 3(1)(d). In this case, Hamdan's lengthy pretrial confinement has amounted to an arbitrary and illegal sentence. The government cannot now undo this violation by charging Hamdan over two and a half years after it first detained him; nor can it stop its *continued* violation of this same provision by bringing him to trial before a military commission that is manifestly not a "regularly constituted court."

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[44] Hamdan's statements, and Respondents' vague allegations, certainly create such doubt. Accordingly, Hamdan is entitled to the protections of the GPW. *See Hamdi*, 124 S. Ct. at 2658 (Souter, J., concurring) (stating that Government's treatment of Hamdi "appears to be a violation of the Geneva Convention provision that even in cases of doubt, captives are entitled to be treated as prisoners of war 'until such time as their status has been determined by a competent tribunal'") (quoting Art. 5, 6 U.S.T. at 3324).

Respondents argue that Common Article 3 is inapplicable because the Article recites that it applies in "armed conflict not of an international character." In this context, Respondents find it expedient to acknowledge that the conflict in which Hamdan was captured was international in character instead of merely a police action. *See* Resp.'s brief at 36. However, Respondents are mistaken in believing that the character of the conflict (internal versus international) is decisive. In fact, it is widely recognized that Article 3 applies to ***all*** armed conflicts, regardless of their character. Speaking of this provision, the ICRC Commentary to the Geneva Conventions explains that "[t]his minimum requirement in the case of a non-international armed conflict, is *a fortiori* applicable in international conflicts" as well.[45] Indeed, the Commentary states that the purpose of Common Article 3 is to "ensure[] respect for the few essential rules of humanity which all civilised nations consider as valid *everywhere* and under *all circumstances* and as being above and outside war itself." *Id.* at 44 (emphasis added). The applicability of Common Article 3 to international armed conflicts is now recognized in the jurisprudence of the International Court of Justice,[46] the International Criminal Tribunal for the Former Yugoslavia,[47] the International Criminal Tribunal for Rwanda,[48] and the Inter-American Commission for Human Rights.[49] In short, it is "indisputable that [C]ommon Article 3, which sets forth a minimum core of mandatory rules, reflects the fundamental humanitarian principles which underlie international humanitarian law as a whole, and upon which the Geneva Conventions

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[45] Int'l Comm. of the Red Cross, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 14 (Jean S. Pictet ed., 1958).

[46] Military and Paramilitary Activities (*Nicar. United States v.*), 1986 I.C.J. 14, 113-14 (June 27).

[47] *See Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, P 87 (Int'l Crim. Trib. for Former Yug. App. Ch. Oct. 2, 1995), 35 I.L.M. 32 (1996).

[48] *See Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Int'l Crim. Trib. for Rwanda Trial Chamber Sept. 2, 1998), *reprinted in* 37 I.L.M. 1399 (1998).

[49] *See Abella v. Argentina*, Case 11,137, Inter-Am. C.H.R., PP 155-56, OEA/ser. L/V.97, doc. 38 (1997).

in their entirety are based."[50] There can be no doubt that this "minimum" core of "mandatory" rules applies to the treatment of Hamdan.

V. THE CONSTITUTION GOVERNS COMMISSIONS AT GUANTANAMO

A. The Constitution Extends to Guantanamo Bay

Rasul v. Bush, 124 S. Ct. 2686 (2004) held that Guantanamo Bay detainees possess constitutional rights that this Court can protect through habeas corpus:

> Petitioners' allegations - that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe "custody in violation of the Constitution or laws and treaties of the United States." 28 U.S.C. § 2241(c)(3). *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-278 (1990) (Kennedy, J., concurring), and cases cited therein.

Id. at 2698, n.15. This is not *dicta*. It obviously concerns constitutional violations, otherwise the Court's citation to pages in Justice Kennedy's *Verdugo* concurrence would make no sense.

The "cases cited" in Justice Kennedy's concurrence, known as the *Insular Cases*, hold that "fundamental" constitutional rights extend by their own force to "unincorporated" territories. *See, e.g., Downes v. Bidwell*, 182 U.S. 244 (1901). The *Insular Cases* thus guarantee fundamental constitution rights in territory where the United States possesses governing authority; it is the exercise of exclusive jurisdiction and control, rather than nominal sovereignty, that obligates the United States to recognize fundamental rights. *See, e.g., Examining Bd. of Eng'rs, Architects, & Surveyors v. Flores de Otero*, 426 U.S. 572 (1976) (holding under the *Insular Cases* that the fundamental constitutional right to equal protection applies to citizens and aliens alike within the unincorporated territory of Puerto

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[50] *Prosecutor v. Delalic*, Case No. IT-96-21-A, Judgment, P 143 (Int'l Crim. Trib. for Former Yugoslavia App. Chamber Feb. 20, 2001).

Rico); *Canal Zone v. Scott*, 502 F.2d 566, 568 (5th Cir. 1974) ("[N]on-citizens and citizens of the United States resident in such territories are treated alike, since it is the territorial nature of the Canal Zone and not the citizenship of the defendant that is dispositive.").[51] *Rasul*'s reliance on these cases explains its holding that those in unincorporated territories like Guantanamo have rights. That is why it held "nothing in *Eisentrager* or in any of our other cases categorically exclude aliens detained in military custody outside the United States from the 'privilege of litigation' in U.S. courts." 124 S. Ct. at 2698.

Justice Kennedy's concurrence, which Respondents studiously avoid even though it states the *Verdugo* holding,[52] endorses Justice Harlan's position: "The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place." *Verdugo*, 494 U.S. at 277 (Kennedy, J., concurring) (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)). Justice Kennedy held that courts should determine whether the application of a particular constitutional provision would be "impracticable and anomalous." *Id.* at 278. Application of the Fourth Amendment, Justice Kennedy held, would be impracticable due to the "absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and

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[51] *See* Brief Amici Curiae of Former U.S. Government Officials in Support of Petitioners, *Rasul v. Bush* & *Al Odah v. United States* (providing an in-depth analysis); *Ralpho*, 569 F.2d at 618-19 (holding that Due Process constrained the Micronesian Claims Commission in its adjudication of inhabitants' claims); *United States v. Tiede*, 86 F.R.D. 227, 249-53 (U.S. Ct. for Berlin 1979) (holding that the Constitution guarantees rights to an alien defendant in the American Sector in Berlin).

[52] "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 185, 193 (1977) (quotation and citation omitted). If anything, *Verdugo* establishes that the Constitution *does* apply abroad. When Justice Kennedy's vote is added to the dissenters, there are five votes for this proposition. Swift here is not alleging a comparatively weaker Fourth Amendment violation; rather he is alleging Constitutional violations that go to the heart of American Government. *See Milligan*, 71 U.S. at 118-19 ("Had this tribunal the legal power and authority to try and punish this man? No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people").

privacy that prevail abroad, and the need to cooperate with foreign officials." *Id.* But these factors are not present in Hamdan's case. Unlike Mexico, Guantanamo is under exclusive jurisdiction and control of the United States. And military officers and judges at Guantanamo stand ready to execute any command of this Court. Even the *Verdugo* plurality explicitly bracketed the question in this case: "the extent to which respondent might claim the protection of the Fourth Amendment if the duration of his stay in the United States were to be prolonged—by a prison sentence, for example—we need not decide." *Id.* at 271-72.[53]

Not only are the factors that militated against applying the Fourth Amendment in *Verdugo* absent in the current case, the reasons for extending the Constitution's reach are stronger. Although the protection of one's residence against warrantless searches is valuable, the rights afforded by the due process and equal protection components of the Fifth Amendment are considerably more fundamental. Hamdan's life, his freedom, his right to a fair trial, and his dignity and integrity as a human being hang in the balance. And separation of powers has never been thought subject to *Verdugo*'s analysis.

Respondents also deploy the recently questioned *Eisentrager* decision, whose Fifth Amendment language is *dicta* and only concerns proven enemy combatants.[54] Unlike the

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[53] Respondents' assertion that *Verdugo* means that the Constitution protects only those possessing "voluntary, substantial contacts with the United States," Resp.'s brief at 39, is untrue, as is their claim that the plurality decided the equal protection issue. *See Verdugo*, 494 U.S. at 264 (plurality) ("Before analyzing the scope of the Fourth Amendment, we think it significant to note that it operates in a different manner than the Fifth Amendment, which is not at issue in this case"). For example, the Chief Justice began his analysis by explaining that, under the Fourth Amendment, "if there were a constitutional violation, it occurred solely in Mexico," where the defendant was captured. *Id.* at 264. This was in contrast to the Fifth Amendment, which protects defendants from trial in United States territory. *Id.* As Justice Kennedy's concurrence put it, "I do not mean to imply, and the Court has not decided, that persons in the position of the respondent have no constitutional protection. The United States is prosecuting a foreign national in a court established under Article III, and all of the trial proceedings are governed by the Constitution. *All would agree*, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant." *Id.* at 278 (emphasis added).

Here, Hamdan is not claiming that the Constitution was violated by his capture in Afghanistan. Rather, he is saying that the Constitution was violated by his confinement in Guantanamo for purposes of a military trial. That trial is under the auspices of the PMO, and the constitutional violation has therefore occurred in a very different location, Washington, DC, from the Mexican search and seizure of Mr. Verdugo.

[54] In light of the Supreme Court's overruling of *Ahrens v. Clark*, 335 U.S. 188 (1948), and its holding

habeas petitioners in *Eisentrager*, moreover, Hamdan is being held in a place where no other law applies.[55] If anything, *Eisentrager* itself establishes that the Equal Protection Clause protects those at Guantanamo.[56] Respondents overread a purely descriptive sentence from the opinion that mentioned "sovereign territory," but *Eisentrager* was about territory and control, not sovereignty. *See Verdugo*, 494 U.S. at 266, 271, 274-75.[57]

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in *Rasul v. Bush*, 124 S. Ct. 2686 (2004), it is unclear whether *Eisentrager* remains good law. *See, e.g.*, *Rasul*, 124 S. Ct. at 2701 (Scalia, J., dissenting) (arguing that *Rasul* effectively overruled *Eisentrager*).

[55] Unlike *Eisentrager*, where the Government claimed "enemy aliens in enemy lands are not subject to duties under the American Constitution and laws, and…like Englishmen in England, or Frenchmen in France, they must look to the rights and remedies open to them under their country's present laws and government," U.S. *Eisentrager* brief, *supra*, at 67, there appears to be no inclination whatsoever to let Cuban law apply to those facing military tribunals. Deference to local practices as in Puerto Rico or the Philippines, *see Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904), is not compatible with American policy.

[56] *See* 339 U.S. at 771 ("And, at least since 1886, we have extended to the person and property of resident aliens important constitutional guaranties – such as the due process of law of the Fourteenth Amendment. But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its *territorial jurisdiction* that gave the Judiciary power to act. In the pioneer case of *Yick Wo v. Hopkins*, the Court said of the Fourteenth Amendment, 'These provisions are universal in their application, to all persons within the *territorial jurisdiction*, without regard to any differences of race, of color, or of nationality.'") (citations omitted, emphasis added).

[57] *Rasul* reverses the characterization of Guantanamo Bay in *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003). The D.C. Circuit "rejected the argument—which the detainees make in this case—that with respect to Guantanamo Bay control and jurisdiction is equivalent to sovereignty." *Al Odah*, 321 F.3d at 1143 (citation and punctuation omitted). Whereas the D.C. Circuit claimed that "the Guantanamo detainees have much in common with the German prisoners in *Eisentrager*," because "they are now abroad," *id*. at 1140, the Supreme Court found that the detainees *differed* from the prisoners in *Eisentrager* in that respect. It held that the *Eisentrager* detainees were "at all times imprisoned outside the United States," while the Guantanamo detainees "have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control." 124 S. Ct. at 2694. For the *Rasul* Court, this exercise of "exclusive jurisdiction and control" is the crucial marker of sovereign power. *See id.* at 2697 (citing historical evidence that the reach of sovereign power depended not on formal territorial boundaries but on "the exact extent and nature of the jurisdiction or dominion exercised in fact…"). *Rasul* thus embraced the notion "of *de facto* sovereignty" that the D.C. Circuit rejected. 321 F.3d at 1144.

Put differently, the DC Circuit's decision hinged on the fact that Guantanamo was not part of the territory of the United States. It was that crucial finding that permitted it to distinguish the leading previous case, *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977). In *Ralpho*, Congress established a commission to disburse funds for claims against the United States for damages arising out of the World War. "Because Congress intended the Micronesia Trust Territory to be treated as if it were territory of the United States, the court held that the right of due process applied to the commissions actions." *Al Odah*, 321 F.3d at 1144. Now, however, the Court has said that Guantanamo is like Micronesia in *Ralpho*.

Finally, even if all of Respondents' characterizations about the territory of Guantanamo and the

Cases within the D.C. Circuit suggesting that the Constitution does not apply extraterritorially are distinguishable on their facts and do not survive the Court's decision in *Rasul*. Some cases have looked to whether an individual had "substantial connections" with the United States. But in these cases the court contemplated that there was some genuine opportunity for the petitioners, unlike Hamdan, to have formed such connections.[58] In other words, no D.C. case approves of the government's ability to manufacture the denial of Constitutional protections based on someone's lack of "substantial connections" with the U.S., particularly when the Government simultaneously exercises total dominion over that party in what "is in every practical respect a United States territory." *Rasul*, 124 S. Ct. at 2700 (Kennedy, J., concurring).

In a second line of D.C. Circuit cases, the facts showed that it was foreign authority exercised in a wholly foreign jurisdiction that effected the alleged constitutional deprivation. *See Harbury v. Deutch*, 233 F.3d 596, 599 (D.C. Cir. 2000), *rev'd Christoper v. Harbury*, 536 U.S. 403 (2002); *Holmes v. Laird*, 459 F.2d 1211, 1214 (D.C. Cir. 1972). In this case, of course, the Constitution is invoked to defend against authority exercised solely by the United States Executive without any intervention or involvement of foreign authority, in a territory where the United States has absolute control. *See Rasul*, 124 S. Ct. at 2700.

B. Even Under the Most Extreme Version of Extraterritorial Rights and Military Deference, Petitioner Has Shown a Constitutional Violation

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meaning of *Verdugo* were granted, it would not defeat the Petition. As set out in Petr.'s Mem. at 6 and his Opposition to the Change of Venue at 8-11, the PMO directly undermines Commander Swift's constitutional, statutory, regulatory and treaty-based rights. By forcing him to operate within this unjust system, the PMO and the regulations therefore create violations upon someone residing in the United States. In addition, the numerous and frequent contacts between Commander Swift and Hamdan create a constructive presence in America for Hamdan.

[58] *See, e.g., Jifry v. FAA*, 370 F.3d 1174, 1183 (D.C. Cir. 2004) (citing *32 County* and *People's Mojahedin*, but then determining that defendants had received due process protections in denial of property interest in pilot's license); *32 County Sovereignty Committee v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (no property interest in the United States or other form of presence); *People's Mojahedin Organization of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) (deciding that Constitution did not apply because no financial institutions held any of the defendant's property).

The acceptance of Respondents' anachronistic claim that the Constitution applies with muted force outside the U.S. would not alter this suit. "The Constitution creates a Federal Government of enumerated powers," *United States v. Lopez*, 514 U.S. 549, 552 (1995). Even under that cramped claim, civilian courts always retain the power to decide whether federal action is authorized. *See Verdugo*, 494 U.S. at 277 (Kennedy, J., concurring) ("[T]he Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic."); *Reid*, 354 U.S. at 5-6 (plurality) (the "United States is entirely a creature of the Constitution. Its power and authority have no other source").

Verdugo's plurality opinion was based on a notion of the social compact whereby individuals who voluntarily come into the nation join the community and are burdened and benefited by its obligations and rights. Courts have found one other group to be similarly situated in this way to non-resident aliens for these purposes, and that is American servicemen and servicewomen. The military "is a specialized society separate from civilian society with laws and traditions of its own." *Councilman*, 420 U.S., at 757 (internal quotations and citation omitted). Members of the military do not have the same Bill of Rights protections. *See Brown v. Glines*, 444 U.S. 348, 354 (1980).

As a result, were this Court to disregard *Rasul*'s footnote 15, the cases involving servicemen are the best analogy for how this Court should treat individuals under the *Verdugo* plurality's analysis. While civilians can raise full Bill of Rights protections, *see Ex parte Milligan*, 71 U.S. 2 (1866), servicemen have only a limited ability. Nevertheless, every court permits servicemen to challenge whether a tribunal is appropriately authorized and properly constituted. *See In re Grimley*, 137 U.S. 147, 150 (1890); *Carter v. McClaughry*, 183 U.S. 365, 401 (1902). Servicemen can use habeas corpus to examine whether the tribunal: (1) is legal; (2) has personal jurisdiction over the accused; and (3) has subject-matter jurisdiction to hear the offense charged. *See Hiatt v. Brown*, 339 U.S. 103, 111 (1950).

Federal courts have, all along, extended the very same tripartite formulation to unlawful belligerents. *See Ex parte Quirin*, 317 U.S. 1, 25 (1942) ("neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission."). *Quirin* didn't give the saboteurs rights because they decided to directly threaten the U.S. by landing on its shores. To do so would have meant *rewarding* with special rights those who had infiltrated our soil instead of remaining abroad. Ironically, Respondents' reading, were it law, would therefore weaken national security.[59]

Yet Respondents today assert nothing more than "the obnoxious doctrine asserted by the Government . . . to the effect that restraints of liberty resulting from military trials of war criminals are political matters completely outside the arena of judicial review" – a view that "has been rejected fully and unquestionably." *Yamashita*, 327 U.S. at 30 (Murphy, J., dissenting). *Eisentrager* never held what Respondents claim. Parts II and III of the opinion declined to extend certain Bill of Rights protections to convicted war criminals. But in Part IV, the Court reached the merits of whether the commission was appropriately authorized and properly constituted. Ever since *Milligan*, those latter inquiries have been the foundational questions that every Court has reached.[60]

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[59] Similarly, *Yamashita* permitted a convicted enemy belligerent to examine the authority of the commission on habeas:

> [W]e held in *Ex parte Quirin*, as we hold now, that Congress . . . has not foreclosed their right to contend that the *Constitution or laws of the United States withhold authority to proceed with the trial*. It has not withdrawn, and the Executive. . . could not, unless there was suspension of the writ, withdraw from the courts the *duty and power* to make such inquiry into the *authority* of the commission as may be made by habeas corpus.

327 U.S. at 9 (citations omitted, emphasis added). Petitioner stands in the same procedural position as General Yamashita, in that he has been labeled an "enemy alien" who contends that the "Constitution or laws" "withhold authority to proceed" with the trial. The Supreme Court's consideration of the petitioners' claims in *Quirin* and *Yamashita* stemmed not from any right gained by sneaking into America but from the fact that we are a nation bound by law and claim no power to punish except as permitted by law.

[60] *Eisentrager* quoted *Yamashita*'s language, that "We consider here only the lawful power of the commission to try the petitioner for the offense charged,'" and it explained that it *must* reach these claims on habeas. *Id.* at 787. *Eisentrager*'s Part IV mirrored the system of military justice at the time, where despite the

Finally, the Supreme Court has already rejected Respondents' claim by citing to President Johnson's veto of a congressional bill establishing commissions: the Constitution "shields every human being who comes or is brought under our jurisdiction. We have no right to do in one place more than in another that which the Constitution says we shall not do at all." *Duncan v. Kahanamoku*, 327 U.S. 304, 324 n.21 (1946). The veto explains why Respondents' argument would create a Thirteenth Amendment violation by reducing people "to the most abject and degrading slavery." *See* Petr.'s Mem. at 15 n.3.

VI. THE COMMISSIONS VIOLATE SEPARATION OF POWERS

A. Section 821 Does Not Authorize a Military Commission to Try Hamdan

10 U.S.C. § 821 does not authorize the President to try Petitioner by commission. It merely negates the implication that the UCMJ deprives military courts of jurisdiction. Petr.'s Mem. at 54-55. The statute, which lacks any affirmative grant of authority, is not even close to a clear statement by Congress to supplant civilian courts or courts-martial. *See Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) ("In traditionally sensitive areas, . . . the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.") (internal quotations and citation omitted).

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uncertainty about Fifth and Sixth Amendment rights in the military, habeas review was always present to examine whether the tribunals had "lawful power."

Respondents claim that *Eisentrager* trumps *Rasul* also faces the particular problem that Mr. Eisentrager did not even bring the same kind of habeas action as Petitioner. Eisentrager's counsel made the unusual choice to assert only one type of habeas jurisdiction, that for "being a citizen of a foreign state and domiciled therein . . . in custody for an act done or omitted under any alleged . . . order or sanction of any foreign state, or under order thereof, the validity and effect of which depend upon the law of nations." 28 U.S.C. § 2241 (c)(4). *See also* Resp.'s brief; *Johnson v. Eisentrager*, at 2 (reprinting statute involved and only reprinting (a) and (c)(4)); *id.* at 24-26 (making argument based solely on (c)(4)). Lothar Eisentrager, unlike General Yamashita, eschewed a (c)(3) claim, that his trial violated the Constitution and laws. As such, Eisentrager could not benefit from, and the Supreme Court did not confront the possible tension with, *Yamashita*'s foundational claim. *Yamashita* built on the bedrock of *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 325-26 (1867) where the Court observed that the habeas corpus statute "is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge *every possible case of privation of liberty contrary to the National Constitution, treaties, or law*." (emphasis added). Petitioner invokes that (c)(3) claim, unlike Eisentrager, but like Rasul. Footnote 15 of *Rasul* therefore controls.

Respondents do not argue that Section 821 is such a clear statement – rather, they claim that the Court has considered its predecessor, Article 15 of the Articles of War, to act as authorization. But the Court's previous cases differ dramatically. First, they all involved an explicit declaration of war by Congress. In *Quirin*, for example, the Court's finding that Congress had authorized military commissions in the form of Article 15 was based on the fact that the President has the "power to wage war which Congress has declared." 317 U.S. at 26. The "war" was repeatedly mentioned. *Id.* at 28, 29. Similarly, in *Yamashita*, the Court stated that the President's authority to try and punish enemy combatants is without qualification "so long as a state of war exists – from its declaration until peace is proclaimed." 327 U.S. at 11-12. *See also Madsen v. Kinsella*, 343 U.S. 341, 346 n.9 (1952) (commission derives its authorization from Congress's power to declare war). Thus, it is the declaration of war by Congress and its appurtenant grant of war powers to the President that functions as the clear statement.

Moreover, *Yamashita* makes clear that the only function of Section 821 is to permit a commander, on the battlefield, to select a commission when a court martial is inconvenient to convene. *See* 327 U.S. at 66 n.31. Respondents ask this Court, for the first time, to permit trial by commission when war has not been declared, congress has not otherwise authorized the commissions, the commission is not in a zone of war, and the courts are open.[61]

Finally, Respondents omit that a key source of authorization in the World War II cases has been repealed, for in those cases the Justices relied on 50 U.S.C. § 38. *See Yamashita*; 327 U.S. at 7; *Quirin*, 317 U.S. at 27.[62] The absence of a modern section 38 is

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[61] In the non-declared Civil War, Congress specifically authorized commissions in a series of very explicit acts. *See* Winthrop, at 833.

[62] Section 38 was initially passed with the Espionage Act of 1917, 40 Stat. 219, which created criminal liability for espionage. It stated that "Nothing contained in this title shall be deemed to limit the jurisdiction of the general courts-martial, military commissions, or naval courts-martial . . . ." 40 Stat. 219, § 7. The entire Espionage Act was later repealed, Act of June 25, 1948, ch. 64, § 21, 62 Stat. 683, 862, and most of its provisions, but not § 38, were reenacted. *See, e.g.*, 18 U.S.C. §§ 793, 794. As such, of the two statutory

even more important because, at the time *Quirin* and *Yamashita* were decided, section 38 provided at least something of a statutory basis for charging non-servicemen via a commission because it appeared outside the sections of the Code dealing with the governance of military personnel (in distinction to section 821). With its repeal, there is now no indication that Congress in any way has authorized the use of commissions to try non-servicemen.

When there is no declaration of war, no Section 38, and no other authorizing legislation, there is no clear statement from Congress that the President may employ a process which necessarily involves the compromise of individual rights.

B. *Quirin* Was Decided on a Different Set of Facts and Is Not Controlling Here

Respondents seek to use a statute, the AUMF, with far more vagueness than the World War II declaration to authorize commissions. However broadly that statute might be read, it is impossible to find within it any such authorization. "Force" has, incident to it, detention, but not punishment. And it is entirely unreasonable to suppose that Congress knew it was authorizing such a power, one that had not been used in 60 years and even then used only in a far more restrained and far more appropriate set of circumstances. And particularly when the AUMF is only *prospective*, it is impossible to see how that creates the retrospective power to *punish*. *See infra* Section I(F).

Even assuming, *arguendo*, that *Quirin*'s emphasis on presidential power to "wage war which Congress has declared" should be read out of the opinion, *Quirin*'s phrase "time of war" has been read narrowly. Respondents correctly point out that in cases involving soldiers, who are undoubtedly within the military's jurisdiction irrespective of war, courts have read "time of war" broadly. But in cases where the military's very jurisdiction over a defendant is contested, the military's courts have consistently favored a narrow reading that

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provisions in the World War II cases, one no longer exists in current law.

requires an actual declaration of war.[63] Indeed, Congress recently enacted legislation that, *inter alia*, fills the gap created by *Avarette*, and provides courts-martial for military contractors in circumstances where Congress has not declared war.[64]

Moreover, the charges in *Quirin* specifically permitted trial by commission. Respondents claim that the first charge against the saboteurs, "[v]iolation of the [common] law of war," 317 U.S. at 23, was not an offense prescribed by Congress, even if the second and third charges were. Not only does this neglect whether the first charge was pendant to the others, it also fails to address the fact that the specifications of the first charge mirrored offenses clearly designated by Congress as triable by commission. *See* Petr.'s Mem. at 48-49. Respondents ask this Court to extend *Quirin* far beyond its original moorings, to offenses that are in no way tethered to congressionally defined ones.

Respondents read *Quirin* to say that Article 15 authorizes the use of a commission to try any offense against the law of war. But *Quirin* says the contrary, by assuming that "there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury." 317 U.S. at 29.

Another major distinction is that, unlike the *Quirin* saboteurs, Hamdan has not

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[63] *See, e.g., United States v. Averette*, 19 U.S.C.M.A. 363, 365-66 (1970) (finding that the Vietnam conflict was not a time of war because, even though it qualified as such by general usage, that recognition "should not serve as a shortcut for a formal declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction"); *Cole v. Laird*, 468 F.2d 829, 831 n.2 (5th Cir. 1972) (civilians are subject to court-martial "if they serve in the field with the Armed Forces during a period of a formally-declared, global war"); *Robb v. United States*, 456 F.2d 768, 771 (Ct. Cl. 1972) ("the phrase 'in time of war' . . . refers to a state of war formally declared by Congress despite the fact that the conflict in Vietnam is a war in the popular sense of the word"); *Willenbring v. Neurauter*, 48 M.J. 152, 157-58 (C.A.A.F. 1998).

[64] *See* 18 U.S.C. § 3261 *et seq*. (2000); Statement of Robert Reed, U.S. Dep't of Defense, H. Hrng. Military Extraterritorial Juris. Act. of 1999, at 13 (stating that *Reid v. Covert* limitations on dependents and *Avarette*'s limitation to "congressionally-declared wars" created a "jurisdictional gap in criminal justice and accountability that H.R. 3380 now addresses").

conceded his unlawful combatant status and contests the commission's jurisdiction. In *Quirin*, it was stipulated that the petitioners had received sabotage training, were members of the German armed forces, had come ashore in the United States with quantities of explosives, timers, and fuses, and had shed their German uniforms for civilian clothes. 317 U.S. at 20-21. The Court found that petitioners "upon the conceded facts" were within the boundaries of a commission. *Id.* at 46. It relied on that stipulation to find that the first charge was "sufficient to charge all the petitioners with the offense of unlawful belligerency . . . and the admitted facts affirmatively show that the charge is not merely colorable or without foundation." *Id.* at 36; *see also Ex parte Endo*, 323 U.S. 283, 302 (1944) (stating that authorization for detention was not present "in case of those whose loyalty was not conceded or established").[65] Thus here, where there are no admitted facts, the government cannot rely on *Quirin* to argue that a mere charge is sufficient to put them before a commission.

On the facts, Hamdan is far closer to Mr. Milligan than he is to Mr. Quirin. Respondents dismiss Milligan as a "civilian," but in fact the Government told the Court that he was an unlawful belligerent who "plotted to seize" arsenals and "conspired with and armed others."[66] Respondents' attempt to downplay *Milligan* is undermined by the Court's post-*Quirin* reliance on it in *Duncan*:

> Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued. Our system of government clearly is the antithesis of total military rule and the founders of this country are not likely to have contemplated complete military dominance within the

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[65] *See* Resp. United States Answer to Pet., 39 Landmark Briefs (Kurland & Casper eds.) 381-382 (providing several paragraphs stating that the eight individuals were trained at a sabotage school, landed in Florida and Long Island with explosives in uniform, buried their uniforms, and then noting that the eight "all admitted the facts stated in the preceding paragraphs of this answer," and "admitted that they had been paid by the German Government."); *Hamdi*, 124 S. Ct. at 2670 (Scalia, J., dissenting) (discussing *Quirin* limitations).

[66] 71 U.S. at 17. Lambdin Milligan was charged with: 1. "Conspiracy against the Government of the United States;" 2. "Affording aid and comfort to rebels against the authority of the United States;" 3. "Inciting insurrection;" 4. "Disloyal practices;" and 5. "Violation of the laws of war." *Id* at 6; *see also id.* at 130 (majority op.); *id.* at 132 (op. of Chief Justice); *Hamdi*, 124 S. Ct., at 2667 (Scalia, J., dissenting).

> limits of a *Territory* made part of this country and *not recently taken from an enemy*. They were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws. Their philosophy has been the people's throughout our history…. We have always been especially concerned about the potential evils of summary criminal trials and have guarded against them by provisions embodied in the Constitution itself. *See Ex parte Milligan*. Legislatures and courts are not merely cherished American institutions; they are indispensable to our government.
>
> Military tribunals have no such standing. For as this Court has said before: "…the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the Republic who advocates the contrary…." Indeed, prior to the Organic Act, the only time this Court had ever discussed the supplanting of courts by military tribunals in a situation other than that involving the establishment of a military government over recently occupied enemy territory, it had emphatically declared that "civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish." *Ex parte Milligan.*

327 U.S. at 322 (emphasis added); *see also Reid*, 354 U.S. at 30 (plurality) (*Milligan* is "one of the great landmarks in this Court's history").

C. *Madsen* Does Not Sanction Commissions Under These Circumstances

Madsen v. Kinsella, 343 U.S. 341 (1952) is a completely different case, one where the Supreme Court upheld the use of a military occupation court to try the wife of a serviceman for murder in post-WWII occupied Germany. Here, neither of these *Madsen* prerequisites are met – we are neither in a war declared by Congress nor has the commission been convened in occupied territory. 343 U.S. at 348.[67] A trial at Guantanamo does not implicate any of the fundamental safety and order concerns explicit in *Madsen*'s holding. No court has ever, to Petitioner's knowledge, upheld commissions in places that are not occupied territory or zones of war. Guantanamo is neither, and thus the commission is not properly constituted

[67] The Court further made clear that this latter constraint arose from the fact that the President has the "urgent responsibility" to "govern[] any territory occupied by the United States by force of arms." *Id*.; *see also id*. at 355 ("The jurisdiction exercised by our military commissions . . . extended to nonmilitary crimes . . . which the United States as the *occupying power* felt it necessary to suppress.") (emphasis added).

and must be struck down. *See* Paust, 79 NOTRE DAME L. REV. at 1363.

Indeed, *Milligan* requires the exercise of military jurisdiction to be "confined to the locality of actual war." *Id. at* 127. *See also Reid*, 354 U.S. at 35, n.63 (discussing how military tribunals have been upheld in "enemy territory which had been conquered and held by force of arms and which was being governed at the time by our military forces"). Even in *Quirin*, the United States was separated into geographical military defense commands to prevent foreign invasion, and the Attorney General stressed the fact that this area "was declared to be under the control of the Army" based on the ongoing threat. Saboteur Tr. at 79. The Supreme Court noted this fact. 317 U.S. at 22 n.1. And it cited Winthrop's treatise repeatedly, which makes this geographic limit clear: "The place must be the theatre of war or a place where military government or martial law may legally be exercised; otherwise a military commission (unless – authorized by statute) will have no jurisdiction of offense committed there." Winthrop, *supra*, at 836. In addition, the Commission lacks authority for a related reason: it is being run by civilian authorities, and is therefore improperly constituted.[68]

If there were any doubts about *Madsen*'s holding, *Reid v. Covert* resolved them. In spite of the existence of Article 15 and treaties that provided for all crimes committed by servicemen or their dependants to be tried by military courts, the Court held that the two

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[68] Throughout American history, to the best of Petitioner's knowledge, only military personnel have appointed members of commissions. For example, in 1942, President Roosevelt personally appointed the military commission to try the eight Nazi Saboteurs. *See Quirin*, 317 U.S. 1 (1942). Similarly, the military commission which resulted in *Eisentrager* was appointed by the United States Commanding General at Nanking, China. Winthrop's treatise thus summarizes: "In absence of any statute prescribing by whom military commissions shall be constituted, they have been constituted in practice by the same commanders as are empowered by Arts. 72 and 73 to order general courts-martial, to wit, commanders of departments, armies, divisions, and separate brigades. The President, as Commander-in-chief, may of course assemble military commissions as he may legally assemble courts-martial." Winthrop, *supra*, at 835.

The Supreme Court expressly relied on Winthrop in explaining who has authority to appoint military commissions. *See Yamashita*, 327 U.S. at 7. But here the Secretary of Defense chose to delegate the authority to appoint members of commissions to a federal civilian employee who is neither a commanding officer nor a commissioned officer. The Secretary had no authority to do so and the commission is void.

petitioners, not in recently conquered territory, could not be subject to military trial because the Court would not indulge "[t]he concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise" because to do so would "destroy the benefit of a written Constitution and undermine the basis of our Government." 354 U.S. at 14 (plurality op.); *see also Quarles*, 350 U.S. at 22 (noting that "[f]ree countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.").[69]

When confronted with *Madsen*, *Reid* easily disposed of it. "*Madsen* [] is not controlling here. It concerned trials in enemy territory which had been conquered and held by force of arms and which was being governed at the time by our military forces." 345 U.S. at 35 n.63. And while "the extraordinary circumstances *present in an area of actual fighting* ha[d] been considered sufficient to permit punishment of some civilians *in that area* by military courts under military rules," *id*. at 33, the Court rejected the government's contention there that "present threats to peace" justify the military trial of civilians in an area where there no hostilities because the "exigencies which have required military rule on the battlefront are not present in areas where no conflict exists," *id*. at 35.[70] "Throughout history

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[69] While the *Reid* opinion was supported by only a plurality of the Court, three years later a clear majority affirmed the plurality's holding and expanded it to preclude military jurisdiction over civilian dependants accused of even noncapital crimes, at least when "the critical areas of occupation" were not involved. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 244-46 (1960). Significantly, *Singleton* held that allowing the military to exercise jurisdiction over civilian noncapital offenders would "would place in the hands of the military an unreviewable discretion to exercise jurisdiction over civilian dependents simply by downgrading the offense, thus stripping the accused of his constitutional rights and protections." *Id*. at 244. Similarly here, the government's position would allow the military unreviewable discretion to exercise jurisdiction over virtually anyone by simply designating them an enemy combatant. This is an untenable claim.

[70] In *Reid*, the government also urged that the concept of "battlefield" should be extended to include dependants traveling with military personnel because of the "conditions of world tension which exist at the present time." *Id*. at 34. The Court rejected this argument, holding that "[m]ilitary trial of civilians 'in the field' is an extraordinary jurisdiction and it should not be expanded at the expense of the Bill of Rights." *Id*. at 35. *See also Toth*, 350 U.S. at 23.

many transgressions by the military have been called 'slight' and have been justified as 'reasonable' in light of the 'uniqueness' of the times," but "[w]e should not break faith with this nation's tradition of keeping military power subservient to civil authority, a tradition . . . firmly embodied in the Constitution." *Id*. at 40; *see also Duncan, supra*; *Toth, supra*.

D. The President's Inherent Authority Does Not Authorize Commissions

The animating assumption of Respondents' argument throughout is the never-accepted notion of inherent authority. *See Quirin*, 317 U.S. at 28-28 (declining to answer this question). Clearly the power and authority to create and convene commissions is a recognized function of a government at war. To say that such power exists as an exercise of the war power, however, is quite different from saying that such power inheres in the Executive. Even a cursory reading of the text shows that the Framers divided the "war power," allocating to the Legislative Branch the power to declare war, maintain and Army and Navy, and allocate funds for the military while reserving the President the power to act as Commander-in-Chief. *See* U.S. Const. art. I, § 8; art. II § 2.[71]

Article I specifically grants Congress the power to "constitute Tribunals inferior to the supreme Court" as well as to "define and punish . . . Offences against the Law of Nations." U.S. Const. art. I, § 8. Given that Article I speaks with such specificity whereas Article II's closest analog is the general grant of Commander-in-Chief power, the Constitution is best read as allocating the power to authorize commissions to Congress. *Yamashita*, 327 U.S. at 7 ("We [in *Quirin*] pointed out that Congress in the exercise of the power conferred upon it by Article I, § 8, Cl. 10 of the Constitution to 'define and punish…

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[71] The President "and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers." *Reid*, 354 U.S. at 39; *see also Toth*, 350 U.S. at 17; *The Brig Amy Warwick*, 67 U.S. 635, 668 (1863); *Dakota Cent. Tel. Co. v. South Dakota*, 250 U.S. 163, 183 (1919); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948). The "principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *Buckley v. Valeo*, 424 U.S. 1, 124 (1976) (per curiam).

Offences against the Law of Nations…,' of which the law of war is a part, had by the Articles of War recognized the 'military commission'….") (citation omitted); *id*. at 8,9,10.[72] Nothing suggests that the President may unilaterally authorize such commissions.[73]

The government's appeal to historical precedent is without merit. General Washington's use of military commissions during the Revolutionary War predates the modern Constitution and its separation of powers. Further, the fact that Presidents have appointed commissions in the past does not speak to whether or not they have the inherent authority to do so, for they may have been authorized by Congress. Even Respondents' own source for their historical examples finds that the commission derives from Congress's constitutional powers. *See* Winthrop, *supra*, at 831. And their Mexican-American precedent hurts them, since the Order for that Commission specifically made clear that "no military commission shall try any case clearly cognizable by any court-martial." *See* General Orders, No. 287, at ¶ 11 (Sept. 17, 1847).

VII. THE PMO VIOLATES EQUAL PROTECTION

For what may be the first time since the enactment of the Fourteenth Amendment, the federal government is discriminating against aliens in a matter of fundamental justice.[74]

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[72] Respondents quote *Yamashita* to note that disciplinary measures are an "important incident to the conduct of war," *id*. at 11, but neglect to mention that immediately before this statement, the Court held that "the order creating the commission for the trial of petitioner was authorized by military command, and was in complete uniformity to the Act of Congress sanctioning the creation of such tribunals," *id*., and immediately after held that the trial and punishment of enemy combatants is "an exercise of the authority sanctioned by Congress." *Id*.

[73] *Hirota v. MacArthur*, 338 U.S. 197 (1948), is unavailing. The per curiam opinion decided that U.S. courts had no authority to review petitions from prisoners who were sentenced by an international tribunal. *Id*. at 198. Justice Douglas's concurrence explicitly noted that "[w]e need not consider to what extent, if any, the President . . . would have to follow . . . the procedure that Congress had prescribed" because the tribunal at issue was not a traditional military court but an international tribunal established by the Allied powers. *Id*. at 208.

[74] The commissions in the World War II cases applied symmetrically to aliens and citizens. They also differed in scope. *See* Fisher, *Nazi Saboteurs on Trial* 160 (2003) (President Bush's "group of noncitizens and resident aliens represented a population of an estimated 18 million people. FDR had looked backward at a handful of known saboteurs who had confessed. Bush looked forward to a large population of unknowns, not yet apprehended or charged.").

Respondents do not dispute this fact, nor do they offer *any* rational basis for such a distinction. Instead, they attempt to justify it as a "politically sensitive determination." Resp.'s brief at 40. It is undoubtedly true that this arbitrary line-drawing is "politically sensitive," but the question is whether it has a basis in *law* or mere politics. *Hamdi* itself has strongly intimated the answer to that question: "Nor can we see any reason for drawing such a line here." 124 S. Ct. at 2640.

The guarantee of equal protection exists not only to safeguard a foundational concept of parity, but to ensure that politically motivated Government action may not target weak minorities. *See* Petr.'s Mem. at 66-67. The PMO unfairly singles out aliens and has done so outside the normal channels of political accountability, thereby opening the door to the "arbitrary and unreasonable" processes infecting the commissions. *See Ry. Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). For that reason, the Court should not award the deference typically afforded Presidential decisions to any aspect of this case, including its equal-protection justification.

A. The PMO Fails to Satisfy Any Rational Basis

Respondents have failed to provide even the most basic justification for the PMO's singling out of aliens. Instead, they refer only to the President's *ex ante* determination that commissions are "necessary." Resp.'s brief at 40. Yet nothing explains why they would be "necessary" *only* for aliens. Indeed, it is impossible to discern any logical – never mind constitutionally permissible – reason why commissions might be essential for safeguarding the homeland from Hamdan, but not from John Walker Lindh, Yaser Esam Hamdi, Jose Padilla, or terrorists who might actually intend to harm Americans.[75] As history has repeatedly demonstrated, governments have a tendency to single out outsiders for detention

[75] Indeed, the Government has itself acknowledged that Congress did not want to draw an alien/citizen distinction in the AUMF. *See* U.S. Gov't Reply Br., at 17, in *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) ("The Authorization supports the President's use of force against any 'organization' or 'person' that 'he determines' aided the September 11 attacks, without suggesting any condition on that authority based on citizenship").

and punishment; the Equal Protection clause serves as a critical bulwark against devastating and unwarranted abuses of non-citizens in times of war. *Cf.* Presidential Comm'n on Wartime Relocation and Internment of Civilians Report (1982); Attorney General A. Mitchell Palmer, Hearing Before the House Comm. On Rules, 66th Cong. 27 (1920); Harries & Harries, *The Last Days of Innocence: America at War 1917-1918*, 307-08 (1997).[76]

Respondents characterize rational-basis review as an essentially toothless standard. The Supreme Court has explicitly rejected this characterization. *See Romer v. Evans*, 517 U.S. 620, 632 (1996); *American Federation of Government Employees (AFL-CIO) United States v.*, 195 F. Supp.2d 4, 12 (D.D.C. 2002), *aff'd* 330 F.3d 513 (D.C. Cir. 2003); Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. CHI. L. REV. 657, 664 (2001). Indeed, rational basis is far from toothless even in cases that involve *no* suspect classifications or fundamental rights. *See, e.g., Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam). When, as here, the measure in question targets a politically unpopular group, this scrutiny has been particularly searching. *See Lawrence v. Texas*, 123 S. Ct. 2472, 2485 (2003) ("When a law exhibits… a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.") (O'Connor, J., concurring).[77] Such groups lack power in the political process, meaning that "such discrimination is unlikely to be soon rectified by legislative means." *Cleburne*, 473 U.S. at 440.

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[76] William H. Rehnquist, All the Laws But One: Civil Liberties in Wartime 225 (1998) (stating that the past abuses of civil liberties during wartime make it "both desirable and likely that more careful attention will be paid by the courts to the basis for the government's claims of necessity as a basis for curtailing civil liberty").

[77] The Court has applied this "more searching form of rational basis review" to strike down statutes that singled out for unfavorable treatment not only homosexuals, but also the mentally disabled, *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985); the children of illegal immigrants, *Plyler v. Doe*, 457 U.S. 202 (1982); hippies, *U.S. Dep't. of Agric. v. Moreno*, 413 U.S. 528 (1973); those who lack real property, *Quinn v. Millsap*, 491 U.S. 95 (1989), *Turner v. Fouche*, 396 U.S. 346 (1970); recent immigrants to a state, *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), *Williams v. Zobel*, 457 U.S. 55 (1982); and those who are not married, *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

The PMO's targets face not one, but two obstacles. As aliens, they cannot vote, and as prisoners, they lack access to society. "Indeed, the special place of prisoners in our society makes them more dependent on judicial protection than perhaps any other group. Few minorities are so 'discrete and insular,' so little able to defend their interests through participation in the political process, so vulnerable to oppression by an unsympathetic majority. Federal courts have a special responsibility to ensure that the members of such defenseless groups are not deprived of their constitutional rights." *Doe v. District of Columbia*, 701 F.2d 948, 960 n.14 (D.C. Cir. 1983) (separate statement of Edwards, J.).

B. The PMO Unlawfully Discriminates Against a Suspect Class and Deprives Detainees of Fundamental Rights

The Supreme Court has long recognized that "classifications based on alienage" are "inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 372 (1971). *See also In re Griffiths*, 413 U.S. 717 (1973) (finding alienage to be a suspect classification); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948); *Franklin v. Barry*, 909 F. Supp. 21, 24 (D.D.C. 1995). Respondents argue that, although the PMO classifies on the basis of alienage, only lawfully admitted aliens residing within our geographic borders are eligible for heightened scrutiny, and that heightened scrutiny only applies to state governments. These claims are false.

First, the Supreme Court has repeatedly found that fundamental constitutional rights, including those guaranteed by the Fifth and Fourteenth Amendments, extend by their own force to territories over which the United States maintains complete jurisdiction and control. *See Otero*, 426 U.S. at 601-602; *supra* pp. 40. And Respondents' other claim, that the equal protection component of the Fifth Amendment is substantially weaker than that of the Fourteenth Amendment, is discredited by a long line of case law.[78]

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[78] Indeed, the Court has explicitly held that "Equal Protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995). The Court has long recognized that the Fifth Amendment's Due Process Clause embraces the "concept

Respondents correctly point out that *Fiallo v. Bell*, 430 U.S. 787 (1977), *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), and *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), counsel the courts to grant Congress substantial deference in the area of immigration and naturalization. These cases harm rather than bolster their argument, however, for they underscore that this exceptional power is limited *only* to the field of immigration. The Supreme Court has rejected the notion that this power bleeds over into all other policies involving aliens. *See Wong Wing v. United States*, 163 U.S. 228, 227 (1896), carefully distinguished between the wide latitude granted the federal government in devising policies affecting immigration as opposed to those affecting *punishment*, holding that "[i]t is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt, and adjudge the punishment by one of its own agents." *See also Chan Gun v. United States*, 9 App. D.C. 290, 298 (D.C. Cir. 1896) (citing *Wong Wing* for the proposition that "[w]hen . . . the enactment goes beyond arrest and necessary detention for the purpose of deportation and undertakes also to punish the alien for his violation of the law, the judicial power will intervene and see that due provision shall have been made, to that extent, for a regular judicial trial as in all cases of crime").[79]

The PMO's discrimination against aliens is therefore constitutional only if "narrowly

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of equal justice under law." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). *See also News America Publishing, Inc. v. F.C.C.*, 844 F.2d 800, 804 (D.C. Cir. 1988) (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

[79] The Supreme Court has recently reaffirmed its commitment to the principle that the federal government may not abrogate aliens' constitutional rights when it enacts policies that do not directly bear on immigration. *See Zadvydas v. Davis*, 533 U.S. 678, 695 (2001). The Military Order has even less to do with immigration than the policies declared unconstitutional in *Wong Wing* and *Zadvydas*. When "overriding national interests" in the field of immigration do not actually "predominate," judicial scrutiny remains strict, rather than sinking to rational basis. *United States v. Lopez-Flores*, 63 F.3d 1468, 1473 (9th Cir. 1995); *Hampton*, 426 U.S. at 103. *See also Mathews v. Diaz*, 426 U.S. 67 (1976).

Finally, even in the context of immigration the federal government's "power is subject to important constitutional limitations." *Zadvydas, supra*, at 695; *see also INS v. Chadha*, 462 U.S. 919, 941-42 (1983). And to the extent that the government has greater leeway when it comes to unlawful aliens who violate immigration rules, that rationale cannot justify the current policy of denying rights to individuals who were forced against their will into United States territory by the American government.

tailored [to] further compelling governmental interests." *Adarand Constructors*, 515 U.S. at 227. Respondents have failed to come close to satisfying this standard.

Even were alienage not a suspect classification, the PMO nevertheless would be entitled to heightened scrutiny because it dispenses fundamental rights to citizens but not to aliens who are charged with identical offenses and who have exactly the same relationship to the very same international terrorist organizations. *See, e.g., Plyler*, 457 U.S. at 221.[80] As discussed in Part V, fundamental rights are not limited to United States citizens or United States soil – and therefore apply to aliens in Guantanamo Bay.[81]

Respondents assert that the court's scrutiny should be tempered by a blanket deference to whatever the President has declared "necessary" for national security. Yet courts have always rejected arguments "that cast Article III judges in the role of petty functionaries . . . required to enter as a court judgment an executive officer's decision but stripped of capacity to evaluate independently whether the executive decision is correct." *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 198 (D.C. Cir. 2001) (citation omitted). If the Government may ever take such a step, shunting all aliens into a procedure from which even the most dangerous U.S. citizens are spared, it must only be upon legislation enacted by Congress with a convincing showing of necessity—one that matches the claims of threat to the fact of alienage.[82]

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[80] The Government's reliance on *Quirin* and *Yamashita* for the proposition that "enemy combatants" possess no constitutional right to trial before an Article III court is misplaced, as the defendants in those cases were nationals of states against which the United States had officially declared war, providing a statutory basis absent here. *See* Petr.'s Mem. at n.22 (describing the still-existing Alien Enemy Act of 1798, which authorizes the government to treat nationals of a nation against which Congress has declared war more harshly than other individuals).

[81] *See, e.g., Wong Wing*, 163 U.S. at 238 ("[A]ll persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] amendments . . . even aliens. . . ."); *Tiede*, 86 F.R.D. at 242-44, 249 (holding that the Constitution guarantees criminal defendants overseas such fundamental rights as due process and trial by jury regardless of their citizenship status whenever "the United States is acting as prosecutor *in its own court*").

[82] Justification for the exercise of presidential power in Respondents' cited cases is far stronger than in this case because it is exercised pursuant to clear congressional legislation. *See Shekoyan v. Sibley Int'l. Corp.*,

Finally, even if this Court were to accept the novel position that nonresident aliens have no rights, the PMO is substantially overbroad because it sweeps resident aliens into it. The Supreme Court has repeatedly invoked an overbreadth rationale to strike down laws which threaten to chill other's fundamental rights. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 894 (1992) (striking down a spousal consent requirement on its face despite respondent's arguments that "the statute affects fewer than one percent of women seeking abortions"); *Janklow v. Planned Parenthood*, 517 U.S. 1174 (1996) (Stevens, J., concurring in denial of certiorari) (collecting non-First Amendment cases); Michael C. Dorf, *Facial Challenges to States and Federal Statutes*, 46 STAN. L. REV. 235, 266 (1994). As such, this suit should go forward because the Order is facially unconstitutional.

VIII. THE MILITARY COMMISSION VIOLATES SECTION 1981

Respondents do not dispute that the PMO flies in the face of the original version of Section 1981, which guarantees rights to "give evidence" and "like punishment" and specifically protects not only citizens but all "persons." Instead, they attempt to lead this Court into making a decision that is inconsistent with that statute's purpose. In 1991 a new subsection was added: "The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. § 1981(c). The subsection has led some courts to conclude that Section 1981 no longer reaches federal conduct. *See* Resp.'s brief at 43-44; *Williams v. Glickman*, 936 F. Supp. 1 (D.D.C. 1996).

This reading of Section 1981, while supported by the caselaw, defies common sense. The plain text of the Act does not *exclude* protection from federal misconduct, and it has always been read to include it. *See, e.g., NAACP. v. Levi*, 418 F. Supp. 1109, 1117 (D.D.C.

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217 F.Supp.2d 59, 70, n.8 (D.D.C. 2002); *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16, 27 (D.D.C. 1999) (subsequent history omitted); *Haitian Refugee Center, Inc. v. Gracey*, 600 F.Supp. 1396, 1399-1400 (D.D.C. 1985), *aff'd*, 809 F.2d 794 (D.C. Cir. 1987).

1976) (applying Sec. 1981 to federal government); *Kurylas v. U. S. Dep't of Agric.*, 373 F. Supp. 1072 (D.D.C. 1974) (same), *aff'd*, 514 F.2d 894 (D.C. Cir. 1975). Subsection (c) makes clear that Section 1983 is not the exclusive remedy for violations of rights by state actors; it legislatively overruled *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735 (1989). The Act said not one word about *restricting* its reach to the federal government, it merely added state actors to the already existing protection against federal wrongdoing.

The sole intent of the 1991 Amendment was to expand the reach of Section 1981, not contract it. It had four stated "purposes," all to increase civil rights. *See* P.L. 102-166 (1991), Sec. 3(4) (purpose is to "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination"). Had restricting the reach of Section 1981 been on the agenda, one would have expected commentary somewhere about it.[83] For these reasons, *La Compania Ocho, Inc. v. U.S. Forest Service*, 874 F. Supp. 1242, 1251 (D.N.M. 1995), states a better view. Adopting it would not require overruling the decision in *Williams*, *supra*.[84]

Grutter v. Bollinger, 539 U.S. 306 (2003), and *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982), merely confirm that Section 1981 requires purposeful discrimination. Neither of them concern a situation whereby the very rights enumerated in Section 1981 are specifically and purposefully not provided to aliens. If anything,

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[83] Senators Kennedy, Wellstone, and every other Democratic Senator save one (who abstained) voted for the 1991 Amendments. It strains credulity to argue that they were voting to *restrict* the application of Section 1981. *See* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=102&session=1&vote=00238 (The only five Senators to vote against the Amendments were Senators Helms, Coats, Smith, Symms, and Wallop.). The House of Representatives is no different. Representatives Rangel, Frank and 250 other Democrats voted for the Amendments. *See* http://clerk.house.gov/evs/1991/roll386.xml.

[84] *Williams* grounded its holding not only in the text of the statute, but also the fact that the plaintiffs there could use a different statute, Section 1982. *Williams*, 936 F. Supp. 5 & n.6 ("Especially in view of the fact that the plaintiffs may seek equitable relief here under §1982, the Court does not conclude that the result reached by applying the statute's plain meaning is absurd."). 42 U.S.C. 1982 gives property rights to "citizens" and is plainly not applicable here. Respondents' interpretation of Section 1981 would thus force the 1991 Amendments to be read in a way entirely inconsistent with equity and with Congress's stated intent.

Respondents have it backward: the clear conflict between the original words of Section 1981 and the Military Order highlight the Order's Equal Protection problems.

IX. THE MILITARY COMMISSION LACKS AUTHORITY TO TRY THIS OFFENSE

In the months since the Petition was filed, Petitioner has been charged with a single count of conspiracy. This charge further explains why the commission is improperly constituted and authorized. *Quirin* recognized that a court must inquire "whether it is within the constitutional power of the national government to place petitioners upon trial before a military commission for the offenses with which they are charged," 317 U.S at 29. The first inquiry is "whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial." *Id.*

A. Commissions Can Currently Try Only Spying and Enemy Assistance

Congress has provided only two offenses explicitly triable by commission. *See* 10 U.S.C. § 904 (aiding the enemy); 10 U.S.C. § 906 (spying). Yet rather than charge Hamdan with these carefully crafted statutes, the Government has invented a definition of an offense that is unknown to the laws of war and untethered to anything in the U.S. Code. Amending the definition of offenses is a job belonging to Congress – one it has proven capable of executing – as the events after *Quirin* demonstrated.[85]

B. Even in Declared War, Commissions May Only Try Offenses Specified By Congress

With respect to what constitutes a violation of the law of war, "Congress ha[s] the

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[85] Following *Quirin*, Congress expanded the reach of Section 906 to make clear that it covered precisely the offenses of the Nazi saboteurs. 10 U.S.C. § 906 (1951) added to the definition of spying not only military installations but also spying over "any manufacturing or industrial plant." *See* Charge 1, Specification 1, in *Quirin* Tr., at 36 (charging them with intent "'to destroy certain war industries, war utilities and war materials within the United States.'"). This was intentional. *See* Hearings on HR 2498 of the 81st Cong. at 1229 (1949) (stating that Article 106 was intentionally expanded "in view of the importance of industrial plants, and other manufacturing units engaged in the war effort"). The UCMJ drafters also enlarged the definition of Article 81 to encompass more tangential connections through punishing anyone who "holds any intercourse with the enemy." This, too, was intentional. *See id.*

choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts." *Quirin*, 317 U.S., at 30. At the time of *Quirin*, Congress chose not to define offenses against the law of war, but it has since done so in the War Crimes Act of 1996, 18 U.S.C. § 2441, and the Expanded War Crimes Act of 1997. These Acts established that a "war crime" consists of "any conduct" that, *inter alia*, is a "grave breach" of international law.[86] Congress provided a huge list of crimes in referencing so many treaties, but conspiracy is not on it.

Respondents attempt to discredit Petitioner's argument by mischaracterizing it. Petitioner is *not* claiming that the War Crimes Act precludes the *jurisdiction* of a military commission to try offenses, rather his claim goes to the category of cases that a Commission with jurisdiction may hear.[87] A lawful commission may hear cases involving poison, killing soldiers who have laid down their arms, and like offenses specified in the Hague Convention and elsewhere, but not conspiracy.

C. The Conspiracy Charge Does Not State a Violation of the Laws of War

1. The laws of war do not recognize a conspiracy offense

Neither Article 23 of the Hague Convention IV nor the Geneva Conventions make any mention whatsoever of a conspiracy charge.[88] While a conspiracy charge was used at

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[86] Respondents' erroneously assert that these Acts did nothing more than establish criminal liability for Americans. The impetus for the Expanded Act was testimony from the Department of Defense and Department of State saying that Congress had defined "war crimes" too narrowly – hardly matters they would have complained about if the law had the cramped intent Respondents claim for it.

[87] Indeed, the House Report for that legislation referred explicitly to Congress's Art. I, Section 8 power to "define and punish . . . Offenses against the law of Nations" and stated that "The constitutional authority to enact federal laws relating to the commission of war crimes is undoubtedly the same as the authority to create military commissions to prosecute perpetrators of these crimes." H.R. Rep. No. 105-204.

[88] Indeed, they *bar* collective punishment like that sought by the Government here. *See* Art. 87 of GPW III; *see also* Art. 33, GPW IV.

Nuremberg, that offense is unavailable today.[89] The Nuremburg judges ruled that there was no offense of conspiracy to commit war crimes or crimes against humanity.[90] Instead, they confined conspiracy to very limited acts, and only against very high-level German officials who were directly involved in specific acts of aggression that took place.[91] Indeed, Respondents essentially admitted that conspiracy is not a violation of the laws of war. Its own Instruction defining the offense divides all offenses into three distinct groups: War Crimes; Other Offenses Triable by Military Commission; and Other Forms of Liability and related Offenses.[92] Conspiracy falls within not "War Crimes," and not even "Other Offenses Triable by Military Commission," but rather in the "Other Forms Of Liability" section.

When leaders act through followers, the leaders may be liable under complicity principles for limited offenses that have actually taken place. But there is literally no support in the law of war for the idea that a low-level individual may be liable simply because he "agrees" to commit some act in the future. The weight of law throughout the world emphatically rejects such a notion. Conspiracy has *never* been used to prosecute an inchoate

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[89] Assistant Attorney General Herbert Wechsler, head of the Criminal Division, criticized the War Department's proposal to use a conspiracy charge, stating that "it is an error to designate as conspiracy the crime itself, the more so since the common-law conception of the criminality of an unexecuted plan is not universally accepted in civilized law." *See* Memorandum for the Attorney General, in *The American Road to Nuremburg*, 84, 87, Dec. 29, 1944 (Smith ed. 1982).

[90] Many read Nuremburg to say that there is no separate offense of conspiracy at all. *See* Major Edward J. O'Brien, *The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood*, 149 MIL. L. REV. 275, 281 (1995).

[91] The International Military Tribunal ultimately "interpreted the [conspiracy] concept very narrowly, and adopted a construction of the Charter under which conspiracies to commit 'war crimes' or 'crimes against humanity' were ruled entirely outside the jurisdiction of the Tribunal." Telford Taylor, Brigadier General, USA, Chief of Counsel for War Crimes, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10., 70 (U.S.G.P.O. 15 Aug. 1949). In fact, all four of the cases brought against defendants for conspiracy to commit crimes against the peace resulted in acquittals. *Id*. at 31.

[92] *See* Military Commission Instruction ("MCI") No. 2; *see also* 1998 Rome Statute of the International Criminal Court, art. 8(a)(2), UN Doc. A/CONF. 183/9 (1998), reprinted in 37 ILM 999 1998) (defining "War Crimes" as grave breaches of the 1949 Geneva Conventions and "other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law").

offense of the law of war. *See* Cassese, *International Criminal Law* 197 (Oxford 2003).

"The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) (Marshall, C.J.). And the Department of Defense admits that "No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question." Military Commission Instruction ("MCI") No. 2, Section 3(A).

2. Conspiracy doctrine cannot be used against low-level individuals

The Government's charging Hamdan, a mere underling, with conspiracy is in complete contrast to international law, which has emphasized that any conspiracy charges must be against leaders.[93] The charges against Hamdan are unprecedented and could potentially destabilize the development of international criminal law.

3. Conspiracy charges cannot incorporate pre-war conduct

The conspiracy charge is based largely on conduct that occurred before 9/11, yet commissions can only adjudicate violations after a war begins.[94] It is a tremendous stretch to

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[93] *See* Nuremberg Trial Proceedings, *reprinted in* The Avalon Project at Yale Law School, vol. 22, 467: Judgment, http://www.yale.edu/lawweb/avalon/imt/proc/09-30-46.htm; *Charter of the International Military Tribunal for the Far East*, art. 1 (January 19, 1946), http://www.yale.edu/lawweb/avalon/imtfech.htm (limiting conspiracy charge to leaders); S.C. Res. 1329 (Nov. 30, 2000) (detailing the Security Counsel's endorsement of an official prosecutorial policy for the ICTY and ICTR that "civilian, military and paramilitary leaders should be tried before them in preference to minor actors."); Statute of the Special Court for Sierra Leone, art. 1(limiting the court's jurisdiction to those "who bear the *greatest responsibility* for serious violations of international humanitarian law."); Wechsler Memorandum, *supra*, at 89 (criticizing conspiracy charges against Germans who were not "prime leaders," because the charge "may be seriously weakened in the eyes of the world if too many individuals are included in it.").

[94] GPW Art. 99 (explicitly barring such ex post facto charges); *see also*, International Covenant on Civil and Political Rights (ICCPR), Article 15 (made non-derogable by Article 4); Wechsler Memo., *supra*, at 86 ("atrocities committed prior to a state of war…are not embraced within the ordinary concept of crimes punishable as violations of the laws of war."); *Prosecutor v. Multinovic*, Decision on Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise, ICTY Appeals Chamber, Case No. IT-99-37-AR72, ¶ 17 (May 21, 2003) ("it is every Chamber's duty to ascertain that a crime or a form of liability charged in the indictment is both provided for under the statute and existed at the relevant time under customary international law."); Winthrop, at 837 ("An offence, to be brought within the cognizance of a military commission, must have been committed within the period of the war"); *id.* n.95 (quoting source that "martial law is not retrospective.

argue that the war began in 1989 or 1995 or 1999. Such a claim would have surprised former President Clinton; indeed, it apparently would even have surprised President Bush, who stated at a March 6, 2004 press conference, "The terrorists declared war on us that day [September 11, 2001]."

4. The Pentagon definition empties conspiracy of its meaning

The Government's "definition" of conspiracy (a questionable term to apply to what Respondents claim is a "common law" offense) is woefully lacking. For example, it eliminates the most important element of conspiracy: agreement. *See Prosecutor v. Juvenal Kajelijeli* (Case No. ICTR-98-44A) Judgment 787 (1 Dec. 2003) ("[T]he evidence must show that an agreement had indeed been reached. The mere showing of a negotiation in process will not do."). Under MCI No. 2, § 6(a)(1), a defendant need only "join[] an enterprise of persons who shared a common criminal purpose" to establish a conspiracy. While those who actively plot specific terrorist activities would fall within the domestic civilian conspiracy offense,[95] the MCI's use of "enterprise" is impermissibly vague.

Second, even under broad domestic standards, conspiracy is a specific intent crime. *State v. Bond*, 49 Conn. App. 183, 196, 713 A.2d 906, 913 (Conn. App. Ct. 1998). As such, the intent of one person to commit a crime cannot simply be imputed to another. *See Clark v. Louisiana State Penitentiary*, 694 F.2d 75 (5th Cir. 1982), *rehearing denied with opinion*, 697 F.2d 699 (5th Cir. 1983). Yet the prosecution does not allege such specific intent.

Given the above deficiencies, a conspiracy charge cannot be based upon the MCI's invented definition of the offense. "Common law" does not mean "made-up law," especially

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An offender cannot be tried for a crime committed before martial law was proclaimed.").

[95] Domestic criminal law is, of course, not a powerful source of support for Respondents. American civilian criminal law has been able to develop a vibrant offense of conspiracy because of its strong commitment to criminal procedural guarantees. While charges can be more vague in a civilian conspiracy trial and hearsay evidence may be admitted, the standard checks on prosecutorial and judicial abuse exist – an indictment by a grand jury, the right to a jury trial, the right to confront witnesses, the right to obtain exculpatory evidence, and so on. These procedural rights are preconditions before conspiracy doctrines become available.

when someone's liberty is at stake.

X. THE COMMISSION LACKS PERSONAL JURISDICTION

Respondents introduce no evidence justifying the commission's personal jurisdiction over Hamdan. They point to a cursory statement by the President from July 2003 that they do not even provide to the Court. The President asserts that his authority for such a finding is in accordance with the Constitution and consistent with the laws of the United States, including the AUMF. This statement is not supported in either fact or law.

The President's statement claims that 1) Hamdan is or was a member of the organization known as al Qaida; 2) that he has engaged in, aided, abetted, or conspired to commit, acts international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or 3) that he has knowingly harbored one or more individuals described in the statements above.

Hamdan disputes each of these factual assertions. Hamdan has specifically denied that he is presently or was at any time a member of al Qaida. He performed the service of driver for monetary compensation and at no time joined or supported the political or alleged criminal activity attributed to Usama Bin Laden and his followers. *See* Hamdan Affidavit, filed in support of petition. Hamdan denies having any foreknowledge of the activities of any specific criminal enterprise attributed to Bin Laden or his followers, and denies any knowing or willing participation in such activity. Finally, as an employee of Bin Laden, Hamdan can not be said to have "harbored" him within the meaning of the term under established law.

Further, even if there was sufficient evidence to prove the above facts, they do not establish jurisdiction of the military commission in this case. It is well settled that a commission's jurisdiction is limited to a time of war. *See Reid*, 354 U.S.at 21 (plurality). As explained above, the President's factual assertions fail to allege that Hamdan committed

criminal conduct during a time of war. Conspicuously absent is any statement of when the supposed violation occurred. For a commission to have jurisdiction, it is not enough to say that a crime has been committed. Rather it must first be established that the crime was committed in conjunction with a war. Nor can the President rely on Congress's AUMF. That Resolution is limited to "force," and it looks only to the future: "That the President is authorized to use all necessary and appropriate force . . . **in order to prevent any future acts** of international terrorism against the United States by such nations, organizations or persons." Sept. 18, 2001 Joint Res. (emphasis added). Unlike detentions, which "prevent" "future acts" of terrorism, commissions are fully retrospective. Even if it might be thought that the AUMF gives the President the full war power to fight prospectively to keep the peace, Congress circumscribed the President's *retrospective* power to *punish*.

Finally, the President's sole allegation of a crime committed by Hamdan is international terrorism. But that is not a violation of the laws of war. Rather, it is a label of convenience, affixed to various acts. As this court said 20 years ago, and remains the case today, terrorism is a term as loosely deployed as it is powerfully charged. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). More recently the Second Circuit held that piracy, war crimes and crimes against humanity fall within universal principles of jurisdiction, but refused to accord terrorism the same status. *See United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003). Implicit in this finding was that terrorism was not a war crime. Nor can it be said that mere membership in a group by itself confers jurisdiction. As such the President's findings of jurisdiction are without support in either fact or law in Hamdan's case. Respondents have had numerous opportunities to rebut the facts as stated by Hamdan since April of this year, including in their Return, and they have not done so.

Respectfully submitted this 30th day of September, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2004, copies of the foregoing **Petitioner's Consolidated Reply to Respondents' Return and Opposition to Cross Motion to Dismiss**, together with supporting **Proposed Order** were served by electronic mail and facsimile, upon the following:

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