IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

November 1, 2004.

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Petitioner David M. Hicks, an Australian national who has been unlawfully detained by Respondents at Guantanamo Bay for nearly three years, respectfully submits this Brief in Opposition to Respondents' Motion to Dismiss and in Support of his Cross-Motion for Partial Summary Judgment on his Second Amended Petition for Writ of Habeas Corpus and Complaint for Injunctive, Declaratory, and Other Relief. Hicks requests that the Court find illegal the

operation of a military commission seeking to try him for newly-invented military crimes (such as conspiracy), deny Respondents' Motion to Dismiss, and grant him partial summary judgment.

Hicks is entitled to judgment as a matter of law. First, the military commission lacks the authority to try Hicks: the substantive "crimes" with which he is charged are not criminal violations at all, much less violations of the law of war that are within the jurisdiction of military commissions. Second, the military commission was not properly authorized by Congress in the first instance, and is invalidly constituted in at least two other respects. Third, the procedures under which the commission will operate violate the fundamental constitutional principle of Due Process, as well as statutory precepts and requirements of international law. Fourth, the executive order establishing the commission is unlawfully discriminatory in violation of the Equal Protection Clause. Fifth, the government's failure to try Hicks for years after his capture violates his right to a speedy trial under both statutory and international law. Finally, there is no reason for this Court to abstain until after the commission proceedings before according Hicks his rights.

Respondents have invoked the "war on terror" to justify these egregious violations of Hicks's rights. But as the Supreme Court recently explained in *Hamdi v. Rumsfeld*, "[i]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." 542 U.S. ___, 124 S. Ct. 2633, 2648 (2004). This admonition applies with additional force to the instant situation: *Hamdi* concerned the detention of an individual only during the course of formal hostilities; here, respondents seek to imprison Hicks for life -- affording him no trial in an Article III court for a violation of domestic law, *see, e.g.*, 28 U.S.C. § 2339A (criminalizing the provision of material support to terrorists),

but instead, a trial by an invalid military commission for fictional "war crimes." The charges against Hicks are based on allegations that he fought against the United States as a foot soldier in Afghanistan -- allegations which, even if true, do not constitute a crime under the law of war or under any statute over which the commission has jurisdiction. The Court should not permit Respondents to fabricate criminal law after the fact. Nor should it sanction a commission that violates the basic safeguards against a wrongful conviction. The very individuals who are prosecuting the "war on terror" -- and who dreamed up the specious charges against Mr. Hicks -- will adjudicate those charges: the commission's members are appointed by a designate of the Secretary of Defense, review of its proceedings will be by other designates of the Secretary of Defense, and ultimate review will be by the Secretary and/or the President. This biased process will rely on impermissibly lax evidentiary standards, admitting evidence long excluded even from civil proceedings, much less criminal proceedings -- including even evidence obtained through torture.

There is no genuine issue of material fact to prevent a determination that the military commission is unlawful -- a determination that should be made now.

STATEMENT OF UNDISPUTED FACTS

In the aftermath of the terrorist attacks on American targets of September 11, 2001, Respondent President Bush announced that the United States was engaged in a "war on terror." On or about October 7, 2001, the United States commenced air strikes against Taliban and "*al Qaeda*" targets within Afghanistan, followed with ground operations on October 19, 2001. *See Rasul v. Bush*, 542 U.S. at __, 124 S. Ct. 2686, 2690 (2004). The United States was supported by the Northern Alliance, a group of armed and organized Afghan opponents of the Taliban.

Also contributing to the campaign against the Taliban were military delegations from other nations (the "Coalition Forces").

During the campaign, the Northern Alliance took into custody a number of persons allegedly associated with the Taliban and/or *al Qaeda*. Among those prisoners was Petitioner David M. Hicks, an Australian national. At the time of his apprehension, Hicks was not engaged in combat against the United States or any of its allies.

Within ninety days of the commencement of military strikes, the United States, the Northern Alliance, and the Coalition Forces defeated the Taliban. The Northern Alliance then transferred custody of Hicks to the United States. Hicks was confined for several weeks on U.S. Navy vessels, where he was extensively questioned by military or intelligence personnel. Second Am. Pet. ¶ 22. In January 2002, Hicks was transported by U.S. aircraft to Guantanamo Bay, and was placed in a special facility reserved for alien detainees denominated "enemy combatants." *Id.* ¶¶ 1, 22. Hicks was subjected to intensive and continuous interrogation while at Guantanamo. *Id.* ¶¶ 23, 24. The coercive and abusive interrogation methods employed against Hicks and other Guantanamo detainees,[1] constitute torture in violation of various provisions of international law. *See, e.g.*, United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Article 1, opened for signature February 4, 1985, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85; *see also Khouzan v. Ashcroft*, 361 F.3d 161, 168-69 (2d Cir. 2004). Hicks was not brought before a competent

[1] The interrogation techniques used on Mr. Hicks are described in the accompanying declaration of Mr. Hicks that is being filed under seal. *See also* Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed, Composite Statement: Detention in Afghanistan and Guantanamo Bay (July 26, 2004), Second Am. Pet. Ex. 3 [hereinafter "Composite Statement"].

tribunal as required by Article 10 of the UCMJ and Article 5 of the Geneva Convention (III) to determine his status. Second Am. Pet. ¶¶ 87, 90, 104.

In July 2003, Respondents declared Hicks eligible for "trial" before a military commission on criminal charges punishable by life imprisonment. *See id.* The military commission in question was established by Presidential Military Order on November 13, 2001. *See* Presidential Military Order, 66 Fed. Reg. 57833 (Nov. 13, 2001), Second Am. Pet. Ex. 4 (hereinafter, the "PMO").

After issuance of the PMO, the General Counsel of the Department of Defense ("DOD") established by order the "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism." *See* Gen. Counsel, Dep't of Defense, Military Commission Order No. 1 ("MCO No. 1") (March 21, 2002), Second Am. Pet. Ex. 5. This order established that that the Executive Branch would serve as prosecutor, judge, jury and reviewing court. Pursuant to the order, the Secretary of Defense designates an Appointing Authority, who in turn appoints individuals to serve on the commissions. *See* MCO No. 1, ¶¶ 2, 4(A)(1). The commission decides questions of both law and fact, although only the presiding officer is required to have legal experience. PMO ¶ 4(c)(2); MCO No. 1, ¶ 4(A)(3), (4). A review panel appointed by the Secretary of Defense, and then the Secretary himself or the President, reviews the determinations of the commission. MCO No. 1, ¶ 6(H)(4). Only non-citizens are to be tried before the commissions. *See* PMO generally. Unsworn testimony and confessions obtained through torture "shall" be admitted at the commissions' "trials," limited only by the general rule that they be of probative value to a reasonable person. MCO No. 1, ¶ 6(D)(1), (3).

For nearly two years after he was first detained -- and for five months after he was designated eligible for "trial" before the commission -- Respondents failed to afford Hicks legal

representation. In response to repeated entreaties for visits and communication by Hicks's family and their retained Australian counsel, the Australian government responded: "Your request for Mr. Hicks's family to have access to him was referred to the United States authorities. The United States has advised that, a this stage, no family access will be allowed any of the detainees held at Guantanamo Bay." Letter from Robert Cornall, Australian Attorney General's Department (Feb. 8, 2002). On November 28, 2003, Major Michael D. Mori of the United States Marine Corps was, at last, formally detailed to serve as Hicks's military defense counsel.[2] Subsequently, Joshua L. Dratel, Esq., was approved as Hicks's Civilian Defense Counsel, and Stephen Kenny of Australia was approved as his Foreign Attorney Consultant.

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

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

Second Am. Pet. ¶ 29; *see also* Charge Sheet ¶¶ 19-22, Second Am. Pet. Ex. 2. These "offenses" are not part of the laws of war; they were defined for the first time in an order issued by the Department of Defense on April 30, 2003. *See* MCO No. 2, ¶ 6.

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[2] Major Mori was flown in from his post in Hawaii the week of July 14, 2003, in anticipation of his assignment to Hicks's case. *See* Aff. of Maj. Michael D. Mori, USMC, ¶ 6, Second Am. Pet. Ex. 1; *see also* Mem. from Dep't of Defense, Office of the Chief Defense Counsel, to … Maj. Mori (July 23, 2004), Second Am. Pet. Ex. 6 (detailing Maj. Mori to represent Hicks). Nevertheless, Maj. Mori's representation of Hicks was not formalized for another four and a half months. *See* Mori Aff. ¶¶ 10-11.

The government has alleged facts in support of these spurious charges amounting to nothing more than that Hicks was part of an organization fighting against United States troops. There is no allegation that Hicks participated in any attacks on civilians, planned any such attacks, or even had advance knowledge of any such attacks. The government does not even allege that Hicks killed, injured, fired upon, or directed fire upon, any U.S. or Coalition forces or the Northern Alliance forces. *See* Charge Sheet. In short, there is no basis for Hicks's trial before a military commission.

Hicks's attorneys were ordered to and did appear before the commission on August 25, 2004 to determine a schedule for further proceedings, and to present the indictment. At that appearance, Hicks pleaded not guilty to all charges. Kathleen T. Rhem, *Australian Detainee Pleads Not Guilty, Meets With Family*, AMERICAN FORCES PRESS SERVICE (Aug. 26, 2004), *available at* http://www.defenselink.mil/news/Aug2004/n08262004_2004082601.html. Hicks's "trial" before the commission was scheduled for January 2005. On September 17, 2004, Respondents convened a Combatant Status Review Tribunal ("CSRT") which purported to determine whether Hicks could be held as an enemy combatant. The CSRT did not evaluate whether Hicks was a privileged combatant entitled to prisoner of war status or an unprivileged combatant.[3] Hicks did not participate in the CSRT both because of the inadequacy of CSRT procedures and because his uncounseled testimony potentially could have been used against him in the criminal proceedings before the commission.

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[3] Briefing on the CSRT is proceeding on a different schedule. *See* DOCKET # 72. Therefore, the inadequacy of the CSRT will be addressed in subsequent submissions to the court. The legitimacy of the CSRT and the accuracy of its findings are irrelevant to the instant motion: *regardless of whether David Hicks may be detained as an enemy combatant for the course of the war, he may not be tried by the commission for "war crimes" punishable by life imprisionment for the reasons detailed herein*.

The instant action was commenced with Hicks's petition for writ of habeas corpus on February 19, 2002. On August 31, 2004, Hicks filed a motion for leave to file a Second Amended Petition for Writ of Habeas Corpus and Complaint for Injunctive, Declaratory, and Other Relief, which was subsequently granted. *See* DOCKET # 77 ("Second Am. Pet."). Because no genuine issue of material fact exists in this case with respect to the legality of the military commission's proceeding against Hicks, this Court should grant partial summary judgment to Hicks on his challenge to the commission process.

JURISDICTION

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

STANDARD OF REVIEW

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

ARGUMENT

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

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

Because Congress understood the extraordinary nature of military commissions, it limited the jurisdiction of even properly constituted commissions to adjudication of only two kinds of charges: (1) those that Congress has expressly authorized them to adjudicate, and (2) those that are recognized as crimes under the traditional law of war. [4] Article 21 of the UCMJ, on which Respondent President Bush relied in enacting the PMO which established military commissions,[5] thus specifies that military commissions shall not have jurisdiction over offenses other than those "that *by statute* or *by the law of war* may be tried by military commissions." 10 U.S.C. § 821 (emphasis added). The Executive Branch seemed to acknowledge these limits in MCO No. 1, which reiterates them, *see* MCO No. 1 § 3(B); and Respondents seem to acknowledge these limitations here. Respondents' Brief (DOCKET # 88) at 26-28 [hereinafter Resp. Br.); s*ee also*

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

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

Ex parte Quirin, 317 U.S. 1, 29 (1942) (the first inquiry for a court is "whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial.")

The charges against Hicks do not fall within the purview of any valid military commission. Hicks is charged with three offenses: conspiracy, attempted murder by an unprivileged belligerent, and aiding the enemy. *See* Charge Sheet, ¶¶ 19 - 22. None of these three charges is subject to review by a military tribunal: none has been expressly delegated to military commissions by Congress, and none has been recognized under the law of war.

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

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

The law of war is one part of international law. The law of war was originally a system of "common law" based on "*universal* agreement and practice." *Quirin*, 317 U.S. at 30 (emphasis added). When the practice of military forces "attains a degree of regularity and is accompanied by the general conviction among nations that behavior in conformity with the practice is obligatory, it can be said to have become a rule of customary law binding on all nations." UNITED STATES NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, MCWP 5-12.1/NWP 1-14M ¶ 5.41 (1995) [hereinafter, "LAW OF NAVAL OPERATIONS"], http://www.cpf.navy.mil/pages/legal/NWP%201-14/NWPTOC.htm. Since World War II, much of the law of war has been set forth in international conventions and treaties. *See id.* ¶ 5.4. Chief among those treaties are the four Geneva Conventions. The international bodies that interpret those conventions (such as international war crimes tribunals), further develop the law of war. For example, the procedures and decisions reached by the

International Criminal Tribunal in Yugoslavia ("ICTY"), the International Criminal Tribunal in Rwanda ("ICTR"), and the International Criminal Court ("ICC"), contribute to the body of jurisprudence known as the law of war. The teachings of scholars also are considered a source of authority to identify the law of war. Schmitt Aff. ¶ 4, Ex. 2.

Not all violations of the law of war are crimes. Those that are "war crimes" consist of "grave breaches of the Geneva Conventions of 12 August 1949" and "other serious violations of the laws and customs [of international armed conflict] … within the established framework of international law."[6] ICC Statute, art. 8.2(a)(2)(a) and 8.2(a)(2)(b); *see also* 1998 Rome Statute of the International Criminal Court, art. 8(b), UN Doc. A/CONF. 183/9 * (1998), *reprinted in* 37 I.L.M. 999 (1998) [hereinafter, "Rome Stat."] (defining "War Crimes" as grave breaches of the 1949 Geneva Conventions and "other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law"). Finally, war crimes should not be confused with crimes as defined by other bodies of law in the international system -- such as crimes against humanity (e.g., genocide), or crimes against the peace. Schmitt Aff. ¶¶ 2, 3, 25 & n. 33. As noted, the law of war is a subset of international criminal law with a very specific purpose: to provide rules for war in order to civilize it, not to eliminate it.

The law of war thus does not criminalize participation in war, but rather "seeks to mitigate the effects of war, first in that it limits the choice of means and methods of conducting

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

military operations, and secondly, in that it obliges the belligerents to spare persons who do not or no longer participate in hostile actions." JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW, CASES AND MATERIALS 806 (2d ed. 2000) (citations omitted). Thus, for example, the law of war limits attacks on combatants who are "*hors de combat*," or "out of combat," either because they have surrendered, because they are sick or wounded, or because they are shipwrecked.[7] The law of war also limits the methods of warfare, for example by prohibiting methods resulting in unnecessary suffering or superfluous injury, and the use of specific weapons such as poison or blinding lasers.[8] Similarly, the law of war limits attacks on civilians who have not directly participated in hostilities. *See* Geneva Protocol I, art. 51. *But the law of war does not make it illegal simply to participate in a war*. Nor does it govern activities outside the context of a war.

As we will see in the following sections, two of the charges against Mr. Hicks – aiding the enemy and attempted murder by an unprivileged belligerent – are basically charges that it

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

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

was illegal for Mr. Hicks to participate in a war. The other charge – conspiracy – is an attempt to import an American crime into the law of war even though the international community has expressly rejected that crime. Importantly, even the Executive Branch appeared to recognize this when it listed the war crimes over which military commissions would have jurisdiction in MCI No. 2. This instruction divides offenses into three distinct groups: War Crimes; Other Offenses Triable by Military Commission; and Other Forms of Liability and related Offenses. MCI No. 2 § 6(A), (B), (C). The "War Crimes" section of MCI No. 2 defines offenses that qualify as violations of the law of war triable before the commissions, such as willful killing of protected persons, pillaging, and torture. But the crimes with which Mr. Hicks is charged do not fall into the "War Crimes" section. Rather, they fall under the "Other Offenses Triable by Military Commission," and the "Other Forms Of Liability" sections. This being so, according to MCI No. 2 itself, no offense with which Mr. Hicks is charged qualifies as a violation of the law of war. Therefore, since none has been delegated to the authority of military commissions by Congress, none is within the jurisdiction of the commission.

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

One of the three charges that Respondents bring against Hicks is the charge of "aiding the enemy", as if Mr. Hicks had an obligation to the United States to be loyal to it. Charge Sheet ¶ 22. But there is no crime of "aiding the enemy" under the law of war, and the domestic crime does not apply to Australian citizens, such as Mr. Hicks.

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

Respondents do not contend in their Motion to Dismiss that "aiding the enemy" constitutes a violation of the law of war. That is for good reason. The claim that Mr. Hicks aided the enemy amounts to the claim that he joined a unit participating in combat against the

United States in Afghanistan – a foreign country that the United States had invaded (albeit after the 9/11 attacks). But as we have seen, this is not illegal.

Indeed, not a single international treaty lists "aiding the enemy" as a violation of the law of war. Nor is such a theory supported by other sources. As discussed above, *see* section I(A), *supra*, even MCI No. 2 does not list aiding the enemy as a violation of the law of war. Indeed, the very notion that aiding the enemy could be a violation of the law of war is an absurdity: the law of war is intended to establish neutral rules that apply equally to both sides in combat. *See discussion supra* section I(A). Thus, from the perspective of the law of war, there is no "enemy." Surely Respondents do not believe that American soldiers could have been tried by the Taliban government of Afghanistan for "aiding the enemy" simply for fighting against the Taliban. Yet that would be the consequence of the view that a country could try all opposing soldiers for "aiding the enemy."

2. No statute imposes criminal liability on aliens such as Hicks for aiding the enemy.

No act of Congress authorizes military commissions to try all opposing soldiers as criminals for aiding the enemy – or even makes such opposition criminal at all. While "aiding the enemy" is one of two offenses over which Congress has expressly conferred jurisdiction to military commissions (the other being espionage),[9] the key element in determining who can be prosecuted for aiding the enemy is that the accused owed a duty of allegiance to the United States. Absent such a duty, it is not illegal for an individual to *be* an enemy of the United States, much less to aid the enemy. For example, the Iraqis who fought the United States attacks in 2003 did not violate United States criminal law.

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

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

Respondents acknowledge that only someone with a duty of allegiance can be charged with "aiding the enemy", but suggest that allegiance to a United States ally is sufficient. *See* Resp. Br. at 31; MCI No. 2 § 6(B)(5)(b)(3), Second Am. Pet. Ex. 11 (stating that the accused must only "owe allegiance or some duty to the United States of America or to an ally or coalition partner"). They cite not a single source supporting this radically expanded notion of allegiance. And it is outrageous to suggest that the United States can try an Australian citizen for aiding enemies of the United States -- just as outrageous as if Australia were to bring such a charge against an American citizen. Surely, if any nation may charge Hicks with aiding the enemy, it is Australia and no other. And Australia does not even view Mr. Hicks's actions as criminal![10]

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

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

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

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

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

As discussed above, the law of war does not criminalize participation in war. *See* section I(A), *supra*. Respondents do not contend otherwise. They argue, however, that Hicks's alleged participation in war constituted attempted murder because Hicks was an "unprivileged belligerent." Resp. Br. at 30. That is wrong for two reasons.

a. Hicks Was Not an Unprivileged Belligerent

First, The government's own allegations, if true, show that Hicks was a privileged belligerent.[11] Under the law of war, members of the armed forces, as well as members of

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

militias or volunteer corps that form part of the armed forces, are privileged belligerents.[12] And the government's allegation that Hicks was guarding a Taliban tank (*i.e.*, a tank of the recognized government of Afghanistan, a sovereign nation) on its face shows that Hicks's alleged participation in combat was as part of the Afghan armed forces.

b. Unprivileged Belligerency Is Not a War Crime

Equally important, the government's assertion that unprivileged belligerency constitutes a war crime over which military commissions have jurisdiction is premised on a complete misunderstanding of the law of war. As Professor and former Judge Advocate Schmitt explains, "Simply put, it is not a violation of the law of armed conflict to kill a combatant, even when the individual doing so lacks the combatant privilege to use force." Schmitt Aff. ¶ 39.

Privileged status under the law of war has two purposes. First, a privileged combatant is entitled to be treated as a POW when captured. Second, a privileged combatant *may not be prosecuted for domestic crimes*; of even those states with subject matter and personal jurisdiction over him. Schmitt Aff. ¶ 38. For example, U.S. soldiers in Iraq have a privilege against prosecution for combat-related deaths under any nation's domestic law. In contrast, civilians (and other unprivileged belligerents) who have violated a domestic law of a state with subject matter and personal jurisdiction can be prosecuted pursuant to the domestic laws of that state.

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[12] *See* Geneva Convention (III) art. 4(A)(1), (2), (6). In addition to members of the armed forces, privileged belligerents include members of militias who are under responsible command, who carry arms openly, have a distinctive sign recognizable at a distance," and who are part of a force that operates in accord with the law of war. *See* Geneva Convention (III) arts. 4(A)(1), (2), (6). In addition, persons who "on the approach of the enemy spontaneously take up arms to resist the invading forces" are also entitled to such status. Nothing in the charges suggests Hicks falls outside these categories.

But while the law of war does not protect unprivileged belligerents from domestic prosecution for participation in hostilities, *the law of war does not itself make such actions criminal*.[13]

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

The distinction between belligerent acts that are unprivileged and acts that constitute crimes under the law of war is well established, and is a critical limit on the jurisdiction of

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

military commissions, leaving domestic crimes to be tried in Article III courts. As Professor Yoram Dinstein explains, the law of war "merely takes off a mantle of immunity from the defendant, who is therefore accessible to penal charges for any offense committed against the domestic legal system."[14] Similarly, a recent working paper of Harvard's Humanitarian Law Research Initiative states that while unprivileged belligerents may be prosecuted under domestic law, international law

> does not criminalize direct participation in hostilities per se…. Any interpretation that would result in the conclusion that mere participation in hostilities by civilians could be subject to the principle of universal jurisdiction [based on a serious violation of international human rights law] ["IHL"] would be highly contested, as no provision of IHL treaty law enables such an interpretation.[15]

The sources cited by the government are not to the contrary. *See* Resp. Br. at 30. The Geneva Convention indicates only that unprivileged belligerents are not entitled to POW status. Similarly, the Law of Land Warfare Manual states only that unprivileged belligerents are not immune from prosecution and trial – presumably under domestic law**.** Neither remotely suggests that unprivileged belligerents have violated the law of war. Indeed, contrary to the reading Respondents give to the Law of Land Warfare Manual, a handbook provided to all of U.S. soldiers makes clear that in the view of the U.S. armed forces, unprivileged belligerents can only be tried under domestic law:

> Unprivileged belligerents may include spies, saboteurs, or civilians who are participating in the hostilities or who otherwise engage in

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[14] DINSTEIN, *supra* note 14, at 31; *see also* MYRES S. MCDOUGAL & FLORENTINO P. FELCIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 712 (1961).

[15] Jean-Francois Queguiner, *Working Paper: Direct Participation in Hostilities under International Humanitarian Law* 10-11 (Nov. 2003), *available at* http://www.ihlresearch.org/ihl/pdfs/briefing3297.pdf.

> unauthorized attacks or other combatant acts. Unprivileged belligerents are not entitled to prisoner of war status, and may be prosecuted under the *domestic law* of the captor.

U.S. ARMY, JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 23 (2004) (emphasis added).

Finally, Respondents' citation of *Quirin* is inapposite. *Quirin* did not hold that an individual could be tried simply for unprivileged belligerency. *Quirin* held only that ***spies*** -- "those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property" -- could be tried by military commissions. *Quirin*, 317 U.S. at 35. It explicitly limited its holding to those "particular acts," *id*. at 45-46, after pointing to a long history of commission proceedings against spies. Critically, spying was one of two statutorily defined domestic crimes over which Congress had expressly conferred jurisdiction on military commissions. *See id.* at 27 (citing 10 U.S.C. §§ 1471-1593). Thus, a domestic statute provided a lawful basis for commission jurisdiction in *Quirin*. The law of war could not have done so because spying is uniformly viewed as lawful under the law of war.[16]

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[16] The contemporary Army Field Manual explained, in a section aptly entitled "Employment of Spies Lawful," that spies are not punished as violators of the law of war. DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 77 (1956) [hereinafter LAW OF LAND WARFARE]; *see also* DINSTEIN, *supra* note at 14, at 213; *see generally* Baxter, *supra* note 14, at 487.

To be sure, the *Quirin* Court blurred the distinction between the law of war and domestic law.[17] But because domestic law clearly provided authority for trial of spies before military commissions, this distinction was immaterial to the Court's holding. The same would not be true here. Because there is no domestic statute conferring jurisdiction on military commissions to try individuals for a purported crime of unlawful belligerency, a decision that such a charge makes out a violation of the law of war would confer jurisdiction on the commission when there otherwise would be none. And, as we have seen, such a decision would be incorrect under the recognized sources of authority for the law of war.

Today, it is even clearer than it was at the time of *Quirin* that a person who participates in combat – even if not privileged – is not guilty of "attempted murder" under the law of war. As respondents recognize, the law of war is a system of "common law" based on "universal

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[17] The *Quirin* Court's suggestion that spying violates the law of war has been criticized by none other than the current Law of War Chair in the Office of General Counsel for the United States Secretary of Defense, W. Hays Parks:

> [T]he Court failed to note ¶ 203 of Field Manual 27-10, *Rules of Land Warfare* (1940), which states that spies are not punished as "violators of the law of war." Rather, the Court erred in stating that "the absence of uniform . . . renders the offender liable to trial for violation of the laws [sic] of war." *Ex parte Quirin*, 317 US at 35–36 n12.... The Hague Convention IV … (a treaty to which the United States was a party during World War II), … states that "[a] spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage." Were absence of uniform a violation of the law of war, criminal liability would remain even after a soldier returned safely to his own lines**.**

W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L 493, 510 n.31 (2003). As noted by the Dutch Special Court of Cassation in the 1949 *Flesche* case, "espionage…is a recognized means of warfare and therefore is neither an international delinquency on the part of the State employing the spy nor a war crime proper on the part of the individual concerned." *In re Flesche*, 16 Ann. Dig. & Rep. of Pub. Int'l L. Cases 266, 272 (Neth. Spec. Ct. of Cassation 1949).

agreement and practice." *Quirin*, 317 U.S. at 30. At the time of *Quirin*, very little of that law had been codified in treaties. Since then, however, nations have agreed to the Geneva Conventions, and have established the ICTY, the ICTR, and the ICC, each of which has jurisdiction over crimes under the laws of war and each of which sets out what those crimes are. None of those authorities define participation in hostilities by an unprivileged belligerent as a law of war violation. There clearly is no "universal agreement" that unprivileged belligerency constitutes a war crime over as would be necessary for military commissions to have jurisdiction.

2. No act of Congress delegates authority for prosecuting "attempted murder" of combatants to a military commission.

There is no other basis for commission jurisdiction. As discussed in the preceding subsection of this brief, unprivileged belligerency is not one of the two crimes over which Congress has expressly conferred jurisdiction on military commissions.

D. The Commission Lacks Jurisdiction to Try Hicks for "Conspiracy."

Respondents also seek to subject Hicks to "trial" by the commission for "conspiracy," Charge Sheet ¶ 19. This charge also falls outside the jurisdiction of military commissions.

1. Conspiracy is neither a crime nor a theory of individual responsibility under the law of war.

Because the government is unable to bring any charges that Hicks himself committed any war crimes, the government attempts to make Hicks guilty by association. The government charges that Hicks is criminally liable for allegedly joining a group that had the purpose of violating the laws of war by, among other things, attacking civilians and civilian objects. The government does not allege that Hicks himself shared the purpose of attacking civilians, that he planned any attacks against civilians or civilian objects, that he participated in any such attacks,

much less that he was a leader of such attacks. Instead, the government charges Hicks with the crime of conspiracy based on the American view that he can be held liable for joining a group that has a criminal purpose so long as someone in the group commits an overt act towards fulfillment of that purpose.

But conspiracy is not recognized as a substantive, independent crime under the law of war. Conspiracy does not violate the Geneva Convention; nor is it a serious breach – or any breach – of customary international law. Legal scholars, one important source of the law of war, regularly write that there is no doctrine of conspiracy in the law of war. *See, e.g.*, ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 191 (2003); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 646 (2000); GERHARD WERLE, VÖLKERSTRAFRECHT 165 (2003); Schmitt Aff. ¶¶ 22-26. As Professor Cassesse, former President of the International Criminal Tribunal for the former Yugoslavia and current Chairman of the United Nations International Commission of Inquiry into Genocide in Darfur, explains: "the conspiracy offense listed in MCI No. 2 and charged against Mr. Hicks is not a valid offense under international criminal law." Cassesse Aff. at 1, Ex. 3.

International legal history conclusively proves the point. Before World War II, there was no concept of conspiracy in international criminal law at all, much less in the law of war. There is no conspiracy charge whatsoever in Article 23 of the Hague Convention IV, for example, which provides a laundry list of criminal violations but does not list conspiracy. *See* HIVR art. 23. This is because conspiracy is not recognized in civil law systems (as opposed to common law systems). Schmitt Aff. ¶ 22, Ex. 2.

After World War II, Americans attempted to introduce the notion of conspiracy as part of their plan of war-crime prosecution. Stanislaw Pomorski, *Conspiracy and Criminal*

Organization, *in* THE NUREMBERG TRIAL AND INTERNATIONAL LAW 213, 216-17 (George Ginsburgs & V.N. Kudriavisev eds., 1990). Because the concept of conspiracy is not part of civil law, much of the international community resisted this attempt. *Id.* at 218. Ultimately, the term conspiracy appeared only in the definition of the first of the three crimes within the jurisdiction of the International Military Tribunal at Nuremburg, crimes against the peace (specifically, the crimes of "planning, preparation, initiation or waging of a war of aggression"), not crimes of war or crimes against humanity. *See* Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, 59 Stat. 1544, 82 U.N.T.S. 279. The Tribunal explained that "the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war."[18] This point was reinforced in the trials conducted by the United States-constituted Nuremberg Military Tribunal pursuant to Allied Control Council Law No. 10 (1945): "[T]he Tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offense." *United States v. Pohl*, No. 4 (Nuremberg Mil. Tribunal II Nov. 3, 1947), *reprinted in* TRIALS OF WAR CRIMINALS BEFORE THE NURENBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 958, 961 (1950), *available at* http://www.marzal.org/archive/nmt/05/NMT05-T0961.htm.

In the sixty years since Nuremberg, the crime of conspiracy has remained an extremely limited concept even in the more general international criminal law, and it has simply never been applied to the laws of war. The sole references to conspiracy in international criminal law

[18] Thus, contrary to the view of Respondents, Resp. Br. at 30 n.30, the Tribunal did reject conspiracy to commit war crimes as a valid charge and expressly distinguished them from crimes against peace. *The Nurnberg Trial*, 6 F.R.D. 69, 111 (Int'l Mil. Tribunal 1946). The Tribunal thereby rejected the argument that a non-specific reference included in the last sentence defining the substantive crimes created liability for conspiracy to commit war crimes. Indictment at III, *The Nurnberg Trial*, 6 F.R.D. 69 (Int'l Mil. Tribunal 1946), *available at* http://www.yale.edu/lawweb/avalon/imt/proc/count1.htm.

conventions since Nuremberg have appeared in connection to genocide (a crime against humanity), not the law of war. There is no conspiracy charge at all in any of the four Geneva Conventions despite a long list of substantive crimes in each convention. *See* Geneva Convention (I), art. 50; Geneva Convention (II), art. 51; Geneva Convention (III), art. 130; Geneva Convention (IV), art. 147. And the conventions establishing the International Criminal Tribunals in Yugoslavia and Rwanda list conspiracy as a substantive crime only with respect to genocide. *See* United Nations, Statute of the ICTY, art. 4(3)(b), S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 2, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1203; Statute of the ICTR, art. 2(3)(b), S.C. Res. 955, U.N.SCOR, 49th Sess., 34534d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (same). Moreover, the international community has recently withdrawn whatever recognition it previously gave to liability for conspiracy. The Rome Statute -- the most recent multilateral statement of international law on conspiracy -- mentions neither the word conspiracy, nor the concept of an agreement to commit a crime, nor even conspiracy as a theory of individual responsibility, *see* discussion *infra*. The omission was deliberate. The concept of conspiracy appeared in initial drafts of the statute, but all references to conspiracy were removed during negotiations.[19]

Thus, it is clear that "conspiracy" is not a recognized crime in the law of war. Indeed, as we have seen, the government itself does not list "conspiracy" as a substantive crime in MCI No. 2. *See* MCI No. 2 § 6(A), (B). The government instead lists conspiracy as a theory of individual responsibility. A theory of individual responsibility under international law is one in which an

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[19] Richard Barrett & Laura Little, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals*, 88 MINN. L.REV. 30, 80 (2003) (citing Report of the Preparatory Committee on the Establishment of an Internatinal Criminal Court, U.N. GAOR, 51st Session, Supp. No. 22A, at 94-95, U.N. Doc. A/51/22 (1996)).

individual charged with a particular substantive crime can be held responsible for that crime. For example, both the ICTY and the ICTR have used "joint criminal enterprise," "aiding and abetting," or "command responsibility" as theories to establish an individual's responsibility for a crime perpetrated by a group. *See*, *e.g.*, *Prosecutor v. Kvocka et al*., Judgment, Case No. IT-98-30/1,T.Ch. I, 2 Nov 2001; *Kayishema and Ruzindana,* ICTR-95-1-T (Trial Chamber), May 21, 1999, ¶¶ 203-205. Thus, an individual could be charged with a particular substantive offense -- such as use of poison gas – and then held liable as, for example, a member of a joint criminal enterprise that perpetrated that crime. *But he could not be charged with the non-existent substantive crime of "joint criminal enterprise."* This is very different than the American concept of conspiracy in which an individual can be charged with (and found guilty of) both the underlying offense and a separate substantive crime of conspiracy. Hence, Respondents' attempt to charge Hicks with a substantive crime of conspiracy is inconsistent with their own description of conspiracy in MCI No.2, which recognizes that conspiracy is not a substantive crime under the law of war.

In fact, even MCI No. 2 overstates the place of conspiracy in the law of war. Conspiracy is not even a recognized theory of individual responsibility in the law of war. While each of the international criminal conventions lists theories of individual responsibility, none lists conspiracy. *See* ICTY at art. 7; ICTR at art. 6; Barrett & Little at 37. And the theories of individual responsibility they do list require a much greater degree of involvement than is alleged against Mr. Hicks. *See infra* n. 22. In any event, the exact parameters of various theories of individual responsibility in the law of war are irrelevant here. The critical point is that there is no substantive crime of conspiracy with which Mr. Hicks can be charged.

Respondents nonetheless assert that conspiracy has long been recognized as a substantive offense under the law of war. But the three authorities they cite do not show this. The Winthrop Treatise refers to conspiracy during the Civil War as a crime that could be tried by military commissions only because the courts were closed -- in other words, a domestic crime, not a crime *triable as a violation of the laws of war*.[20] *Mudd v. Caldera*, 134 F. Supp. 2d 138 (D.D.C. 2001), involved a defendant convicted of "of aiding and abetting as an accessory" to the assassination of President Lincoln for providing shelter, medicine and a method of escape to John Wilkes Booth -- thus, the substantive crime appeared to have been assassination with the term "conspiracy" loosely used as a theory of individual responsibility that actually consisted of aiding and abetting, a recognized theory of individual responsibility. *See id.* at 140. Moreover, because that case occurred in the context of the army's decision not to change the individual's military records, it involved deferential review, that is not warranted here. Finally, *Colespaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956), contains absolutely no discussion as to whether conspiracy violates the law of war or the source for such a proposition.

Certainly, these few domestic sources, involving convictions 50 or 150 years ago, cannot establish the "*universal* agreement and practice" necessary to show a violation of the law of war as it exists today. *Quirin*, 317 U.S. at 30. In the last 60 years, statutes establishing international criminal tribunals have never made conspiracy to violate the laws of war an offense and have twice (at Nuremberg and at Rome) explicitly rejected proposals to do so. Thus, the charge of conspiracy against Hicks does not serve as a valid source of commission jurisdiction.

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[20] 2 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 839 & n.5 (2d ed. 1920). Winthrop notes that some conspiracy trials were also in part trials based on violations of the laws of war, but he provides no indication that there were any commission proceedings based on a charge that conspiracy itself constituted a substantive violation of the laws of war.

2. Respondents have not alleged Hicks had the requisite degree of involvement

As explained, conspiracy has never been recognized as a crime under the laws of war. It has only been recognized in two very narrow instances within the broad categories of the law of peace and international humanitarian law (not the law of war) -- conspiracy to wage an aggressive war and conspiracy to commit genocide. And even there, much more has been required to make out the elements of the charge than has been suggested of Hicks. For example, the ICTY and ICTR have concluded that a defendant to a charge of conspiracy to commit genocide must have "the intent to commit genocide, that is to destroy, in whole or in part, a national, ethnic, racial or religious group, as such," and must have been integrally involved in the planning and execution of specific acts of genocide. *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13 A, Judgment and Sentence at 192 (27 Jan. 2000) (emphasis added); *see also Prosecutor v. Eliezer Niyitegeka*, Case No. ICTR-96-14-T, Judgment and Sentence (16 May 2003). *See also* Statute of the Special Court for Sierra Leone, art. 1 (limiting the court's jurisdiction to those "who bear the *greatest responsibility* for serious violations of international humanitarian law."). Conspiracy to wage aggressive war -- a crime against the peace at Nuremberg, *see supra* pp. 24-25 -- likewise consisted of demanding criteria. *See* IMT Nuremberg Transcript Vol. 1, p. 225 (establishing that conspiracy to wage aggressive war required proof personal guilt on the part of an individual defendant, a concrete plan of war that was actually carried out, and knowing participation by defendant). The eight persons convicted at Nuremberg of conspiracy to wage aggressive war were all Nazi leaders -- Goering,

Ribbentrop, Keitel, Jodl, Rosenberg, Raeder, Hess, and von Neurath.[21] These individuals were also convicted of the substantive crime of waging an aggressive war, and were integrally involved in the planning and execution of the aggressive war that actually took place. *See* IMT Nuremberg Transcript Vol. 1, p. 225.[22] Thus, much greater involvement was required than has been alleged against Mr. Hicks.

3. The purported objects of the alleged conspiracy do not violate the law of war.

The conspiracy charge fails to confer jurisdiction on military commissions for another reason as well: none the alleged objects of the conspiracy violate the laws of war. The only alleged object of the conspiracy that would violate the law of war is attacking civilians and civilian objects. *See* Schmitt Aff. ¶ 27. And attacking civilians and civilian objects is only a violation of the law of war during *wartime* . Respondents do not allege that Hicks -- or, for that matter, any alleged member of *al Qaida* -- attacked civilians during the Afghanistan war, which began on October 7, 2001. Only the Afghanistan war, not the "war on terror," constitutes an

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[21] The theories of individual responsibility under the law of war also extend liability only to persons who know of the specific crime and who directly participate in the perpetration of that crime and only after the crime is carried out. For example, the statute establishing the ICC states that an individual can be held guilty of a crime based on his participation as a member of the criminal enterprise, but only if he "contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose," and either has the "aim of furthering the criminal activity or criminal purpose of the group" or has "knowledge of the intention of the group to commit the crime." *See* Rome Stat., art. 25(3)(d)(i), (ii). Thus, Osama bin Laden, if charged with a substantive violation of the law of war could be held liable for the actions of his subordinates under a theory of individual responsibility premised on group activity, but a peripheral figure (such as Hicks) not involved in the planning and perpetration of the crime could not be.

[22] Finally, the limited crime of conspiracy under international criminal law requires an agreement. *See Prosecutor v. Juvenal Kajelijeli*, Case No. ICTR-98-44A, Judgment 787 (1 Dec. 2003) ("[T]he evidence must show that an agreement has been reached. The mere showing of a negotiation in process will not do.") Indeed, even under domestic standards, conspiracy is a specific intent crime. *State v. Bond*, 713 A.2d 906, 913 (Conn. App. Ct. 1998).

international armed conflict under which the *law of war* would govern. *See* Schmitt Aff. ¶¶ 11, 21; Cassesse Aff. at 2. As Professor Cassesse explains, "[t]he only war in which the United States was involved that would give rise to application of the laws of war was the war in Afghanistan, which began on 7 October 2001. Cassesse Aff. at 2.

4. No act of Congress delegates authority for prosecuting conspiracy to a military commission.

As noted in section I(D) of this brief, *supra*, Congress has not invested military commissions with the authority to adjudicate charges of conspiracy. Because conspiracy also does not violate the law of war, the charge of conspiracy pending against Hicks is beyond the jurisdiction of the commission.

E. Hicks May Not Be Tried For Offenses Created *Ex Post Facto*.

Not only are they beyond the Commission's jurisdiction, the charges against Petitioners are also not crimes in the first instance. The Executive defined them for the first time in MCI No. 2, which was promulgated on June 21, 2003. This violates the fundamental prohibition against *ex post facto* laws, *see* U.S. Const. art. I § 9, cl. 3, as well as the principle of separation of powers, according to which only Congress has the power to legislate, including the power "[t]o define and punish. . .Offences against the Law of Nations." *Id.* art. I, § 8.

These fundamental principles strongly counsel against interpreting the law of war to apply expansively to categories beyond which it has previously been applied. It must be remembered that this is a *criminal* prosecution. "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself." *United States v. Wilterberger*, 18 U.S. 76, 95 (1820) (Marshall, C.J.); *see also United States v. Thompson*, 504 U.S. 505, 518 (1992) ("[It] is proper. . . to apply the rule of lenity and resolve the ambiguity in [the accused's]

favor.") (citing *Crandon v. United States*, 494 U.S. 152, 168 (1990); *Commissioner v. Acker*, 361 U.S. 87, 91 (1959)). Thus, even were this Court to conclude that there is some ambiguity as to whether the law of war, or an act of Congress, subjects Hicks to the commission's jurisdiction on the charges which Respondents have brought, the Court is obligated to resolve that ambiguity in Hicks's favor and declare the charges beyond the purview of the commission.

This does not mean that the government cannot prosecute terrorists. What it does mean is that the government cannot make up charges intended to bring a defendant within the narrow jurisdiction of military commissions. It must either charge the defendant with a domestic crime prosecutable in U.S. courts, charge an actual violation of the law of war before a military commission, or determine that the defendant has committed no crime at all and thus must be released -- or held as an enemy combatant (if proven to be such) only for the duration of hostilities.

II. THE MILITARY COMMISSION IS INVALIDLY CONSTITUTED.

Even if the charges against Hicks were properly within its purview, the military commission that will "try" Hicks would still lack jurisdiction for three independent reasons: *first*, Respondent President Bush lacked Congressional authorization to convene the military commissions; *second*, the military commission set to try Mr. Hicks is far removed from any relevant theater of operations; and *third*, the commission is not appointed by a commissioned military officer, but rather by a civilian.

A. The Commissions Lack Jurisdiction Because They Were Established by the President Without Congressional Authorization.

In the preceding section of this brief, we discussed § 821 of the UCMJ, under which Congress limited the jurisdiction of military commissions to particular types of criminal

violations, but even when these violations *are* at issue, which they are not here, commissions only have jurisdiction when otherwise authorized by Congress.

Only Congress has the power "[t]o constitute Tribunals inferior to the Supreme Court," U.S. Const., art. I § 8, cl. 9, and "[t]o define and punish … offences against the Law of Nations." *Id.*, cl. 10. As the Supreme Court has observed, "the jurisdiction of military tribunals is … derived from the cryptic language in Art. 1, § 8," which gives power to Congress. *Reid v. Covert*, 354 U.S. at 21. Here, the commission at issue is the result of a unilateral Presidential order, not Congressional authorization. *See* 66 Fed. Reg. 57,833, modified on March 22, 2002. Significantly, neither of the two bills introduced during the 108th Congress which contemplate authorization of military commissions have received the endorsement of the federal legislature; indeed, neither has progressed through the legislative process in over a year.[23] For this reason, the commission constitutes a gross violation of the principle of the separation of powers which undergirds our Constitution. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

1. There is no statutory authorization for the commissions.

Respondents rely on § 821 of the UCMJ as Congressional authorization. Section 821 is not an affirmative grant of jurisdiction; it states only:

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

[23] Senate Bill 22, entitled the Justice Enhancement and Domestic Security Act of 2003, contains the Military Tribunal Authorization Act of 2003 at Subtitle C of Title I -- but the bill is far from becoming law. The last major action on the bill was its referral to the Senate Judiciary Committee on January 7, 2003. Its companion bill, House of Representatives Bill 1290, was referred to the House Subcommittee on Crime, Terrorism, and Homeland Security on May 5, 2003. It hasn't moved since.

> tried by military commissions, provost courts, or other military tribunals.

10 U.S.C. § 821 (emphasis added). Section 821 merely makes clear that by establishing court martial jurisdiction, the UCMJ did not deprive commissions of jurisdiction *if that jurisdiction is grounded elsewhere*.[24] *See In re Yamashita*, 327 U.S. 66 n.31 (1946) (making clear that function of § 821 is to permit a commander, on the battlefield, to select a commission when a court martial would be inconvenient). Section 821 is far from being a "clear statement" of Congress' intent to provide a substitute for civilian courts or courts-martial, as is required "[i]n traditionally sensitive areas." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

For their flawed interpretation of § 821, Respondents rely on *Quirin*. *See* Resp. Br. at 17-18. *Quirin* is distinguishable for at least three reasons. First, *Quirin* was rendered against the backdrop of two statutes that explicitly conferred jurisdiction on military commissions over precisely the charges leveled against the petitioners in that case. *See* Act of Aug. 29, 1916, ch. 418, § 3, art. 82, 39 Stat. 619, 663 (authorizing commission trial of persons charged with relieving, harboring or corresponding with spying); *id.* § 3, art 81, 39 Stat. at 663 (authorizing commission trial of persons charged with relieving, harboring or corresponding with the enemy); *see also Quirin*, 317 U.S. at 27. Those statutes do not remain in existence today.[25]

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[24] The fact that proponents of the Articles of War might have referred to military commissions as courts of the "common law of war," *see* Resp. Br. at 17, does not imply that Congress intended to provide statutory authorization for these courts, which is the pertinent constitutional question In any event, because the plain language of § 821 is clear, the legislative history is irrelevant. *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment); *Garcia v. United States*, 469 U.S. 70, 76 n. 3 (1984).

[25] The *Quirin* Court, admittedly, located the relevant Congressional grant of jurisdiction to military tribunals in "the Articles of War, and especially Article 15," *id.* at 28, the predecessor to the linguistically-similar § 821 of the UCMJ. But given the other bases for the commission's jurisdiction in *Quirin* and the fact that § 821 was then being read against the backdrop of a

Second, *Quirin* occurred during a declared war, and thus the result could be seen to stem from the Presidential "power to wage war which Congress has declared." 317 U.S. at 26. *Quirin* repeatedly referred to the time of war. *See, e.g.*, *Quirin*, 317 U.S. at 25 (remarking on the deference due to "the detention and trial of petitioners [] ordered by the President … *in time of war and of grave public danger*" (emphasis added)); *id.* at 42 (noting that "an alien spy, *in time of war*," can be tried by military tribunal (emphasis added)). Congress has not declared war here.[26]

The AUMF was not a declaration of war. Although it may confer upon the President powers associated with the use of force, it does not confer the full panoply of war powers. Indeed, by its terms, the AUMF limited the President to the use of "necessary and appropriate *force*." AUMF, Pub. L. 107-40, § 2(a), 115 Stat. 224 (2001) (emphasis added). This does not encompass the power to criminally punish Hicks for conduct some of which occurred before the AUMF was even issued. The *Hamdi* plurality did not hold otherwise. *Hamdi* concerned the authority to detain enemy combatants for the course of hostilities, a power that differs from the power to punish because it is incident to the authorization to use force. Other cases make clear the importance of a declaration of war in assessing whether Congressional authorization encompasses punishment. *See Yamashita*, 327 U.S. at 11-12 (describing President's authority

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declared war, *Quirin* should not be read to eclipse the statute's clear meaning. *See* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1283 (Apr. 2002). ("That the Court adverted to Article 15, rather than Articles 81 or 82, in its jurisdictional analysis cannot negate the fact that Article 15 by its terms merely removes any inference that the jurisdiction of courts-martial is exclusive of military commissions.").

[26] Respondents are wrong that a declaration of war is irrelevant to the legitimacy of trying Hicks by military commission. *The Prize Cases*, 67 U.S. 635 (1862), had to do with whether a state of war existed for a purpose completely unrelated to adjudication and punishment. Resp. Br. at 19 n.20.

to try and punish combatants "so long as a state of war exists -- from its declaration until peace is proclaimed."); *Madsen v. Kinsella*, 343 U.S. 341, 346 n.9 (1952) (noting that the military commission derived its authority from Congress's power to declare war); *Cole v. Laird*, 468 F.2d 829, 831 (5th Cir. 1972) (holding that 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").

Finally, the Court took care to emphasize that its holding in *Quirin* was extremely limited. The Court stated:

> We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries….

317 U.S. at 45-46; *see also* Katyal and Tribe, *Waging War*, 111 Yale L.J. at 1286-87 ("At most, *Quirin* provides a narrow exception to the general rule announced in the earlier *Milligan* case, which found congressional authorization to be a necessary, although by no means sufficient, requirement.") *Quirin* is "not a happy precedent," David J. Danelski, *The* Saboteurs' *Case*, 1 J. Sup. Ct. Hist. 61, 80 (1996) (quoting a memorandum from J. Frankfurter); it was a "hurried" decision, rendered "after-the-fact," Katyal and Tribe, *Waging War*, 111 Yale L.J. at 1283; *see also Hamdi*, 124 S. Ct. at 2669 (Scalia, J., dissenting) (*Quirin* was "not [the Supreme] Court's finest hour.") It should not be read to authorize military commissions outside the context of a declared war without explicit congressional authorization.

2. The Commander-in-Chief power does not comprehend authorization of commissions.

As neither § 821 nor the AUMF provides an independent Congressional authorization, Respondents are forced to argue that the authority to establish the commissions is derived from

the President's inherent authority as Commander in Chief. *See* Resp. Br. at 20-22. This argument has never been accepted. *See Quirin*, 317 U.S. at 28 (declining to answer the question). The Constitution divides the "war power" among branches of government, according to Congress the power to declare war, to maintain an Army and Navy, and to allocate funds for the military, *see* U.S. Const. art. I, § 8; while investing in the President the responsibility to act as Commander in Chief, *see id.* at art. II, § 2. But the Commander-in-Chief power cannot encompass the powers explicitly delegated to Congress, which include 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.

Indeed, the Supreme Court has recognized Article I, § 8 as the source of *Congress*' power to create military commissions. *Yamashita*, 327 U.S. at 7 (citations omitted); *see also Reid v. Covert*, 354 U.S. at 21 (noting that "the jurisdiction of military tribunals is … derived from the cryptic language in Art. I, § 8"). Respondents cite no case -- because there is none -- locating the authority to establish military commissions in the Executive power. *See generally* Amicus Br. of Seventeen Law Professors at 8-20.

The cases Respondents do cite are inapposite. They first cite a concurring opinion by Justice Douglas in *Hirota v. MacArthur*, 338 U.S. 197 (1949), which 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 sentencing tribunal was not a military court of the United States but an international tribunal established by the Allies. *Id*. at 208. Neither did *Yamashita* concern a military commission established by the Executive in the absence of Congressional authorization; on the contrary, that case had to do with a commission "authorized by military command … in complete uniformity to the Act of Congress sanctioning the creation

of such tribunals." 327 U.S. at 11; *see also id.* (holding that trial and punishment of enemy combatants is "an exercise of authority sanctioned by Congress"). Finally, the government's appeal to historical precedent is without merit. *See* Resp. Br. at 21 n.21. General Washington's use of military commissions during the Revolutionary War predates the modern Constitution and its separation of powers, and later Presidents to have appointed commissions have done so with Congressional authorization. *See* 2 WINTHROP at 831. The commissions in the Mexican American war concerned the very different question of governance of an occupied territory that had no other courts, according to Respondents themselves. Br. at 21 n.21.

In sum, the military commission contemplated by Respondents constitutes a gross violation of the principle of separation of powers. In this regard, it is closely analogous to the military tribunals struck down by the Supreme Court as a violation of the separation of powers in *Ex parte Milligan*, 71 U.S. 2, 127 (1866). *Milligan* was concerned with military tribunals created unilaterally by President Lincoln to try Confederate sympathizers in northern areas where the civilian courts were functioning. The Court queried:

> [F]rom what source did not the Military Commission[s] that tried [petitioners] derive their authority? Certainly, no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it "in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish," and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is "no unwritten criminal code to which resort can be had as a source of jurisdiction."

Id. at 121. The Court ultimately concluded that "[o]ne of the plainest constitutional provisions was … infringed when Milligan was tried by a court not ordained and established by Congress." *Id.* at 122. For the same reason, the military commission contemplated by Respondents is invalid.

B. The Commission Has No Authority To Sit At Guantanamo Bay.

A military commission -- even one properly authorized by Congress -- has no jurisdiction except in the zone of an actual armed conflict, in an area within the command of the convening authority, or within the occupied territory in which the convening authority commands. *See Milligan*, 71 U.S. at 127; 2 WINTHROP at 836. It has long been clear that "[t]he jurisdictional boundaries [of military commissions] are affected by the location and nature of the crime, [and] the location of the court that tries the offenders." Maj. Timothy C. MacDonnell, *Military Commissions and Courts-Martial*, ARMY LAW., Mar. 2002, at 19, 40. In *Milligan*, the Court unanimously struck down military tribunals created by President Lincoln to try Southern sympathizers in the North during the Civil War in areas where the civilian courts were functioning. The Court stated: "Martial rule can never exist where courts are open, and in the proper and unobstructed exercise of their jurisdiction," for the "Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." 71 U.S. at 120-21. The Court held, therefore, that the exercise of military jurisdiction must be "confined to the locality of actual war." *Id.* at 127.

Since *Milligan*, the Court has never authorized use of military commissions outside the zone of conflict or occupation; it has approved commissions only in the immediate area of the relevant conflict. *See, e.g.*, *Reid*, 354 U.S. at 35 n.63; *Madsen v. Kinsella*, 343 U.S. at 348;[27] *Johnson v. Eisentrager*, 339 U.S. 763, 766 (1950). *Quirin* is not to the contrary. *See* 317 U.S. 1

[27] Respondents, amazingly, rely on *Madsen*, while the Supreme Court has made it clear that the approval of commission procedures in that case was contingent on its highly particularized circumstances. The Court later stated: "*Madsen* [] is not controlling here. It concerned trials in enemy territory which had been conquered and held by force of arms and which was being governed at the time by our military forces." *Reid*, 354 U.S. at 35 n.63.

(1942). In that case, the Court considered military commissions that sat within the eastern seaboard of the United States to try German saboteurs who had entered the eastern seaboard and been captured. At the time, the United States had been broken down into geographical areas with military defense commands, in an effort to defend against anticipated foreign invasion. During the proceedings, the Attorney General stressed the fact that the eastern seaboard "was declared to be under the control of the Army" based on the ongoing threat. The Supreme Court noted this fact as well. *Id.* at 22 n.1. Thus, *Quirin* did not change the basic principles limiting jurisdiction of military commissions.

The military commission that will try Hicks has not been created by an exercise of military jurisdiction based on authority of an occupying power. It is far removed from any theater of operations, and it is not based on conduct that occurred at Guantanamo Bay. For that reason, in addition to the others detailed herein, it lacks jurisdiction.[28]

III. THE COMMISSION'S PROCEDURES VIOLATE THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS, AS WELL AS STATUTORY AND INTERNATIONAL LAW

Even if a military commission had jurisdiction to try Hicks, such a trial would result in gross violations of Hicks's rights under basic principles of statutory, constitutional and

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[28] Under Respondent's theory that a military proceeding is needed to try Hicks, the commission has no authority for another reason. The Secretary of Defense has delegated authority to a civilian, Mr. John Altenburg, to appoint members of military commissions, but under the rules for court martials, a civilian cannot exercise such authority. 10 U.S.C. § 822; Manual for Courts-Martial, Part I, ¶ 2(a)(4) (2002); *id.* at pmbl. The rules for courts-martial in the UCMJ apply to military commissions, as we explain in section III(B) *infra*, and it has uniformly been the case through American history that only those authorized to appoint courts-martial have appointed military commissions, as Winthrop's leading treatise explains. 2 WINTHROP, *supra* note 23, at 835. Thus, the Supreme Court explained in *Yamashita* that the reason General Styer was a competent authority to appoint the commission in question, is that he was a commander "competent to appoint a general court-martial." 327 U.S. at 10. Mr. Altenburg is not competent to appoint a court martial and thus cannot appoint the members of military commissions.

international law. The commission procedures fail to provide even the most basic safeguards against wrongful conviction: they fail to provide an impartial fact-finder and interpreter of law; they fail to guarantee an adequate, impartial review process; and they fail to ensure that evidence adduced bears the most basic hallmarks of reliability and acceptability -- requiring admission even of evidence obtained through torture. These failures are so basic that they violate every controlling body of law. It is axiomatic that under the United States Constitution, the UCMJ, and the Geneva Conventions findings of fact and conclusions of law in criminal proceedings must be returned by an impartial adjudicator; that review by an impartial authority must guarantee those findings and conclusions; and that evidence must be drawn from reliable sources. Respondents do not contend otherwise, instead asserting that these bodies of law do not apply and they are free to try Mr. Hicks using whatever procedures they choose. Their view appears to be that even though Mr. Hicks's most basic liberty interests are at stake in a criminal proceeding, he is entitled to no procedural protections but those they deign to give him. Under this theory, they could execute Mr. Hicks or others held in Guantanamo without according them any process at all. That is inconsistent with the Supreme Court's rulings in *Rasul* and *Hamdi*, as well as the requirements of the UCMJ and Geneva Conventions.

In what follows, we first discuss the procedural deficiencies of the commissions and then discuss how these procedural deficiencies violate statutory, constitutional, and international law.

A. The Commission Procedures Are Fatally Deficient.

The Constitution provides specific rights to criminal defendants -- e.g., trial by jury, access to legal counsel, confrontation of witnesses, and freedom from self-incrimination. While not all of these specific guarantees apply fully in a military setting, the Constitution's explicit establishment of these rights nonetheless underscores the importance of procedural protections in

a criminal proceeding. Thus, even the lesser protections for courts-martial set forth in the UCMJ aim to achieve these same ends. Rather than using the existing courts martial system, however, Respondents chose to set up a new system that falls far short of even these basic protections, underscoring just how deficient the commissions are. [29]

1. The commission is not an impartial trier of fact or law.

The military commission process lacks the judicial independence that "helps to ensure judicial impartiality." *Weiss v. United States*, 510 U.S. 163, 179 (1994). Instead, it fuses together the legislative, executive and judicial functions in a single body, undermining our constitutionalism and with it the rule of law. Commission members, including the presiding officer of the commission, are chosen by the Appointing Authority, *see* MCO No. 1 § 4(A)(1), (4), who is the designate of the Secretary of Defense. The Appointing Authority also approves and refers charges to the commission on behalf of the Executive Branch, *see id.* § 6(A)(2), and approves plea agreements, *see id.* § 6(A)(4). In other words, commission members are chosen by the very same entity that has a strong interest in the result -- namely, the executive branch of the federal government. Commission members are appointed for two years and can be removed

[29] In addition to the procedures established in the Military Commission Orders issued by the Secretary of Defense beginning on March 21, 2002, it appears that many other aspects of commission procedure will be made up on an ad hoc basis, with the early "trials," including Hicks's own, serving as experiments as to how the later ones will be conducted. The almost-certain disarray will only be magnified because the commission rules have no known analog: the commissions will follow neither judicial rules, nor the rules for court martial proceedings, nor the rules for international military proceedings. That commission members will work in a standardless vacuum was evident even at the initial preliminary hearings, where members were completely flummoxed by questions such as whether a detainee could represent himself, or by what standard a member could be dismissed for cause. John Hendren, *Trial and Errors at Guantanamo: Military Tribunal's First Week Trying Suspects Is Marked by Confusion and Inexperience*, L.A. TIMES, Aug. 29, 2004, at A1, 2004 WL 55934140.

by the Appointing Authority if he has "good cause." *Id.* § 4(A)(3). Significantly, the accused has no peremptory challenges against commission members.

The impermissible partiality of the commission extends to issues of law. The presiding officer is the only member of the commission who is required to have legal experience, *see id.* § 4(A)(3), (4), leaving laypersons to founder through complex legal questions with little guidance. Other legal decisions, including all case-dispositive questions, will be made on an interlocutory basis by the Appointing Authority himself. *See id.* § 4(A)(5)(d). Allowing the Appointing Authority to decide questions of law further conflates the distinction between prosecutorial and judicial functions.

The partiality of the military commissions is inconsistent with the very notion of a fair trial. As the Supreme Court has stated: "It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt, and adjudge the punishment by one of its own agents." *Wong Wing v. United States*, 163 U.S. 228, 237 (1896). The same is true of the Executive. Congress recognized this principle when it specified that the members of a court-martial may not chosen by the Executive who is referring the charges; rather, the UCMJ calls for a judge who is a member of an independent judiciary that is outside of the chain of command. 10 U.S.C. § 826(a). The UCMJ also allows a defendant to exercise peremptory challenges against the members of the court-martial who try the facts. *See id.* § 841. But without any justification whatsoever, the Executive Branch refused to provide the same impartial tribunals for the commission process -- creating an extremely high risk of a wrongful conviction.

The dangers of a wrongful conviction from this partial tribunal are further increased by the fact that conviction requires only a two-thirds vote, unlike the three-quarters vote required by

the UCMJ for any confinement greater than ten years. *Compare* PMO § (4)(c)(6)-(7) *with* 10 U.S.C. § 852(a)(1), (b)(1)-(2). Moreover, the commission now only has three members (thus, requiring only two votes for conviction),[30] whereas the lawful minimum for a court martial is a panel of five members (thus requiring at least four votes for conviction). 10 U.S.C. § 816(1)(a).

2. The commission does not provide for an adequate review process.

The lack of judicial independence extends to the review process. There is no process by which the accused can file an appeal to federal court. Instead, as noted, the Appointing Authority -- who is removable at will by the Secretary of Defense, *see* MCO No. 1 § 2 -- will decide all interlocutory issues, *see id.* § 4(A)(5)(d). The Appointing Authority will also conduct the first review of the decision of the military commission after its conclusion, to ensure that its proceedings were "administratively complete." MCO No. 1 § 6(H)(3). The Appointing Authority thus serves as an accuser, investigating officer, appointer of judge/jury, and reviewer of the proceedings.

The commission review process after the initial review by the Appointing Authority is equally illegitimate. The Defense Department has established a review panel consisting of four members appointed by the Secretary of Defense. Although these members have served in important legal roles, they have not been chosen for their impartiality. Two members who have been appointed to the review panel served as appointees on the very panel that crafted the trial procedures. *See* Stephen J. Fortunato, Jr., *A Court of Cronies*, IN THESE TIMES (June 28, 2004),

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[30] Here, Petitioner challenged four of five original commission members for cause. The Appointing Officer granted the two challenges that were unopposed but denied the two opposed challenges. The Appointing Officer did not replace the stricken members. Since conviction requires a 2/3 vote, reducing the commission from 5 members to 3 requires the same number of members for acquital (two) but requires two less for conviction (two instead of four as existed before any were stricken). Thus, the decision to strike two members and no others has harmed Petitioner.

available at http://www.inthesetimes.com/ site/main/article/a_court_of_cronies. One of the members of the panel has stated in a recent opinion-editorial: "It is clear that the September 11 terrorists and detainees, whether apprehended in the United States or abroad, are protected neither under our criminal-justice system nor under the international law of War." *See id.* And a fourth member is a close friend of the Secretary of Defense. *See id*. The Review Panel is thus hardly impartial. Moreover, while the review panel will issue an opinion in all cases, only at its discretion will it review written submissions by the defense and hear oral arguments. *See* MCI No. 9 § 4(C)(4) (Dec. 26, 2003), *available at* http://www.fas.org/irp/doddir/dod/ milcominstno9.pdf. And because the review panel must issue its ruling within 30 days of receipt of the case, *see* MCO No. 1 § 6(H)(4), defense counsel will have almost no time to prepare an appeal and have it included in the review panel's deliberations. Members of the review panel are appointed for a term not exceeding two years, and can be removed for "good cause." MCI No. 9 § 4(B)(2). Thus, the review panel will present a façade of judicial review without providing a genuine opportunity for defense counsel to present claims of error and have them fairly judged.

Final review of the commission decision is by the Secretary of Defense himself, or by the President. *See* MCO No. 1 § 6(H)(5), (6). There is no procedure for direct appeal to federal court. Thus, once again, the accuser and investigator is also the ultimate decisionmaker in the case.

The impermissible partiality of the commission process is illustrated by the fact that the executive branch has already decided that Hicks is guilty of the "offense" of unprivileged belligerency. *See* Dep't of Defense Order No. 651-04, ¶ a, (July 7, 2004), Second Am. Pet. Ex. 8 ("Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense."); Remarks by Respondent

Sec'y of Defense Donald Rumsfeld to Greater Miami Chamber of Commerce (Feb. 13, 2004), *available at* www.defenselink.mil ("[T]he people in U.S. custody are … enemy combatants and terrorists who are being detained for acts of war against our country."). A trial before commission members appointed by officials who have made these judgments and reviewed by these officials themselves, as well as defining the crimes under which detainees will be charged, is hardly the neutral justice for which America has long stood.

The defects in the commission process are thrown into even greater relief when contrasted with Congressional requirements for military trials under the UCMJ. The UCMJ forbids anyone who acted as a judge, counsel, or investigating officer in a case from later participating in the work of the court-martial independent Review Panel. *See* 10 U.S.C. § 806(c). The UCMJ also provides that "[a] judge advocate may not review a case under this subsection if he has acted in the same case as an accuser, investigating officer, member of the court, military judge, or counsel, or otherwise acted on behalf of the prosecution or defense." *Id.* § 864(a). Under the UCMJ, review may be had by the Court of Appeals of the Armed Forces, which consists of 15 civilian appointees not under the control of the executive branch, and final appeal is to the United States Supreme Court. *See* id. §§ 867(a), 867a(a). The contrast with the commission process is therefore striking.

3. The commission will rely on unsworn evidence and coerced confessions.

Respondents have authorized the commission to accept evidence that does not meet the standards for acceptability and reliability long established in both criminal and civil proceedings.

First, the military commissions are required to use self-incriminating statements that may have been wrenched from Hicks over years of coercive interrogation so long as commission

members determine the evidence has probative value. *See* MCO No. 1 § 6(D)(1), (3). Hicks has long been a specific target of custodial physical, mental and emotional abuse.[31] Significant interrogation of Hicks was also conducted in the absence of legal counsel: despite Hicks's repeated requests to be appointed counsel and the availability of military defense counsel to be detailed, Respondents refused to assign or allow Mr. Hicks counsel until November 28, 2003, nearly two years after he was detained. *See* Mori Aff. 10-11. The commission procedures fail to limit the admissibility of statements drawn from Hicks under such illegal circumstances or other evidence obtained as a result of such statements.

In contrast, Congress clearly understood the importance of excluding such statements in establishing the UCMJ. Congress forbid the extraction of incriminating statements through compulsion, and provided that "[n]o statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial." 10 U.S.C. § 831(d). Congress also guaranteed that the defendant be provided with counsel during the initial investigation and before his charges are forwarded to the body that will try him. *See* UCMJ Art. 32, 10 U.S.C. § 832(b) (declaring that the right to counsel attaches during the initial investigation phase, before charges are forwarded to a formal court-martial). Again there is no basis to deviate from these fundamental protections in commission proceedings.

These protections are designed to ensure both the integrity and accuracy of the judicial process. With respect to integrity, the Supreme Court has explained, "[C]onfessions which are

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[31] Hicks's interrogation is described in the accompanying declaration. *See also* Composite Statement, *supra* note 1; Fergus Shiel, *Ex-detainees allege Habib and Hicks abused*, THE AGE, Aug. 5, 2004, *available at* http://www.theage.com.au/articles/2004/08/04/1091557920149.html; *Govt. to examine Hicks abuse claims*, AUST. BROAD. CORP. NEWS ONLINE, *available at* http://www.abc.net.au/news/newsitems/s1107601.html (May 13, 2004).

involuntary, i.e., the product of coercion, either physical or psychological, cannot stand … because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system." *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961). As for accuracy, the Court has emphasized that "[i]nvoluntary or compelled statements … are of dubious reliability and are therefore inadmissible for any purpose." *Withrow v. Williams*, 507 U.S. 680, 703 (1993); *see also Powell v. Alabama*, 287 U.S. 45, 69 (1932) ("[The accused] lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

Second, the commissions will not restrict evidence obtained from other interrogations at Guantanamo even if those interrogated are no longer there to testify. For example, deposition testimony may be used without regard to the availability of a witness. See MCO No. 1 § 6(D)(3). The commission procedures also permit the use of "sworn or unsworn" written statements, as well as physical evidence or scientific reports, subject only to the limitation that such evidence be of probative value to a reasonable person. *See* MCO No. 1 § 6(D)(1), (3). Moreover, MCO No. 1 only extends the right to compel witnesses "to the extent necessary and reasonably available as determined by the Presiding Officer." *Id.* § 5(H).

Use of such unreliable evidence will greatly enhance the likelihood of wrongful conviction. As the Supreme Court has long made clear, an ability to challenge witnesses is vital, because, it is the "very mission" of such confrontation to "advance 'the accuracy of the truth-determining process in criminal trials.'" *United States v. Inadi*, 475 U.S. 387, 396 (1986) (quoting *Tennessee v. Street*, 471 U.S. 409, 415 (1985)). For that reason, the UCMJ allows the

use of deposition testimony only in limited circumstances. *See* 10 U.S.C. § 849(d). Furthermore, the UCMJ allows the accused to compel witnesses on their behalf according to a process mirroring that used by federal district courts exercising criminal jurisdiction. *See id.* § 846. But again Respondents have decided to deny detainees these same protections without any justification.

Finally, the evidence against Petitioner can be presented in closed proceedings in which Petitioner and civilian defense counsel can be excluded if Respondents believe this is justified to protect classified information or other national security interests. *See* MCO No. 1 § 6(B)(3). This precludes the military counsel's ability to present an adequate defense, as he will not be able to determine from Petitioner the accuracy of any evidence presented. In contrast, U.S. law has long made clear the unacceptability of conviction based on such evidence. *See* Classified Information Procedures Act (CIPA), 18 U.S.C.A. app. 3, § 6(a)(2) (providing for dismissal of indictment or other sanction upon Government's refusal to disclose classified information when ordered to do so by the district court); *Jencks v. United States*, 353 U.S. 657, 670-71 (1957) (holding that the Government may "invoke its evidentiary privileges [to avoid public disclosure of highly sensitive material] only at the price of letting the defendant go free.... [S]ince the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense.") (quoting *United States v. Reynolds*, 345 U.S. 1, 12, (1953)).

B. The Commission Is Illegal Under the UCMJ.

These fundamentally flawed procedures violate statutory, constitutional, and international law. With respect to statutory law, we have already seen that the procedures established for

military commissions are far less protective than the procedures provided under the UCMJ. But Petitioner is entitled to the protections of the UCMJ.

The UCMJ applies to all "persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands." UCMJ art. 2(a)(12), 10 U.S.C. § 802(a)(12). Hicks, who is being detained at a naval base that is leased from the Cuban government but subject to the "complete jurisdiction and control" of the United States, *see Rasul v. Bush*, 542 U.S. at ___, 124 S. Ct. at 2690-91 & n.2, clearly falls within the language of the UCMJ, and is therefore entitled to its protections.

Respondents are not providing him those protections, however. While the President has significant discretion to prescribe procedures outside the core procedures specified in the UCMJ as a minimum baseline, the procedures prescribed may not be "contrary to or inconsistent with" the UCMJ. 10 U.S.C. § 836. As discussed in the preceding section, the commission procedures fall well short of even the minimum requirements specified in the UCMJ. Moreover, even where the President has discretion to prescribe procedures, the procedures for military commissions may not differ from those for court martial proceedings unless impracticable. *Id*. ("All rules and regulations made under this article shall be uniform insofar as practicable.") Respondents have offered no reason why court martial procedures would be impracticable in military commissions. For that reason, too, they violate the UCMJ.[32]

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[32] *In re Yamashita*, 327 U.S. 1 (1946), illustrates the importance of this language in Article 2(a)(12). The *Yamashita* Court held that the Articles of War did not apply to the trial before a military commission of an individual not subject to military law under Article 2 of the Articles of War. *Id.* at 19-20. In so holding, the Court expressly recognized that the Articles of War

History supports this conclusion. With the exception of a very brief period during World War II, the procedures of military commissions and courts-martial have been the same.[33] The difference between courts-martial and military commissions concerned who was tried before them and the type of crimes tried, not the procedures used.[34] As retired Navy Commander David Glazier explains, "[e]ven the *Manual for Courts-Martial*, which is the official guidance on the implementation of military justice given by the President to the military services, declares in its preamble that 'military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial.'"[35]

Respondents nonetheless contend that the Supreme Court has "rejected any suggestion" that procedures prescribed by the Articles of War (or UCMJ) should apply to trial before a military commission. Resp. Br. at 23-24. But the Court's decision in *Madsen v. Kinsella*, 343 U.S. 341 (1952), to which Respondents point, was limited solely to whether the United States Court of the Allied High Commission for Germany had proper jurisdiction to try a dependent

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sanctioned the use of military commissions "for the trial of two classes of persons, to one of which the Articles do, and to the other of which they do not, apply in such trials." *Id.* at 20. In General Yamashita's case, the Articles did not apply, as he was "not a person made subject to the Articles of War by Article 2," and the military commission which tried him was therefore convened pursuant only to the common law of war. *Id.* Clearly then, the logical corollary is that the Articles of War would apply in the case of an individual who was subject to military law under Article 2. Accordingly, the *Yamashita* decision suggests that any individual held at Guantanamo Bay, or tried before a military commission there, is brought within the coverage of the UCMJ by the express language of Article 2(a)(12), regardless of military affiliation or citizenship. *See generally* David Glazier, Note, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2075 (2003) (arguing that "*Yamashita*'s logic . . . calls for mandatory extension of the UCMJ's provisions regulating trial to any military commissions that might be conducted at Guantanamo, or any other overseas facilities actually under U.S. control").

33 *See* Glazier, *supra* note 36, at 2008, 2023-73, 2085, 2092-93.

34 *See id*. at 2010.; *Madsen* at 346-47 & nn. 8-9.

35 *See* Glazier, *supra* note 36, at 2085.

military spouse for murder. *See Madsen*, 343 U.S. at 345-46. There is nothing to indicate that the petitioner raised any challenge related to the procedures of the commission. And while the Court indicated in dicta, that the procedures of military commissions have varied widely over time, it did not say that those procedures can be inconsistent with the minimum baseline procedures set forth in the Articles of War (or the UCMJ) where the Articles apply. The UCMJ itself makes clear the procedures cannot deviate from these baseline requirements. As a result, the commission procedures are invalid.

C. The Commission is Illegal Under The United States Constitution.

1. The commission violates the Due Process of Law guaranteed by the Fifth Amendment to the U.S. Constitution.

In addition to their inconsistency with the UCMJ, the commission procedures must be invalidated because they fail to comport with the fundamental requirement of due process. U.S. Const. amend. V. Respondents do not even pretend these procedures comport with due process -- instead arguing that Petitioner is not entitled to invoke any constitutional rights, a remarkable argument to which we respond in the next section.

In *Hamdi*, the Supreme Court held that the calculus to be used in determining whether an alleged enemy combatant was being denied due process of law is the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *See Hamdi*, 542 U.S. ____, 124 S. Ct. at 2633. To determine whether a violation of due process has occurred, *Mathews* requires the balancing of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the

> fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. The commission procedures clearly fail this test.

a. The private interest at stake in this case -- Hicks's physical liberty -- is the most fundamental of all.

In *Hamdi*, the Supreme Court recognized that the freedom from physical detention by one's own government "is the most elemental of liberty interests." 542 U.S. ____, 124 S. Ct. at 2646. The Court explained that the fact of the detention mattered more for the *Mathews* balancing test than any other factor, including the accusations against the petitioner. The Court noted: "Nor is the weight on this side of the *Mathews* scale offset by the circumstances of war or the accusation of treasonous behavior, for '[i]t is clear that commitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection.'" *Id.* at 2646-47 (quoting *Jones v. United States,* 463 U.S. 354, 361 (1983)); *see also id.* at 2647.

The liberty interest in Hicks's case is even greater than that contemplated in *Hamdi*. While the petitioner in *Hamdi* was faced with detention until the end of the conflict if found to be an enemy combatant, *see Hamdi*, 542 U.S. at ___, 124 S. Ct. at 2640, Hicks is faced with the possibility of life imprisonment. *See* PMO § 4(a). The need for due process, already great in the context of detainment for the course of the battle, is even more significant when the government seeks to put its defeated enemies on trial to impose punishments that will last far after the war is over.

b. There exists an enormous risk of an erroneous deprivation of Hicks's liberty interest through the commission procedures.

Criminal prosecutions before commissions that provide far fewer protections even than courts-martial are altogether inconsistent with due process. As discussed, the procedures used by

military commissions will pose a particularly grave risk of erroneous conviction. *See* section III(A), *supra*. Each of the procedures the government would dispense with have been deemed essential by the Supreme Court to provide reasonable assurance against erroneous convictions. *See* section III(A), *supra*. The absence of independent triers of fact and interpreters of law, and the use of unreliable hearsay evidence obtained through coercion are inconsistent with the most basic requirements of a fair trial. Thus, for example, the Court has found court-martial procedures constitutional only because "by insulating military judges from the effects of command influence, [they] sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause." *Weiss*, 510 U.S. at 179. The military commission process contains no similar insulation.

c. Respondents cannot present an interest that outweighs the liberty interest at stake for Hicks.

Given the importance of the liberty interest at stake in this case, and the clear risk of erroneous results, the government must provide an extremely weighty justification for use of the rules proposed in MCO No. 1. Here, the government's interest does not approach that level.

In *Hamdi*, the Court recognized a substantial governmental interest in "ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States." *Hamdi*, 542 U.S. at ___, 124 S. Ct. at 2647. But it is one thing to deny the need to provide full courtroom procedure when determining whether an alleged enemy combatant can be detained during the course of a war. Even there, significant procedural protections are required. It is quite another to deprive a defendant of basic trial rights -- including the "neutral decisionmaker" that the Supreme Court held was necessary to make a valid determination of

enemy combatant status, *id.* at 2648 -- when bringing him in front of a prosecutorial tribunal with consequences that could last long after the battle has ended.[36]

In the latter case, the government's security interest is minimal. Indeed, its interest is most clearly analogous to that which exists in an ordinary criminal prosecution, where critical procedural protections are expressly guaranteed. This is also apparent form the fact that the government has tried American citizens accused of crimes in Afghanistan for violations of domestic law, and has done so in federal court. *See, e.g.*, *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002). It is therefore clear that the government has no reason to refuse Hicks the procedural protections provided in federal court, much less the basic protections afforded by the UCMJ. In a criminal prosecution, where Hicks's lifelong liberty is at stake, the government has no interest sufficient to justify a trial before a biased decisionmaker based on unreliable evidence. The military commission procedures thus do not comport with the requirements of Due Process.

[36] Respondents asserted the right to detain Hicks as an enemy combatant during the course of the war, so it is only the post-war period that is relevant to this motion.

2. Hicks Is Entitled to the Protections of the Due Process Clause

Respondents do not assert the commission procedures will accord Hicks due process. They instead assert that Petitioner has no constitutional rights at all, relying on their motion pertaining to the enemy combatant aspects of the petition. Resp. Br. at 36. Respondents' argument is a remarkable one, suggesting that they are free to treat Petitioner completely arbitrarily in a proceeding in which his lifelong liberty is at stake. While Petitioner will respond to this argument in its opposition to the enemy combatant motion, the critical fact is that Petitioners have already made and lost this argument.

In *Rasul v. Bush*, 124 S. Ct. 2686 (2004), the Supreme Court made it clear that Hicks, himself one of the petitioners in *Rasul*, possesses constitutional rights which may be vindicated by a writ of 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 or treaties of the United States*." 28 U.S.C. § 2241(c)(3). *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-278, 108 L. Ed. 2d 222, 110 S. Ct. 1056 (1990) (Kennedy, J., concurring), and cases cited therein.

Id. at 2698 n.15 (emphasis added).

This is not dicta. Respondents' CSRT Brief (DOCKET # 83) at 28-30. The cognizability of the *Rasul* petitioners' constitutional claims was a necessary antecedent to the Supreme Court's holding in *Rasul*. Under the habeas statute, § 2241(c)(3), subject matter jurisdiction may be found only if the petitioner has alleged a cognizable claim that he is held in violation of the Constitution, laws, or treaties of the United States. *See, e.g.*, *Maleng v. Cook*, 490 U.S. 488, 490

(1989) ("The federal habeas statute gives the United States district court jurisdiction to entertain petitions for habeas relief only from persons who are 'in custody in violation of the Constitution or laws or treaties of the United States.'") (citation omitted); *Latu v. Ashcroft*, 375 F.3d 1012, 1019 (10th Cir. 2004). Moreover, the *Rasul* footnote was an explicit rejection of the government's argument that the federal courts lacked jurisdiction because the petitioners had no cognizable rights under the Constitution, laws, or treaties of the United States. Resp. Brief at 19-20, 26-36, 38-40, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (No. 03-334). This Court should not countenance Respondents' repetition of this rejected argument.

Rasul's citation to Justice Kennedy's concurrence in *Verdugo* is also significant. The "cases cited" in Justice Kennedy's concurrence are the so-called *Insular Cases*, in which the Supreme Court held 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 extend fundamental constitutional rights to territory over which the United States possesses only governing authority, rather than nominal sovereignty. *See, e.g.*, *Ralpho v. Bell*, 569 F.2d 607, 618-19 (D.C. Cir. 1977) (Due Process Clause applied within the Micronesian Trust Territory); *Examining Bd. of Eng'rs, Architects, & Surveyors v. Flores de Otero*, 426 U.S. 572 (1976) (Equal Protection applies within the unincorporated territory of Puerto Rico); *Gov't of the Canal Zone v. Scott*, 502 F.2d 566, 568 (5th Cir. 1974); *United States v. Tiede*, 86 F.R.D. 227, 249-53 (U.S. Ct. for Berlin 1979). *Rasul*'s reliance on these cases indicates that the Constitution's protection of fundamental rights extends to Guantanamo Bay.

Moreover, Justice Kennedy's concurrence, which states the *Verdugo* holding,[37] endorses Justice Harlan's position in *Reid v. Covert*, 354 U.S. 1 (1957): "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." *United States v. Verdugo Unquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring) (quoting *Reid*, 354 U.S. at 74 (Harlan, J., concurring)). Application of the Fourth Amendment to a search conducted in Mexico, 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 privacy that prevail abroad, and the need to cooperate with foreign officials." *Id.* No such impracticality exists in Hicks's case. Unlike Mexico, Guantanamo Bay is under the exclusive jurisdiction and control of the United States. Moreover, this case involves claims arising under the Fifth Amendment, a distinction expressly recognized by the *Verdugo* court. *See Verdugo*, 494 U.S. at 264 (plurality opinion) ("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."); *id.* at 278 (Kennedy, J., concurring).

Respondents also rely on the recently questioned *Eisentrager* decision.[38] *Johnson v. Eisentrager*, 339 U.S. 763 (1950). But the Supreme Court found the factual predicates of that

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[37] "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. 188, 193 (1977) (quotation and citation omitted). If anything, *Verdugo* establishes that the Constitution *does* apply abroad. Considering Justice Kennedy's vote together with those of the dissenters, there are five votes for this proposition.

[38] In light of the Supreme Court's overruling of *Ahrens v. Clark*, 335 U.S. 188 (1948), upon which *Eisentrager* relied, and in light of its holding in *Rasul*, it is unclear whether *Eisentrager* remains good law. *See, e.g.*, *Rasul*, 24 S. Ct. at 2701 (Scalia, J., dissenting) (arguing that *Rasul* effectively overruled *Eisentrager*).

decision are inapplicable here. *Rasul*, 124 S. Ct. at 2694. Whereas the *Eisentrager* detainees were "at all times imprisoned outside the United States," the Guanatanamo Bay detainees "have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control." *Rasul*, 124 S. Ct. at 2694.[39] Whereas the *Eisentrager* prisoners at no relevant time were within any territory over which the United States is sovereign . . . ," *Eisentrager*, 339 U.S. at 778, for the *Rasul Court,* it was this exercise of "exclusive jurisdiction and control" which was the crucial marker of sovereign power, not mere nominal sovereignty. 124 S. Ct. at 2697 (citing historical evidence that the reach of sovereign power depended not on formal boundaries but on "the exact extent and nature of the jurisdiction or dominion exercised in fact").[40]

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 case the court contemplated that there was some genuine opportunity

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[39] In addition, the Court emphasized that the *Eisentrager* plaintiffs "at no relevant time were within any territory over which the United States is sovereign." 339 U.S. at 778. In contrast, Hicks was brought to Guantanomo on a military ship that is unquestionably an area of U.S. sovereignty. *United States v. Rodgers*, 150 U.S. 249, 260-65 (1893); *United States v. Flores*, 289 U.S. 137, 155-56 (1933); *United States v. Collins*, 7 M.J. 188 (C.M.A. 1979); *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003), vacated on other grounds, 124 S.Ct. 2932 (2004).

[40] A closer examination of *Eisentrager* likewise suggests that its decision, discussing the reach of constitutional protections in terms of territorial jurisdiction, concerned *de facto* sovereignty rather than nominal sovereignty. *See Eisentrager*, 339 U.S. at 778 ("[T]hese prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the *territorial jurisdiction* of any court of the United States.") (emphasis added); *id.* at 771 ("[I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it as 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, color, or of nationality.'") (citations omitted, emphasis added).

for the petitioners, unlike Hicks, to have formed such connections. *See, e.g.*, *Jifry v. FAA*, 370 F.3d 1174, 1183 (D.C. Cir. 2004). No case, however, addresses an individual's lack of significant voluntary connections with the United States in a circumstance in which the Government exercises total dominion over that party in detaining him 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 a foreign authority exercised in a wholly foreign jurisdiction that effected the alleged constitutional deprivation. *See, e.g.*, *Harbury v. Deutch*, 233 F.3d 596, 599 (D.C. Cir. 2000), *rev'd in part on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002). In this case, the constitutional violations alleged occurred pursuant to authority exercised solely by the United States Executive without any intervention or involvement of a foreign authority, within a territory under the absolute control of the United States. *See Rasul*, 124 S. Ct. at 2700 (Kennedy, J., concurring).[41]

Respondents are not free to try Petitioner in any manner they choose. They must comply with the Constitution. And under the Constitution, the military commission procedures are flagrantly unlawful.

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[41] Respondents' attempt to question the application of the Fifth Amendment protections to Guantanomo Bay fails even more clearly when they attempt to extend their argument to separation of powers issues. Courts always retain the power to decide whether federal action is authorized. *See Verdugo*, 494 U.S. at 277 (Kennedy, J., concurring); *Reid*, 354 U.S. at 5-6 (the "United States is entirely a creature of the Constitution. Its power and authority have no other source."). Thus, courts have long considered detainees' claims that the United States lacks power to try them before military commissions. *See, e.g.*, *Yamashita*, 372 U.S. at 9 ("[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.") Similarly, the *Eisentrager* Court reached the questions raised by petitioner's application for habeas corpus that implicated "the lawful power of the commission to try the petitioner for the offense charged." 339 U.S. at 787.

D. The Commission Procedures Violate International Law and Must Therefore Be Invalidated.

1. The Commission Procedures Violate International Law

The same procedural deficiencies that violate statutory and constitutional law also violate international law. *See*, *e.g.*, Amicus Br. of 271 United Kingdom and European Parliamentarians at 26-41, *Hamdan v. Rumsfeld* (D.D.C. filed Sept. 29, 2004) (No. 1:04-cv-1519-JR) [hereinafter Br. of 271 Pariliamentarians]; Amicus Brief of Former Human Rights Officials and Center for International Human Rights at 3-4 [hereinafter Human Rights Br.]; Amicus Br. of International Law Professors at 16-32; Amicus Br. of Seventeen Law Professors at 33-40. First, international law requires trial by an impartial tribunal. Section 1 of Common Article 3 of the Geneva Convention requires "judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Geneva Convention (III) art. 3(1)(d). Article 75 of Geneva Protocol I similarly assures the right to trial before an "impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure," including those procedural guarantees listed in the International Covenant on Civil and Political Rights ("ICCPR"). Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, *entered into force*, Dec. 7, 1978, *reprinted in* 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977). Finally, Articles 9 and 14 of the International Covenant on Civil and Political Rights ("ICCPR"), Dec. 16, 1966, U.N. Doc. A/6316, 999 U.N.T.S. 171, to which the United States is a party, also guarantee the right to a fair hearing before an independent and impartial tribunal.

Military commissions, as constituted in this case, according to Respondents' orders, are not the impartial tribunals guaranteed by international law. The European Court of Human Rights has held that the "most important" of the "fundamental features" embodied in the very notion of "courts" or "tribunals" is "independence of the executive and of the parties to the case." *De Wilde, Ooms and Versyp v. Belgium*, No. 2832/66 ¶ 78 (Eur. Ct. H.R. June 18, 1971), *available at* http://www.echr.coe.int/eng/Judgments.htm; *see also Findlay v. United Kingdom*, No. 22107/93 (Eur. Ct. H.R. Feb. 25, 1997) (holding that independence of tribunal is based on how members are appointed, their term of office, the existence of guarantees against outside interference, and whether the tribunal appears independent), *available at* http://www.echr.coe.int/eng/Judgments.htm. But the military commission under scrutiny in this case provides no such independence. For this reason, the UN Special Rapporteur on the Independence of Judges and Lawyers has "expressed his deep concern" over the PMO authorizing trial by military commissions. *Civil and Political Rights: Report of the Special Rapporteur*, U.N. ESCOR Comm'n on Human Rights, 59th Sess., Prov. Agenda Item 11(d), at 37, 39, U.N. Doc. E/CN.4/2003/65 (2003).

Second, international law guarantees an independent appeal. *See* ICCPR art. 14(5) ("Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."); Communication No. 701/1996, *Vasquez v. Spain*. Views adopted on 11 Aug. 2000, available at http://www.worldlii.org/int/cases/UNHRC/2000/20.html (finding Spain violated ICCPR by narrowing appeal before normal civilian courts).

Third, international law precludes use of evidence obtained through torture and inhuman treatment of prisoners. *See, e.g.*, Communication No. 728/1996, *Paul v. Guyana*, Views adopted

on 21 December 2001, at 9.3 ("It is important for the prevention of violations under Article 7 that the law must exclude the admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."). It also guarantees the right of an accused to be present when evidence is presented against him. ICCPR art. 14.3(d), Protocol 1, art. 75.4(e). And it guarantees "the right to examine and to compel attendance of witnesses, the right not to be compelled to testify against oneself or to confess guilt, and the right to judicial recourse." *See* ICCPR, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force*, Jan. 3, 1976. [42] Geneva Protocol I incorporates these guarantees, assuring the right to trial before a "court respecting the generally recognized principles of regular judicial procedure," including those procedural guarantees listed in the ICCPR.

Finally, the Geneva Convention provisions on prisoners of war guarantee Hicks all of the protections of the UCMJ. As has been shown *supra*, the allegations against Hicks themselves demonstrate that he is a privileged belligerent (and thus by definition a prisoner of war). And even if that were not the case, the Third Geneva Convention creates a presumption that all detainees are prisoners of war until otherwise proven, which has not occurred here. Article 5 specifies that "[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." Geneva Convention (III), art. 5

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[42] Respondents claim that petitioner has not been compelled to testify against himself, Resp. Br. at 32 n. 32, but the permitted use of coerced confessions is inconsistent with the guarantee against compelled confessions, and Respondents ignore the guaranteed right to compel witnesses and to judicial recourse.

(emphasis added).[43] The United States has ratified the Geneva Convention (III) and is bound to follow its rules for the treatment of prisoners of war. *See, e.g., Eisentrager*, 339 U.S. at 789 n.14. This Convention makes clear that detainees being kept as prisoners of war must be afforded the same procedural protections that the United States would afford its own military personnel. *See* Geneva Convention (III), art. 102 ("A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power. . . ."). Significantly, the United States does not try any of its soldiers by military commissions, but rather by court-martial under the procedures set forth in the UCMJ. *See* MacDonnell at 31; LAW OF NAVAL OPERATIONS ¶ 11.7.1. The Geneva Conventions thus accord Hicks the protections of the UCMJ even if the UCMJ did not itself do so. For that reason, too, the military commissions fall far short of the requirements of international law.

2. Hicks is entitled to the protections afforded by the Geneva Conventions

Again forsaking defense of commission procedures on the merits, Respondents argue that the Geneva Conventions and other protections of international law (1) do not apply to the conflict between the United States and al Qaeda, and (2) do not apply to Hicks as he is not

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[43] This passage has been universally interpreted as creating a strong presumption of combatant status. *United States v. Noriega*, 808 F. Supp. 791, 796 (S.D. Fla. 1992); *Hamdi*, 542 U.S. __, 124 S. Ct. at 2658 (Souter, J. and Ginsburg, J., concurring in part, dissenting in part and concurring in judgment). LAW OF LAND WARFARE, *supra* note 17, ¶ 71; Omar Akbar, *Losing Geneva in Guantanamo Bay*, 89 *Iowa L. Rev*. 195, 212 (2003). *See also* Army Reg. 190-8 § 1.6 (if person *asserts* entitlement to POW status, as Hicks has done, or any doubt arises as to his status, he is entitled to a competent tribunal to determine his status in accord with Geneva Conventions (III) Article 5). The CSRT process did not overcome this presumption, because it determined only that Hicks was an enemy combatant, not that he was an unlawful combatant. Moreover, the CSRT was not a competent tribunal to make that determination for the reasons set forth in the Second Amended Petitition.

entitled to prisoner of war status, and (3) are not self executing. They thus seek to prosecute Hicks under the international law of war while robbing him of its protections. Their arguments are without merit.

a. The Procedural Protections of International Law Apply to Hicks

i. The Conflict in Afghanistan Is Subject to the Geneva Conventions

Respondents argue that the Geneva Conventions are inapplicable to the conflict in Afghanistan because the armed conflict with al Qaeda is not one between contracting parties or between those in which a non-signatory power accepts the convention. Resp. Br. at 33. But if the conflict in question is between the United States and al Qaeda, as Respondents posit, the conflict is not a war within the meaning of international law at all. Thus, the law of war, not just the Geneva Conventions, would be inapplicable in its entirety, meaning there could be no valid charges under the law of war against Hicks! *See* Schmitt Aff. ¶¶ 11--21 (explaining that there is no "war" between the United States and al Qaeda and thus the law of war is not applicable to any such conflict); Cassesse Aff. at 2.

In any event, Respondents' argument concerning the Geneva Conventions focuses on the wrong conflict. United States Armed Forces invaded and occupied portions of Afghanistan in October 2001 "to wage a military 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. Afghanistan is a High Contracting Party to the Geneva Conventions (III), as is the United States. *See* Int'l Comm. of the Red Cross, States party to the Geneva Conventions and their Additional Protocols (June 2, 2004), *available at* http://www.icrc.org/eng. Accordingly, the United States

was in conflict with a Contracting Party and occupied its territory.[44] Hicks was seized by Northern Alliance forces and subsequently transferred into the custody of the United States. As such, the Geneva Conventions (III) clearly applies to this conflict. *See* Schmitt Aff. ¶ 11; Cassesse Aff. at 2.

ii. Hicks Is Protected by Geneva Convention Article 103

Respondents argue that even if the Geneva Conventions (III) apply to the conflict, Hicks is not entitled to protected status under Geneva Conventions (III) art. 103, as he is not a prisoner of war. Resp. Br. at 34 n.35. But, at a minimum, Hicks is presumed to be a POW because he has invoked his POW status. *See supra* § III(D)(1). *See also* Hicks Decl., Ex. 1.

iii. Principles of Customary International Law Apply to Hicks

Even if Hicks were not properly considered a prisoner of war entitled to the protections of Geneva Conventions (III) or the Geneva Conventions did not apply to Afghanistan, he would be entitled to those fundamental protections which have attained the status of customary international law. *See* Human Rights Br. at 4. Among these protections are the "minimum rules" set forth in Common Article 3 of the Geneva Conventions, which include "all the judicial guarantees which are recognized as indispensable by civilized peoples."[45] *See* Human Rights Br. at 7-8; Brief of Seventeen Law Professors at 32-33. These guarantees also include the "fundamental guarantees" for fair trial set out by Article 75 of Geneva Protocol I and the ICCPR,

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[44] Respondents attempt to avoid this result by disingenuously characterizing the context as an "armed conflict between the United States and al Qaeda," simply ignoring the involvement of the Taliban or the occupation of portions of Afghanistan. Respondents' Response at 33-34.

[45] Notably, this principle is also reflected in United States domestic law, which makes violations of Common Article 3 subject to criminal prosecution. 18 U.S.C. § 2441(c)(3).

which have attained the stature of customary international law and thus bind the United States.[46] *See* Human Rights Br. at 8-9.

b. Hicks Is Entitled to Invoke the Protections of International Law Despite Respondents' Argument that the Geneva Conventions (III) are not self-executing

Respondents further argue that whatever protections Hicks has under international law, he cannot invoke those provisions because they are not self-executing. Respondents' EC Response at 67-70. That is both irrelevant and wrong.

i. Hicks can invoke the procedural protections of the law of war directly under the UCMJ

Respondents claim regarding self-execution of the Geneva Conventions (III) is irrelevant because Petitioner can invoke the protections of international law directly under the UCMJ. As has been explained, the jurisdiction of military commissions at most extends to "offense[s] that by statute or by the law of war may be tried by military commissions." 10 U.S.C. § 821. The very jurisdiction of the commissions is thus tied directly to application of the laws of war. Respondents are not free to pick what parts of the law of war they apply. Application of the law of war includes its procedural components.

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[46] *See* G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force*, Jan. 3 1976. Although the United States has not ratified Geneva Protocol I, as respondents note (Br. at 32 n.32), the protocol is nonetheless binding, because more than 160 states have joined it. *See* ratification table at www.icrc.org. Furthermore, the United States' objections to Protcol I did not include objections to article 75. *See* Message from the President Transmitting Protocol II Additional to the 949 Geneva Conventions, 26 I.L.M. 561, 562, 564 (1987). Indeed, U.S. government legal experts and military manuals have identified article 75 as among those provisions of Geneva Protocol I that reflect customary international law. *See* U.S. ARMY, JUDGE ADVOCATE GENERAL'S SCHOOL, INTERNATIONAL & OPERATIONAL LAW DEPARTMENT, OPERATIONAL LAW HANDBOOK (P. 18-2). As for the ICCPR, the United States has ratified it and is bound by it. Br. of 271 Pariliamentarians at 16-17.

Even if § 821 were ambiguous on its face, it would have to be construed in a manner consistent with United States treaties and customary international law if it is possible to do so. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004). *See generally* Human Rights Br. at 3-4. Because it is possible -- indeed logical -- to interpret § 821 to incorporate the procedural protections of the law of war, it must be so interpreted.

This same "*Charming* Betsy" principle must inform the interpretation of other parts of the UCMJ, as well. Thus, in addition to the reasons provided *supra*, Article 21of the UCMJ, 10 U.S.C. § 821, should be interpreted to require application of the baseline UCMJ requirements in military commissions, which would help ensure their consistency with international law. Similarly, the UCMJ's authorization of the President to prescribe procedures for military tribunals (so long as consistent with the UCMJ), 10 U.S.C. § 836, must be interpreted to permit the President to prescribe procedures that are consistent with international law. Interpreted correctly, therefore, the UCMJ precludes trial in a commission that does not accord with international law.

ii. Hicks is entitled to invoke international treaties under the habeas statute

Respondents argument that Hicks has failed to state a claim under international law because the Geneva Conventions are not self-executing fails for another reason as well. Hicks does not bring his claims exclusively pursuant to private causes of action which arise under international law. Rather, Hicks has brought a claim under 28 U.S.C. § 2241(c)(3), which provides a cause of action to anyone detained by the United States "in violation . . . of treaties."

Because the procedures prescribed for commissions are clearly in violation of a number of treaties, including the Geneva Conventions, Hicks is entitled to habeas relief.

iii. Relevant provisions of the Geneva Conventions (III) have been implemented

Regardless of whether the provisions of the Geneva Conventions (III) are self-executing, Hicks is entitled to invoke those provisions that have been executed by the United States in the form of binding army regulations. The armed forces have implemented Article 5, which provides that Geneva Conventions (III) protections must be afforded to any detainee if there is any doubt as to whether he is protected as a prisoner of war under Article 4 of the convention.[47] *See* Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* § 1-5(a)(2) (1997) [hereinafter AR 190-8] ("*All persons* taken into custody by U.S. forces will be provided with the protections of the [Geneva Conventions (III)] *until* some other legal status is determined by competent legal authority.") (emphasis added), http://www.apd.army.mil/pdffiles/r190_8.pdf.[48] Thus, Hicks is entitled to all of the protections of Geneva Convention III on treatment of prisoners of war, including the fair trial rights it

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[47] Respondents are wrong that Petitioner cannot invoke the provisions of Army Regulation 190-8, Br. at 40 n. 39, as will be shown in the Opposition to their EC Response.

[48] AR 190-8 is a multi-service regulation which applies to the Army, Navy, Air Force, and Marine Corps. The regulation itself expressly states that its purpose is to implement international law as set forth in the 1949 Geneva Conventions: "This regulation implements international law, both customary and codified, relating to [enemy prisoners of war], [retained personnel], [civilian internees], and [other detainees] which includes those persons held during military operations other than war. The principal treaties relevant to this regulation are: [Geneva Conventions (I), (II), (III), and (IV)]." AR 190-8 § 1-1(b). Section 1-6 of the regulation provides detailed procedures for a military tribunal to determine an individual's status, expressly in accordance with Article 5 of Geneva Conventions (III). AR 190-8 § 1-6. 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*." *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2658 (2004) (Souter, J., concurring in part, dissenting in part) (emphasis added).

prescribes. In addition, the armed forces have implemented Article 103, which imposes a three-month limit on pretrial confinement.[49] *See* section V(B) *infra* (discussing speedy trial violation with respect to Hicks).

iv. Relevant provisions of the Geneva Conventions (III) are self-executing

In any event, the trial protections of Geneva Convention III on prisoners of war are self-executing and should be enforced as required by the Supremacy Clause. Respondents rely on their brief in the enemy combatant portion of this case to suggest otherwise, and Petitioner will respond there as well. But "[i]n general, agreements that can be readily given effect by executive or judicial bodies, . . . 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 (Third) of Foreign Relations Law of the United States § 111, rep. note 5 (1987) (emphasis added); *see also Commonwealth v. Hawes*, 76 Ky. (13 Bush) 697, 702-03 (1878), *cited in United States v. Rauscher*, 119 U.S. 407, 428-29 (1886) (characterizing *Hawes* as "a very able" opinion). The procedural protections of GC III clearly "prescribe a rule by which the rights of the private citizen or subject may be determined," and therefore "partake of the nature of municipal law . . . capable of enforcement as between private parties in the courts of the country." *The Head Money Cases*, 112 U.S. 580, 598-99 (1884).

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[49] AR 190-8 § 3-7(h):

> 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.

AR 190-8 § 3-7(h).

Contrary to the Respondents' assertions, nothing in Geneva Conventions (III) suggests that it is enforceable by states alone. Rather, the Convention's text makes it clear that it is intended to confer personal rights upon the captured soldier. The 1929 Convention having failed to provide adequate protection during World War II, the 1949 Geneva Conventions were drafted with "the ultimate goal . . . to ensure humane treatment of POWs -- not to create some amorphous, unenforceable code of honor among the signatory nations." *Noriega*, 808 F. Supp. at 799. Articles 6 and 7 both refer "rights" conferred on POWs. Geneva Conventions (III) arts. 6, 7. Moreover, Article 78 authorizes prisoners of war to bring complaints about conditions of their captivity directly to the detaining military authorities, rather than relying solely on diplomatic enforcement between states. *See* Geneva Conventions (III) art. 78.

Because most of the 1949 Geneva Conventions were self-executing on their face, the Senate Foreign Relations Committee concluded that "it appears 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, at 30 (1955). The Committee found only four provisions that required implementing legislation, none of which are applicable here. *Id.* at 30-31. *See generally* Amicus Brief of Experts on the Law of War at 23-26, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696), *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/03-6696/03-6696.mer.ami.expertslow.pdf.

The cases cited by Respondents are not to the contrary. Most concern the 1929 Geneva Conventions which were merely hortatory and which inspired the different language in the 1949 Conventions. Others concern parts of Geneva Convention (IV) on civilians, not POWs. Finally, Judge Bork's concurring opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) expressing the summary view that the Geneva Conventions (III) is not self-executing

(apparently in its entirety) did not command the assent of a majority of the panel, was cursory at best, and considered the question of self-execution in the context of a claim for damages.

Whether directly, or as incorporated into statutes and regulations, the principles of international law thus prevent the government from trying Hicks under the law of war without according him the protections of that law.

IV. RESPONDENTS HAVE DENIED HICKS THE RIGHT TO A SPEEDY TRIAL AS REQUIRED BY THE UCMJ, THE GENEVA CONVENTIONS, OTHER APPLICABLE INTERNATIONAL LAW, AND THE UNITED STATES CONSTITUTION.

Respondents and the Military Commission also are barred from prosecuting Hicks due to their flagrant violation of Mr. Hicks's right to a speedy trial as required by Article 10 of the UMCJ, the Geneva Conventions, other international law, and the Sixth Amendment.

A. Respondents Detained Hicks for Over 32 Months Without Trial.

Petitioner Hicks was originally detained by the United States military in December 2001. Soon thereafter, Hicks was transported to Guantanamo Bay, Cuba. On July 3, 2003, Respondent President Bush announced that Hicks was subject to prosecution before military commissions. Since that determination, Respondents have detained Hicks in solitary confinement, and thus effectively punished him for over a year *after* determining that he would be prosecuted by the military commissions. Respondents did not charge Hicks until June 10, 2004 - 30 months after his original detention and he was not brought before Respondents' military commissions for hearing until August 2004 - over 32 months after he was originally detained.

The clock for determining whether a detainee has been afforded the right to a speedy trial begins to run at the time of his detention. *See United States v. Earls*, 2003 CCA LEXIS 92 (A.F.C.C.A. Mar 24, 2003) (all time after confinement counts for speedy trial purposes); *United*

States v. Wiklinson, 27 M.J. 645 (1988) (same); *United States v. Gouveia*, 467 U.S. 180, 190 (1984) ("[The] Sixth Amendment right [to a speedy trial] may attach before an indictment and as early as the time of 'arrest and holding to answer a criminal charge.'") (quoting *United States v. MacDonald*, 456 U.S. 1, 6-7 (1982)). Indeed, the very case cited by the government, *United States v. Cooper*, holds that Article 10 should be applied to "the entire period up to trying the accused." 58 M.J. 54, 60. It is clear that Hicks has been confined at Guantanamo from at least January 2002 for the purpose of potential criminal prosecution. However, even if the procedural clock was not deemed to run until Respondent President Bush formally designated Hicks eligible for trial by military commission in July 2003, Charge Sheet ¶ 1, his trial has still been unduly delayed: Respondents did not even charge Hicks until almost a year after this designation was made, *see* Charge Sheet. There is no reasonable explanation for this undue delay. Respondents cannot reasonably have needed over two years to gather evidence against Hicks.

B. Respondents' Actions Have Violated Hicks's Right to A Prompt Trial under the UCMJ.

This delay is inconsistent with Hicks's rights under the UCMJ. Article 10 of the UCMJ, 10 U.S.C. § 810, unequivocally provides that any arrest or confinement of an accused must be terminated unless charges are promptly brought and made known to the accused, and speedy trial afforded for determination of guilt on such charges:

> When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or dismiss the charges and release him.

10 U.S.C. § 810 (West 2004); *see also United States v. Kossmann*, 38 M.J. 258, 259 (C.M.A. 1993). In contravention of this requirement, Respondents simply have not been "reasonably diligent" in taking "immediate steps to try" Hicks. *See also Kossman*, 38 M.J. at 262-63.

Respondents argue that the UCMJ does not apply to this case. However, as we have seen, the protections of the UCMJ generally apply to commission proceedings. *See supra* section III(B). Moreover, with respect to Article 10 in particular, that provision on its face applies to "any person subject to this chapter." Hicks is unquestionably such a person. *See supra* section III(B). Furthermore, because Hicks must be presumptively treated as a POW, *see* section III(D), *supra*, the UMCJ applies because it governs the treatment and trial of POWs. *See* 10 U.S.C. § 802(9).

Respondents assert that even if the UCMJ applies, the length of Hicks's confinement does not violate § 810. But the baseline for assessing speedy trial violations under § 810 is *thirty days*. *See Cooper*, 58 M.J. 54, 60 (C.A.A.F. 2003) (identifying Speedy Trial Act, 18 U.S.C. § 3161(b) as relevant baseline); *Kossman*, 38 M.J. at 261 (observing that "3 months is a long time to languish in a brig awaiting the opportunity to confront one's accusers,"); *United States v. Hatfield*, 44 M.J. 22, 23 (C.A.A.F. 1996) (dismissing case for speedy trial violation based on 106 days of confinement).[50] As Justices Scalia and Stevens said in unchallenged words, under the Habeas Corpus Act in England, "a second magna carta, and a stable bulwark of our liberties," "imprisonment without indictment or trial for felony or high treason would not exceed approximately three to six months." *Hamdi*, at 2662 (Scalia, J, dissenting).

It is true that a lengthy delay, standing alone, does not automatically create a speedy trial violation, however, such a delay triggers Respondents' responsibility to demonstrate good faith. *United States v. Goode*, 54 M.J. 836 (2001) (finding that delay in trial was partly due to a defense request, actually helped the defendant, and that prosecution had attempted to reduce

[50] The President has promulgated a 120 day requirement for court martial proceedings. *See* RCM 707(a). As we have seen, the UCMJ applies to Hicks and, in any case, requires uniformity in the rules of court martial and commission proceedings unless impractical. 10 U.S.C. § 836.

delay); *United States v. Laminman*, 41 M.J. 518, 520-21 (C.G. Ct. Crim App. 1994) (burden is on government to show it has taken "immediate steps"). Here, Respondents have offered no showing of good faith or that they took any immediate steps to try Hicks. The generic assertion that conspiracy takes years to investigate is unsupported by any showing that the government made every effort to proceed expeditiously.

Further, Hicks's detention, solitary confinement and abusive treatment while in custody have prejudiced Hicks, resulting in "oppressive pretrial incarceration," *Barker v. Wingo*, 407 U.S. 514, 532 (1972); *United States v. West*, 504 F.2d 253, 256 (D.C. Cir. 1974), greatly increasing his "anxiety and concern," *United States v. Marion*, 404 U.S. 307, 320 (1971); *United States v. Calloway*, 505 F.2d 311, 319 (D.C. Cir. 1974), and impairing his ability to prevent a defense to Respondents' charges. During the period of Hicks's detention he has been "powerless to exert his own investigative efforts to mitigate the[] erosive effect of the passage of time," *Smith v. Hooey*, 393 U.S. 374, 380 (1969), while Respondents have been free to conduct investigations, contact and interrogate potential witnesses, preserve evidence and communicate with council - none of which was afforded Hicks due to Respondents' actions. Although "time's erosion of exculpatory evidence and testimony can rarely be shown" directly, "excessive delay presumptively compromises the reliability of a trial." *Doggett v. United States*, 505 U.S. 647, 655-56 (1992).

Respondents have thus clearly violated Article 10.[51] That Article was intended to prohibit precisely the kind of "foot-dragging" that has characterized Hicks's case from day one. *Kossman*, 38 M.J. at 39.

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[51] For the same reasons, Respondents' have violated the Sixth Amendment's speedy trial requirement. *See Barker v. Wingo*, 407 U.S. 514, 532 (1972).

C. Respondents' Actions Have Violated Hicks's Right to A Prompt Trial under the Geneva Conventions.

The Geneva Conventions also establish stringent speedy trial requirements. The fundamental guarantees of Geneva Protocol I require that Mr. Hicks be "informed without delay" of the charges against him. Geneva Protocol I art. 75(4)(a). Geneva Protocol I also incorporates the guarantees of the ICCPR. Geneva Convention (IV), Geneva Protocol I art. 75(4)(a). The ICCPR provides that anyone arrested "shall be entitled to a trial within a reasonable time or to release." ICCPR, arts. 9(2), 9(3).

Furthermore, for prisoners of war -- which Hicks is presumed to be -- Article 103 of the Geneva Convention (III) provides:

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

Geneva Convention (III) art. 103.

Respondents, in plain violation of international law, have failed to meet any of the Geneva Conventions' requirements set forth above.

D. Respondents' Argument that this Court should Abstain from Enforcing Hicks's Right to a Speedy Trial is Without Merit.

Respondents *Councilman* abstention argument fails for several reasons set forth below. *See* section VII(A)-(B) *infra*. Further, Respondents suggestion that "whatever right he would have under those provisions [§ 810 and the Sixth Amendment] could be fully vindicated under *MacDonald* through post-trial review," *see* Respondents' Response at 45, is without merit since it is Respondents position that Hicks's does not have any right to direct post-trial review in the

federal courts.

E. Hicks Is Entitled to Dismissal of the Charges.

The appropriate remedy for a violation of speedy trial rights under federal law is dismissal of the charges against Hicks. *See*, *e.g.*, *United States v. Hatfield*, 44 M.J. 22, 24-5 (C.M.A. 1996) (dismissing charges for UCMJ Article 10 violation); *Strunk v. United States*, 412 U.S. 434, 439-40 (1973) (dismissal is only proper remedy for Speedy Trial Clause violations). Although an evaluation of prejudice may be part of the determination of whether dismissal is appropriate, dismissal is particularly appropriate in cases where, as here, there has been "truly neglectful" government "attitudes," or "intentional dilatory conduct." *United States v. Edmond*, 41 M.J. 419, 421 (1995).

V. THE NOVEMBER 13, 2001 EXECUTIVE ORDER IMPERMISSIBLY DISCRIMINATES BETWEEN CITIZENS AND NON-CITIZENS IN VIOLATION OF THE FIFTH AMENDMENT AND 42 U.S.C. § 1981.

Finally, the PMO establishing military commissions must be invalidated because it expressly discriminates against non-citizens. Under the terms of this Order, "non-citizens" are subject to trials before the Commission. In stark contrast, a United States citizen who is alleged to be an unlawful combatant and to have committed the same acts can only be prosecuted in a federal court, guaranteeing him the full protections of our Constitution and judicial system. This blatant discrimination violates the equal protection guarantees of both the Fifth Amendment and 42 U.S.C. § 1981. *See Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (stressing that "the central aim of our entire judicial system . . . is [that] all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court") (internal quotations omitted).

A. The Order Has No Rational Basis.

Respondents devote the bulk of their argument to the assertion that laws that differentiate based on alienage are subject to rational basis review. But even if rational basis review were appropriate, and it is not, *see infra*, the PMO could not survive because no rational explanation exists as to why military commissions must be used to try Hicks, but not to try John Walker Lindh,[52] Yaswer Hamdi, Jose Padilla or other American citizens. Respondents *ipse dixit* that "it cannot seriously be argued that the President's action . . .lacks a rational basis," Br. at 38, is not such an explanation. Nor is the President's finding that it was "necessary" to establish military commissions, Br. at 36 -- a finding that does not differentiate citizens and non-citizens.

The Executive Branch itself appears to disbelieve there is any reason for such differential treatment. Throughout the post-September 11 period, the Executive branch has argued repeatedly that U.S. citizens can be as dangerous as non-citizens and that the President and the military must have the power to detain and prosecute U.S. citizens who engage in hostile acts against our government anywhere in the world. *See, e.g.*, *Hamdi*, 124 S. Ct. at 2640-41 ("A citizen, no less than an alien, can be 'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States'").

Congress, too, does not appear to believe there is any reason to distinguish based on alienage. In the AUMF, Congress authorized the President " to use all necessary and appropriate force against those nations, organizations or *persons* he determines planned,

[52] Like Mr. Hicks, Mr. Lindh was charged with fighting against the United States in Afghanistan. *Lindh*, 212 F. Supp. 2d at 568. Indeed, Mr. Hicks's charge sheet specifically alleges that he traveled to Konduz, Afghanistan in November 2001, where "he joined others, including John Walker Lindh, who were engaged in combat against Coalition forces." Charge Sheet ¶ 20(m). Yet, because Lindh is a United States citizen, the government brought his indictment in federal court, allowing him all of the procedural protections that accompany such a federal criminal proceeding.

authorized, committed or aided the terrorist attacks that occurred on September 11, 2001") (emphasis added); *see also Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (No. 03-1027) (Reply brief for Petitioner at 17) ("The Authorization supports the President's use of force against any 'organization' or 'person' that 'he determines' aided the September 11 attacks, without suggesting any condition on that authority based on citizenship").

Finally, the assertion that there is a rational basis to distinguish based on citizenship is falsified by history. The Order under which Mr. Hicks is being prosecuted is an historical first in this country. There has never been a generally-applicable military commission order in the history of this Nation that authorized the trial of non-citizens before a military tribunal while expressly exempting U.S. citizens alleged to have committed the very same acts. This has been true from the first time commissions were used in the Mexican American War to the last, during World War II. *See, e.g.*, Louis Fisher, Congressional Research Service, *Military Tribunals: Historical Patterns and Lessons* 12 (quoting memoir stating that during Mexican American War "all offenders, Americans and Mexicans, were alike punished" under order establishing commissions); Glazier, 89 Va. L. Rev. at 2030 (same); *Ex parte Quirin*, 317 U.S. at 37 (finding that both citizens and non-citizens were subject to World War II military commissions).

Now, after nearly two centuries, the Executive branch, acting unilaterally, without Congress' input or approval, claims the need and legal authority to break from this unbroken historical tradition. It may be that the Executive branch believes that United States citizens would have rebelled against military commissions if they were subject to them. But a central purpose of the Equal Protection Clause is to ensure that government may not target unpopular groups without political power, and the Supreme Court has not hesitated to invalidate such discriminatory laws when they lack a rational basis. *See*, *e.g.*, *Cleburne, Tex. v. Cleburne Living*

Center, 473 U.S. 432 (1985) (mentally retarded); *Lawrence v. Texas*, 123 S. Ct. 2472, 2485 (2003) (O'Connor, J., concurring) (homosexuals); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (same); *Turner v. Fouche*, 396 U.S. 346 (1970) (recent immigrants to a state).

Here, the Supreme Court has already intimated that there is no rational basis, explaining "Nor can we see any reason for drawing such a line here." *Hamdi*, 124 S. Ct. at 2640. Indeed, there is no reason to sanction an unprecedented departure from the most fundamental traditions of fairness underlying our Nation's historic commitment to the rule of law.

B. The PMO Is Subject to Strict Scrutiny.

In any event, Respondents' argument that the PMO is subject only to rational basis review is wrong. They rely primarily on a line of cases stating that the federal government has wide latitude to differentiate between aliens and citizens with respect to benefits based on its power to control immigration. But the federal government has no similar authority with respect to punishment.[53]

Over one hundred years ago, the Supreme Court made clear in *Wong Wing v. United States*, that while the federal government has wide latitude to regulate immigration and foreign affairs, and may, in that capacity, differentiate between citizens and non-citizens, where the government "sees fit to . . . subject[] the persons of such aliens to infamous punishment," the ability to discriminate came to an end: "even aliens shall not be held to answer for a capital or

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[53] The caselaw on which the government relies establishes a limited exception to the general rule that the federal government and states are treated identically under the Equal Protection Clauses of the Fifth and Fourteenth Amendments, *Adrand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995). The exception is based on the federal government's interest in controlling immigration, an interest not shared by the states when they differentiate between aliens and citizens of other states. *Mathews v. Diaz*, 426 U.S. 67, 84-85 (1976). Thus, outside this limited context the rule of strict scrutiny established in *Graham v. Richardson*, 403 U.S. 365, 372 (1971) and *In re Griffiths*, 413 U.S. 717 (1973) is applicable. It certainly applies for laws differentiating with respect to punishment.

other infamous crime" without the protections afforded citizens under the Fifth Amendment. 163 U.S. 228, 237-38 (1896).[54] In *Wong Wing*, the government sought to deport four Chinese citizens for illegal presence in the United States, but first sentenced them to sixty days in jail. *Id.* at 239. The Court left the deportation order undisturbed, but emphatically invalidated the 60-day sentence because it had been imposed without the constitutional protections afforded to citizens charged with a criminal offense. *Id.* at 237-38.

Since *Wong Wing*, the Supreme Court has repeatedly reaffirmed and expanded upon the principle that while the federal government may discriminate against non-citizens in the immigration and foreign affairs areas, it may not punish non-citizens under different procedures. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 694 (2001) (citing *Wong Wing* for the rule that, in the context of "punitive measures . . . all persons within the territory of the United States are entitled to the protection of the Constitution") (internal quotation and citation omitted); *see also Chan Gun v. United States*, 9 App. D.C. 290, 298 (D.C. Cir. 1896) (citing *Wong Wing* for the proposition that "[w]hen . . . the enactment goes beyond arrest and necessary detention for the purpose of deportation and undertakes also to punish the alien for his violation of the law, the judicial power will intervene and see that due provision shall have been made, to that extent, for a regular judicial trial as in all cases of crime"); *Rodriguez-Silva v. INS*, 242 F.3d 243, 247-48 (5th Cir. 2001) (noting that although the federal government has wide latitude to set "criteria for the naturalization of aliens or for their admission to or exclusion or removal from the United States," it is settled that "an alien may not be punished criminally without the same process of law that would be due a citizen of the United States.") (citing *Wong Wing*).

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[54] Significantly, the Court invalidated the jail time even though the government claimed that it had imposed the sentence for the *regulatory purpose* of deterring future illegal immigration, and not to punish. 163 U.S. at 234.

Beyond *Wong Wing* and its progeny, the Court has been particularly loath to "bolt the door to equal justice," where, as here, the most fundamental right of all is at stake – the essential right of liberty from confinement. *Griffin*, 351 U.S. at 24. *See, e.g., Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966) ("it is ... fundamental that, once established, these avenues [of criminal appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts"). The Court also has made clear that even in cases where physical liberty is not at stake, that it will closely scrutinize the denial of basic procedural protections where that denial impacts disproportionately on a select group. *See Tennessee v. Lane*, 124 S. Ct. 1978, 1992 (2004) (right of access to the courts "call[s] for a standard of judicial review at least as searching, and in some cases more searching, than the standard that applies to sex-based classifications"); *M.L.B. v. S.L.J.*, 519 U.S. 102, 125 (1996) (indigent complainant "endeavoring to defend against the State's destruction of her family bonds" may not be denied access to the appellate process).

Respondents ignore *Wong Wing* and its progeny, as well as these more general cases on access to the courts, in their argument that the federal government has wide latitude to discriminate against aliens. These cases also answer the government's argument that lawful, resident aliens are different from other aliens with respect to the Equal Protection Clause, as these cases concerned unlawful aliens whom the government was trying to deport.[55] Whether a person resides in the United States and pays taxes may be relevant to an Equal Protection claim concerning welfare benefits, but it is not relevant when it comes to punishment.

Finally, the government's repeated appeal to deference based on national security is unavailing. The Supreme Court has held that the fight against terror does not give the

[55] In any case, the PMO subjects even resident aliens to trial before military commissions and is thus overbroad. Such overbreadth itself renders the PMO unconstitutional. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 894 (1992).

government a "blank check" to discard the most basic safeguards underlying the rule of law, particularly with respect to the process due an individual facing a loss of liberty. *Hamdi*, 124 S. Ct. at 2650. Indeed, courts have always rejected arguments "that cast Article III judges in the role of petty functionaries. . .required to enter as a court judgment an executive officer's decision but stripped of capacity to evaluate independently whether the executive decision is correct." *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 198 (D.C. Cir. 2001). As has been shown, there is no justification -- national security or otherwise -- to treat Mr. Hicks differently than American citizens accused of identical conduct. The PMO establishing the military commissions is thus invalid under the Equal Protection Clause.[56]

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[56] For the same reasons, the Order's discriminatory treatment of non-citizens also violates 42 U.S.C. § 1981 (2004), which ensures all "persons" have the "equal benefit of all laws and proceedings" as have "citizens." This statute has long been understood to protect non-citizens against unequal treatment by both states and the federal government. *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410, 419 (1948) ; *Duane v. GEICO,* 37 F.3d 1036 (4th Cir. 1994) (same); *NAACP v. Levi*, 418 F. Supp. 1109, 1117 (D.D.C. 1976).

Respondents contention that a 1991 amendment narrowed Section 1981 is supported by some caselaw, but is wrong and has been rejected elsewhere. *See La Compania Ocho, Inc. v. U.S. Forest Service*, 874 F. Supp. 1242, 1251 (D.N.M. 1995). The amendment's language does not exclude protection from federal misconduct, and the four stated purposes of the 1991 Amendment all were to increase civil rights. *See* P.L. 102-166 (1991), Sec. 3(4). Given this, the amendment should not be read to work so radical an alteration of § 1981.

VI. THERE IS NO LAWFUL BASIS FOR ABSTAINING FROM HEARING THIS CASE NOW.

Finally, consistent with the Respondents' refrain that virtually no law applies to this case, they attempt to evade review altogether by insisting that this Court must abstain from hearing Petitioner's claims until the Commission proceedings have run their full course. Like most of Respondents' contentions, that proposition is fabricated from whole cloth.

It is undisputed that this Court possesses the requisite Article III jurisdiction to hear Petitioner's claims. Likewise, although it is firmly established that questions of abstention and exhaustion are questions of congressional intent, *see, e.g.*, *Darby v.* Cisneros, 509 U.S. 137, 144-45 (1993); *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992); *Avacados Plus, Inc. v. Veneman*, 370 F.3d 1243, 1248 (D.C. Cir. 2004) (for exhaustion to be required, Congress must have stated in "clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision"), it is uncontested that there exists nothing resembling a source of congressional authorization for this Court to refrain from exercising the jurisdiction given it.

Rather, Respondents rely on general notions of equity that have no application here. Indeed, Respondents' entire argument is based on *one case* in which both the holding and the underlying reasoning are expressly limited to courts martial proceedings involving United States servicemen. They do not cite a single case in which any federal court has abstained from hearing challenges to a military tribunal's jurisdiction over non-service members, including alleged enemy combatants. And their attempts to distinguish the many instances in which courts have intervened in such cases without requiring exhaustion of military remedies are unsupportable.

A. It Is Well Established That There Are No Grounds For This Court To Abstain.

Over 50 fifty years of Supreme Court jurisprudence makes clear that there are no grounds for abstention in this case. The Respondents' primary rationale for seeking abstention here is that the Executive Branch is best positioned for determining the propriety of trying alleged enemy combatants "consistent with national security and the need to provide a full and fair trial." Br. of Respondents at 14. That proffered rationale cannot be countenanced in light of Q*uirin*.,

There, following Congress's declaration of war against the German Reich, and at the height of the hostilities in World War II, six German citizens were captured after invading the United States' eastern seaboard armed with "explosives, fuses, and incendiary and timing devices." 317 U.S. at 7-8. On July 2, 1942, a military commission was appointed, by order of the President, to try the alleged saboteurs for violations of the laws of war. Immediately thereafter, when the commission proceedings had only just begun, the detained German citizens filed federal habeas corpus petitions challenging the propriety of the military proceedings and the application laws of war against them.

The *Quirin* petitioners' planned attack on the continental United States during a time of declared war represented an unprecedented threat to the nation's safety and security. Yet, it was because of that -- not despite of it -- that the federal court's immediate intervention was necessitated. As the Supreme Court explained, such immediate intervention in the German petitioners' military proceedings was required, "[i]n view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, *in time of war as well as in time of peace*, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions

without any avoidable delay." *Id.* at 19 (emphasis added).[57] This Court is thus not required to stay its hand out of deference to the Executive Branch.[58]

Quirin is the last reported Supreme Court case concerning the proper timing of the role of federal courts in hearing alleged enemy combatants' challenges to military commissions. Since that time, however, the Court has repeatedly confirmed, in a variety of contexts, that there is no abstention or exhaustion requirement for the federal courts to entertain jurisdictional challenges to the authority of military courts. This rule is particularly appropriate when, as here, the question is whether the military has a right to try Mr. Hicks at all. It is "especially unfair to require exhaustion of military remedies when the complainants raised substantial arguments denying the right of the military to try them at all." *Noyd v. Bond*, 395 U.S. 683, 696 n.8 (1969).

Thus, in *United States ex rel. Toth v. Quarles*, the Supreme Court granted a petition for habeas corpus before the defendant's military trial had taken place. 350 U.S. 11 (1955). Toth was arrested by military authorities six months after his discharge from the Air Force for a murder he allegedly committed while a serviceman in Korea. *Id.* at 13. Toth's sister petitioned the district court for a writ of habeas corpus, alleging that the federal statute giving the military the authority to try civilians like Toth violated the Constitution. *Id.* at 13 n.3. The Supreme Court upheld a decision granting the writ before Toth could be tried by the military. *Id.* at 6.

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[57] *Cf. Hamdi*, 124 S. Ct. at 2650 ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.").

[58] In addition to other grounds discussed below, Respondents attempt to distinguish *Quirin* on the grounds that one of the petitioners there might have been an American citizen and all were facing potential execution. *See* Br. of Respondents at 15 n.15. The Supreme Court expressly made clear, however, that the possible American citizenship of one of the petitioners was irrelevant to the Court's analysis, *Quirin*, 317 U.S. at 20, and it in no way based its decision on the fact that the petitioners there faced the possibility of execution upon conviction.

Similarly, in *Reid v. Covert*, the Court granted the habeas petitions of civilian wives of servicemen who were court-martialed for crimes committed on military bases overseas. 354 U.S. 1 (1957). One of the defendants in *Reid* had been convicted and had exhausted her military remedies, but the other, Mrs. Clarice Covert, was awaiting retrial when her habeas petition was granted. *Id.* at 4; *see also McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960) (affirming federal court's exercise of habeas jurisdiction over non-service member's challenge to court martial proceeding before exhaustion of military remedies); *Machado v. Commanding Officer*, 860 F.2d 542, 546 (2d Cir. 1988) ("a civilian . . . may collaterally attack court-martial jurisdiction in the district court without exhausting military remedies"). Like *Toth*, *Reid* and *McElroy*, Hicks contends that the government intends to subject him to a trial by a military commission in violation of the Constitution and laws of the United States. Therefore, his claim may be brought in a pretrial habeas petition.

In *Schlesinger v. Councilman*, 420 U.S. 738 (1975) -- the only case relied on by Respondents -- the Supreme Court did nothing to upset or limit its well settled rule that a petitioner may challenge the jurisdiction of a military tribunal over him without exhausting his military remedies. There, U.S. Army Captain Bruce Councilman filed a habeas petition challenging the jurisdiction of a court martial tribunal over him on the ground that his alleged drug offense was not "service connected" and, therefore, was not within court martial's jurisdiction. The Supreme Court held that Councilman was required to exhaust his military remedies based on a narrowly circumscribed bright line jurisdictional holding, which is not remotely relevant here. *Id.* at 758-60.

Specifically, the Court held that, unlike the petitioners in the cases discussed above, Councilman was an active member of the armed forces. As such, the military court martial

unquestionably had jurisdiction over him. *Id.* at 759-60. Thus, *Councilman* stands only for the narrow proposition that *United States service members*, over whom the military courts have jurisdiction, are precluded from bringing suit in federal court before exhausting their military remedies. *See New v. Cohen*, 129 F.3d 639, 643 (D.C. Cir. 1997) (interpreting *Councilman*).

Mr. Hicks is not a member of the U.S. armed services, nor do his claims here have anything to do with the "service connected" standard examined by the Supreme Court in *Councilma*n. Accordingly, *Councilman* stands as no bar to this Court's immediate review of Mr. Hicks' claims challenging the constitutional authority of the military commission over him.[59]

B. The Recognized Justifications For Requiring Exhaustion Are Wholly Lacking Here.

Without stating so explicitly, the Respondents' position effectively requests an unprecedented extension of *Councilman's* narrow jurisdictional holding to non-servicemen. Such an unwarranted extension cannot be squared with the rationale underlying the Supreme Court's analysis in *Councilman* or exhaustion principles generally.

Two primary concerns animated the Supreme Court's exhaustion rationale in *Councilman*. First, in the context of courts martial, basic notions of comity required federal courts to defer to *Congress's* creation of "an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals consisting of civilian

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[59] In footnote 15 of their brief, Respondents suggest that Mr. Hicks' challenge to the jurisdiction of the war crimes commission is analogous to the failed jurisdictional challenge in *Councilman* because the military courts purportedly have jurisdiction over Hicks based on his status as an enemy combatant. In other words, if Hicks was being detained *either* for war crimes *or* as an enemy combatant, he could challenge the military's jurisdiction over him, but he cannot do so where he is being detained on *both* grounds. In his petition, Mr. Hicks, of course, challenges and seeks immediate judicial review of *both* grounds for his unlawful confinement. Respondents' attempt to bootstrap two unlawful grounds for detention into a justification for abstention has no basis in logic or the law.

judges completely removed from all military influence or persuasion." *Councilman*, 420 U.S. at 757-58. Here, as explained above, the military commission poised to "try" Mr. Hicks is wholly unauthorized by Congress. *See supra* section II(A).

Accordingly, unlike in *Councilman,* there exists no "congressional judgment" that the commission will vindicate Mr. Hicks' constitutional rights. *See Councilman*, 420 U.S. at 758. Moreover, even if this Court somehow were to find sufficient congressional authorization for the establishment of the commission generally, the specific review procedures touted by Respondents were the hasty concoction of the Executive Branch and thus do not deserve the deference afforded the congressionally designed, integrated and impartial courts martial system at issue in *Councilman*.

Second, the *Councilman* Court focused on the need to respect the reasoned judgments of Congress concerning the appropriate balance between the military's unique need to maintain the requisite battle-ready discipline among its troops on the one hand, and a serviceman's constitutional rights on the other. *Id*. at 757. In turn, the Court held that Captain Councilman's challenge to the service connectedness of his drug offense was precisely the type of discipline-related determination to which the expertise of military courts was uniquely suited. *Id.* at 760.

Here, of course, the appropriate treatment of Mr. Hicks, who is not a United States serviceman, has no bearing on maintaining the discipline or preparedness of United States servicemen.[60] Nor are his separation of powers and other constitutional claims remotely within the experience or expertise of the commission panel members -- the majority of whom lack any

[60] *See generally Toth*, 350 U.S. 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.").

legal training -- or the reviewing authorities who are not military members. The expertise of military courts does not extend "to the consideration of constitutional claims." *Noyd*, 395 U.S. at 696 n.8. Indeed, nothing about the Court's analysis in *Councilman* would justify the unprecedented extension of its holding to non-servicemen.

Finally, the Supreme Court has recognized three circumstances in which requiring exhaustion of administrative remedies is particularly inappropriate. All three control here. First, "an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it." *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992). As detailed at length above, the evidence is legion that commission process is biased against Mr. Hicks. *See supra* section III(A)(2). In addition, the process to appoint commission and review panel members described above, s*ee supra* section III(A)(1), make plain the commission similarly has prejudged the legality of the commission itself.

Second, exhaustion is not appropriate where "the question of the adequacy of the administrative remedy . . . [is] for all practical purposes identical with the merits of the lawsuit." *McCarthy*, 503 U.S. at 148. Here, as discussed above, the question of the unconstitutional inadequacy of the commission and its procedures for hearing Hicks' challenges to the commission's own constitutionality *is*, in large part, Mr. Hicks' claim in this Court. *See supra* section III(A).

Third, exhaustion is not appropriate where "requiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action." *McCarthy*, 503 U.S. at 146-47. Here, if the commission is permitted to proceed and Hicks' habeas petition is only heard thereafter, Hicks will have first been forced to make the decision as to whether to testify before the commission. If he does and if the commission process is later declared unconstitutional, the

government will have the advantage gleaned from Hicks' testimony in any retrial before a lawful tribunal. Indeed, regardless of whether Hicks testifies, the government will have been accorded the advantage of a dry run.

Equally important, Hicks has already been confined without trial for years -- most of that time without counsel. If Hicks is tried before a military commission that is later declared unconstitutional and Hicks is then retried, his lawful trial will not begin for many more months or years in further deprivation of his speedy trial rights, and at the potential expense of critical exculpatory evidence that inevitably will have turned stale with the passage of so many years. Hicks will be subject to ongoing confinement during this time, which surely constitutes irreparable harm.

Conclusion

For the foregoing reasons, this Court should deny Respondents' motion to dismiss, grant Petitioner's motion for partial summary judgment, and determine now that the commission proceedings against Mr. Hicks are illegal.

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Washington, D.C.

Respectfully submitted,
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