IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. HICKS Petitioner, v. GEORGE WALKER BUSH, President of the United States, *et al.,* Respondents.	)	Civil Action No. 1:02-CV-00299 (CKK)

RESPONDENTS' RESPONSE AND MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW WITH RESPECT TO CHALLENGES TO THE MILITARY COMMISSION PROCESS CONTAINED IN PETITIONER'S SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS COMPLAINT FOR INJUNCTIVE, DECLARATORY, AND OTHER RELIEF

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COME NOW Respondents, by and through their undersigned counsel, pursuant to this Court's minute order of September 29, 2004, and respectfully submit this response to the Second Amended Petition ("petition") with respect to the military commission proceedings and respectfully request that the Court dismiss the case and otherwise deny Petitioner's request for injunctive and other relief.

Petitioner David M. Hicks's Second Amended Petition challenges his detention (1) as an enemy combatant and (2) as the subject of proceedings before a military commission.[1] Respondents filed a pleading and motion responding to petitioner's challenge to his detention as an enemy combatant on October 4, 2004. See Response to Petitions for Writ of Habeas Corpus and Motion

[1] Petitioner's Second Amended Petition contains eight counts. Count Six concerns his designation as an enemy combatant. The remaining counts are various challenges to the military commission proceedings.

to Dismiss or for Judgment as a Matter of Law (Docket No. 82) ("EC Response").[2] Respondents filed an unclassified factual response in support of petitioner's designation as an enemy combatant on October 6, 2004. (Docket No. 83).

With respect to the military commission, Hicks raises statutory, constitutional, and treaty-based challenges to the President's authority to subject petitioner to trial by military commission and to detain him in connection with the commission proceedings. This Court, however, should abstain from hearing petitioner's challenges to the commission proceedings because petitioner is being detained as an enemy combatant irrespective of the military commission proceedings and he is not suffering any legally cognizable harm as a result of the military commission proceedings. In the alternative, the petition should be dismissed or judgment granted in respondents' favor with respect to military commission matters because petitioner's challenges to the military commission proceedings lack merit.

STATEMENT OF FACTS

1. On September 11, 2001, the al Qaeda terrorist network launched a coordinated attack on the United States, killing approximately 3,000 persons. Congress responded by passing a resolution authorizing the President:

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Authorization for Use of Military Force, Pub. L. 107-40, §§ 1-2, 115 Stat. 224 (2001) ("AUMF").

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[2] A separate motion to dismiss on behalf of the individual respondents who were sued in their personal capacities also was filed on October 4, 2004 (Docket No. 81).

Congress emphasized that the forces responsible for the September 11th attacks "continue to pose an unusual and extraordinary threat to the national security," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Id.

Pursuant to this authorization and his authority under the Constitution, the President, as Commander in Chief, dispatched United States armed forces to seek out and subdue the al Qaeda terrorist network and the Taliban regime and others that had supported it. In the course of that campaign – which remains ongoing[3] – the United States and its allies have captured thousands of individuals overseas, many of whom are foreign nationals. The Military, consistent with settled historical practice in times of war, has determined that many of those individuals should be detained during the conflict as enemy combatants. Approximately 550 of the foreign nationals designated for detention as enemy combatants are being held by DoD at the United States Naval Base at Guantanamo Bay, Cuba. Petitioner is among those being so detained.

2. Equally consistent with historical practice, the President has ordered the establishment of military commissions to try a subset of those detainees for violations of the laws of war and other applicable laws. In doing so, the President expressly relied on "the authority vested in me . . . as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the [AUMF] and sections 821 and 836 of title 10, United

[3] Recent headlines make clear that the war against al Qaeda and its supporters continues to rage both in and outside of Afghanistan. See EC Response at 16-17 & nn.17-18.

States Code."[4] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001) (hereinafter "Military Order").

The President made several findings that undergird the Military Order. He found, inter alia, that:

> – the scale of attacks by terrorists, including al Qaeda, have "created a state of armed conflict" requiring the use of the Military;
> – such terrorists "possess both the capability and the intention" to carry out further, massively destructive attacks;
> – for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to" the Military Order to "be detained, and, when tried, . . . be tried for violations of the laws of war and other applicable laws by military tribunals;" and
> – "[g]iven the danger to the safety of the United States and the nature of international terrorism . . . it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."

Id., §§ 1(a)-(f).

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[4] Sections 821 and 836 are, respectively, Articles 21 and 36 of the Uniform Code of Military Justice ("UCMJ"). These sections provide, in relevant part:

Art. 21. Jurisdiction of courts-martial not exclusive

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

Art. 36. President may prescribe rules

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

The Military Order applies to "any individual who is not a United States citizen with respect to whom" the President makes two determinations "in writing": (1) that there is "reason to believe that such individual" is or was a member of al Qaeda or harbored such individuals, or "engaged in, aided or abetted, or conspired to commit, acts of international terrorism" adversely affecting United States' interests, or harbored such individuals; and (2) that "it is in the interest of the United States that such individual be subject to this order." Military Order § 2(a). The Order further provides for trial of such individuals by military commission "for any and all offenses triable by military commission," with punishment "in accordance with the penalties provided under applicable law, including life imprisonment or death." Id. § 4(a).

The Order authorizes the Secretary of Defense to issue orders and regulations governing the Military Commissions.[5] The Secretary of Defense, acting pursuant to the Military Order, established the Appointing Authority for Military Commissions.[6] Department of Defense Directive No. 5105.70, Feb. 10, 2004 (available at http://www.defenselink.mil/news/Apr2004/d20040408dir.pdf) (hereinafter DoDD 5105.70). The Appointing Authority has many responsibilities, including the authority to appoint military commissions to try individuals subject to the Military Order. Id. § 4.[7]

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[5] These orders and regulations "shall at a minimum provide for," among other things, "a full and fair trial, with the military commission sitting as the triers of both fact and law," Military Order § 4(c)(2); "admission of such evidence as would . . . have probative value to a reasonable person," id. § 4(c)(3); "conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present," id. § 4(c)(6); and "submission of the record of the trial, including any conviction or sentence, for review and final decision by" the President or the Secretary of Defense if so designated by the President, id. § 4(c)(8).

[6] The Secretary designated John D. Altenburg, Jr., a respondent in this action, to serve as the Appointing Authority.

[7] Additional responsibilities of the Appointing Authority are to: designate a judge advocate of any United States Armed Force to serve as a Presiding Officer over each military commission;

The military commissions that the Appointing Authority establishes have jurisdiction over individuals subject to the Military Order who are "[a]lleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority." Military Commission Order No. 1, 32 C.F.R. § 9.3(a) (2003) (hereinafter MCO No. 1). The commission has jurisdiction over offenses that are "violations of the laws of war and all other offenses triable by military commission." Id. § 9.3(b). An individual so charged (the "Accused") is assigned or may choose another available defense counsel ("one or more Military Officers who are judge advocates of any United States armed force") to conduct his defense before the Commission. Id. § 9.4(c)(2). The Accused may also retain a civilian attorney of choice at no expense to the United States government, provided that such attorney meets certain criteria. Id. § 9.4(c)(2)(iii)(B).

Under the procedures the Secretary established for the commissions, the Accused will, inter alia, (1) receive a copy of the charges "sufficiently in advance of trial to prepare a defense"; (2) be presumed innocent until proven guilty; and (3) be found not guilty unless the offense is proved beyond a reasonable doubt. Id. §§ 9.5(a), (b),(c). The prosecution must provide the defense "with access to evidence [it] intends to introduce at trial" and to "evidence known to the prosecution that tends to exculpate the Accused." Id. § 9.5(e). The Accused is permitted but not required to testify at trial, and the Commission may not draw an adverse inference from a decision not to testify. Id. § 9.5(f). The Accused also "may obtain witnesses and documents for [his] defense, to the extent necessary and reasonably available as determined by the Presiding Officer," id. § 9.5(h), and may

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approve and refer charges against such individuals; approve plea agreements; decide interlocutory questions certified by the Presiding Officer; ensure military commission proceedings are open to the maximum extent practicable; and order that investigative or other resources be made available to Defense Counsel and the Accused as necessary for a full and fair trial. DoDD 5105.70 § 4.

present evidence at trial and cross-examine prosecution witnesses, id. § 9.5(i). In addition, once a Commission's finding on a charge becomes final, "the Accused shall not again be tried" for that charge. Id. § 9.5(p). The Secretary of Defense has directed the commissions to provide for a "full and fair trial," to "[p]roceed impartially and expeditiously," and to "[h]old open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer[.]" Id. §§ 9.6(b)(1),(2),(3).[8]

Once a trial is completed (including sentencing in the event of a guilty verdict), the Presiding Officer must "transmit the authenticated record of trial to the Appointing Authority," id. at § 9.6(h)(1), which "shall promptly perform an administrative review of the record of trial," id. § 9.6(h)(3). If the Appointing Authority determines that the commission proceedings are "administratively complete," the Appointing Authority must transmit the record of trial to the Review Panel, which consists of three military officers,[9] at least one of whom has experience as a judge. Id. § 9.6(h)(4). The Review Panel must return the case to the Appointing Authority for further proceedings when a majority of that panel "has formed a definite and firm conviction that a material error of law occurred." Id. § 9.6(h)(4)(ii); Military Commission Instruction No. 9, Review of Military Commission Proceedings, December 26, 2003, § 4C(1)a (hereinafter MCI No. 9) (available at: http://www.defenselink.mil/news/Jan2004/d20040108milcominstno9.pdf). On the

[8] Proceedings may be closed in order to (1) protect classified information; (2) prevent unauthorized disclosure of protected information; (3) protect the physical safety of participants, including witnesses; and (4) protect intelligence and law enforcement sources and methods. MCO No. 1, 32 CFR § 9.6(b)(3). In no circumstance, however, may the detailed defense counsel be excluded from a proceeding, id., and in no circumstance may the Commission admit into evidence information not presented to detailed defense counsel, id. § 9.6(d)(5)(ii)(C).

[9] These officers may include civilians commissioned pursuant to 10 U.S.C. § 603.

other hand, if a majority of the panel finds no such error, it must forward the case to the Secretary with a written opinion recommending that (1) each finding of guilt "be approved, disapproved, or changed to a finding of Guilty to a lesser-included offense" and (2) the sentence imposed "be approved, mitigated, commuted, deferred, or suspended." MCI No. 9, § 4C(1)b. "An authenticated finding of Not Guilty," however, "shall not be changed to a finding of Guilty." MCO No. 1, 32 C.F.R. § 9.6(h)(2).

The Secretary must review the trial record and the Review Panel's recommendation and "either return the case for further proceedings or . . . forward it to the President with a recommendation as to disposition," if the President has not designated the Secretary as the final decision maker. MCI No. 9, § 5. In the absence of such a designation, the President makes the final decision; if the Secretary of Defense has been designated, he may approve or disapprove the commission's findings or "change a finding of Guilty to a finding of Guilty to a lesser-included offense, [or] mitigate, commute, defer, or suspend the sentence imposed or any portion thereof." Id. § 6.

3. Petitioner was initially captured in Afghanistan in late 2001 by Northern Alliance forces and was subsequently transferred to the control of United States forces. Petition ¶ 21. Petitioner was transferred to Guantanamo Bay in January, 2002. Id. ¶ 22. Pursuant to the Military Order, on July 3, 2003, the President designated petitioner for trial by military commission, upon determining that there was reason to believe that Hicks was a member of al Qaeda or otherwise involved in terrorism against the United States. That same month, Hicks, who had been housed with other enemy combatants at Guantanamo Bay, was moved to a different facility at Guantanamo Bay, Camp Echo. Id. ¶ 22. On November 28, 2003, the Chief Defense Counsel detailed Major Michael

Mori as petitioner's defense counsel. Id. ¶ 27. Subsequently, Mr. Joshua Dratel joined Major Mori as civilian co-counsel, and Mr. Stephen Kenny of Australia joined the defense team as a foreign attorney consultant. Id.

On June 10, 2004, the Appointing Authority approved charges against petitioner, and the charges were referred to the Military Commission on June 25, 2004. Id. ¶ 29. The initial hearing in the Commission was held on August 25, 2004. Currently a motions hearing is scheduled for November 1, 2004, and trial is scheduled to commence on January 10, 2005. Petitioner has filed eighteen motions and two written objections in the case, presenting many of the same claims found in his petition.[10]

Petitioner is charged with conspiracy, attempted murder by an unprivileged belligerent, and aiding the enemy. See id. Petition Ex. 2 ("Charge"). (For the elements of these charges, see Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission, April 30, 2003, 32 C.F.R. §§ 11.6(c)(6); (b)(3), (c)(7); (b)(5).) The conspiracy charge alleges that from January to December, 2001, petitioner "knowingly joined an enterprise of persons who shared a common criminal purpose . . . the al Qaida organization . . . to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism."[11] Charge ¶ 19.

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[10] These motions include: motions to dismiss for denial of a speedy trial; an equal protection challenge; a jurisdictional venue challenge; failure to allege criminal offenses; and a challenge to the Appointing Authority's legal authority.

[11] The general allegations in support of the conspiracy charge regarding al Qaeda state that "[b]etween 1989 and 2001, al Qaida established training camps . . . in Afghanistan . . . and other countries for the purpose of supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries." Charge ¶ 14. It also alleges that "[i]n February of 1998, Usama Bin Laden . . . and others under the banner of the 'International Islamic

As for Hicks's role in the conspiracy, the charge alleges that in January, 2001, Hicks traveled to Afghanistan to attend al Qaeda terrorist training camps and participated in various aspects of al Qaeda training throughout 2001. Id. ¶¶ 20.a-i. The charge further alleges that when Hicks, while he was in Pakistan, learned of the attacks of September 11, 2001, and returned to Afghanistan to re-join his al Qaeda associates. Id. ¶ 20.j. The charge concludes by alleging that Hicks, armed with an AK-47, ammunition, and grenades, then participated in al Qaeda operations directed against United States and other Coalition forces. Id. ¶¶ 20.k-m.

Hicks is also charged with attempted murder by an unprivileged belligerent. That charge alleges that as a member of the conspiracy, Hicks attempted to murder by small arms fire and other means "American, British, Canadian, Australian, Afghan, and other Coalition forces while he did not enjoy combatant immunity." Id. ¶ 21. Finally, Hicks is charged with aiding the enemy for his activities in 2001. Id. ¶ 22.

4. On February 19, 2002, petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, which he amended on March 18, 2002. These earlier petitions contained claims challenging petitioner's detention as an enemy combatant. On September 27, 2004, this Court granted petitioner's Motion for Leave to File His Second Amended Petition for Writ of Habeas

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Front for Jihad on the Jews and Crusaders,' issued a fatwa (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military . . . .'" Id. ¶ 16. It further alleges that "[s]ince 1989, members and associates of al Qaida . . . have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001." Id. ¶ 18.

Corpus and for Injunctive and other Relief, which, as noted supra, contains the additional claims addressed herein challenging the legality of petitioner's impending trial by military commission.[12]

ARGUMENT

Since the founding of this nation, the military has used military commissions during wartime to try violations against the laws of war. Nearly ninety years ago, Congress recognized this historic practice and approved its continuing use. And nearly sixty years ago, the Supreme Court upheld the use of military commissions during World War II against a series of challenges, including cases involving a presumed American citizen, captured in the United States, Ex parte Quirin, 317 U.S. 1 (1942); the Japanese military governor of the Phillippines, Yamashita v. Styer, 327 U.S. 1 (1946); German nationals who alleged that they worked for civilian agencies of the German government in China, Johnson v. Eisentrager, 339 U.S. 763 (1950); and the spouse of a serviceman posted in occupied Germany, Madsen v. Kinsella, 343 U.S. 341 (1952). Despite the fact that both Congress and the Judiciary have blessed the Executive's use of military commissions during wartime, despite the fact that the statutory framework today is identical in all material respects to that which existed during the prior legal challenges, and despite the fact that the President has inherent power as Commander in Chief to establish military commissions in the war against al Qaeda and the Taliban, petitioner contends that his detention and trial pursuant to the

[12] Hicks has had the opportunity to contest his status as an enemy combatant before a Combatant Status Review Tribunal ("CSRT"). See generally EC Response § II.B. The CSRT confirmed that Hicks is properly classified as an enemy combatant, see Docket No. 83; therefore, he may be detained as such, whether or not he committed the particular offenses approved and referred for trial by the military commission. See EC Response § I.

Military Order violates federal statutes, the Constitution, and the Geneva Conventions. As discussed below, these claims cannot be heard at this time and, in any event, they lack merit.

I. THE COURT SHOULD ABSTAIN FROM HEARING CHALLENGES TO MILITARY COMMISSION PROCEEDINGS UNTIL THE PROCEEDINGS ARE COMPLETED AND PETITIONER HAS EXHAUSTED HIS MILITARY REMEDIES.

Petitioner asks this Court to intercede in the midst of an ongoing military process designed to determine whether he has committed violations of the laws of war and other offenses triable by military commission. This Court should reject this invitation. Petitioner cannot cite any example of a federal court enjoining a military commission – or a military tribunal of any sort – convened during wartime from trying someone whom the Executive Branch has determined is affiliated with enemy forces. That is because the law is clear that federal courts generally will not consider challenges to military process, jurisdictional or otherwise, until that process has run its course.

The leading case governing the role of the federal courts in addressing challenges to the military judicial process is Schlesinger v. Councilman, 420 U.S. 738 (1975). There, the Supreme Court rejected an Army captain's attempt to enjoin his impending court-martial on drug charges. Councilman contended that the military court lacked jurisdiction because the charges were not "service connected," but the Court held that such a contention did not constitute a sufficient basis to intervene in the military proceedings.[13] At the outset, the Court recognized that "'military law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal

[13] Under the case law at that time, a military servicemember could be tried by court-martial for a violation of the UCMJ only if there was proof that the violation was connected to his or her military service. O'Callahan v. Parker, 395 U.S. 258 (1969). This requirement was rejected in Solorio v. United States, 483 U.S. 435 (1987), which held that a servicemember fell within the jurisdiction of the UCMJ by virtue of his or her military service.

judicial establishment.'" Id. at 746 (quoting Burns v. Wilson, 346 U.S. 137, 140 (1953)). In determining the proper role for federal courts presented with challenges to military proceedings, the Court found instructive the federal approach to ongoing state court proceedings. The Court observed that "considerations of comity [and] the necessity of respect for coordinate judicial systems have led this Court to preclude equitable intervention into pending state criminal proceedings unless the harm sought to be averted is both great and immediate, of a kind that cannot be eliminated by . . . defense against a single criminal prosecution." Id. at 756 (internal quotation marks omitted). The Court further observed that this abstention doctrine is "similar" to "the requirement of the exhaustion of administrative remedies," which is predicated on "the special competence of agencies . . . to develop the facts, to apply the law in which they are peculiarly expert, and to correct their own errors." Id. "These considerations[,]" the Court concluded, "apply in equal measure to the balance governing the propriety of equitable intervention in pending court-martial proceedings." Id. at 757.

The Court further explained that principles of abstention and exhaustion have special salience in the military context. As the Court observed, "there is here something more that, in our view, *counsels strongly against the exercise of equity power even where, under the administrative exhaustion rule, intervention might be appropriate*." Id (emphasis added). The Court identified that "something" as "the unique military exigencies" that set the military apart from civilian society and that relate to its "primary business . . . to fight or be ready to fight wars should the occasion arise." Id. (internal quotation omitted). Based on these "strong considerations," id. at 761, the Court held that "when a serviceman charged with crimes by military authorities can show

no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise." Id. at 758.

The Court rejected Councilman's contention that the threat of being deprived of his liberty by a court lacking jurisdiction constituted "irreparable harm" justifying federal court intervention. The Court explained that "'(c)ertain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, (can) not by themselves be considered 'irreparable' in the special legal sense of that term.'" Id. at 755 (quoting Younger v. Harris, 401 U.S. 37, 46 (1971)) (parentheses in Councilman).

The principles that led the Councilman Court to reject federal court intervention in ongoing military proceedings apply with even greater force here, where the President in his capacity as Commander in Chief, and with the approval of Congress,[14] established the military commissions challenged herein upon finding that they are "necessary" for "the effective conduct of military operations and prevention of terrorist attacks." Military Order § 1(e). Given that the Military Order applies to enemy combatants who are captured during the ongoing war with al Qaeda and its supporters, the traditional deference courts pay the military justice system is at its apogee. The Executive Branch, not this Court, bears the responsibility for protecting the nation from foreign attack and is in the best position to determine appropriate procedures for trying enemy combatants charged with violations of the laws of war and other appropriate offenses consistent with national security and the need to provide a full and fair trial. Id. §§ 1(f); 4(c)(2). The Executive Branch

[14] As discussed in greater detail infra, the Supreme Court has repeatedly held that one of the provisions that President Bush expressly invoked in establishing the military commissions, 10 U.S.C. § 821, constitutes congressional authorization for the President to convene military commissions during wartime to try violations of the laws of war.

has exercised that authority in this war by establishing military commissions and an elaborate set of procedures governing their use, including multiple levels of review. See supra Statement of Facts, § 2. In these circumstances, the Court should await the outcome of Hicks's military prosecution before considering his legal challenges to that proceeding.

Indeed, if a United States servicemember does not have access to the federal courts pending his court-martial, surely a nonresident alien captured during wartime should have no greater access pending his military trial. Cf. Johnson v. Eisentrager, 339 U.S. 763, 783 (1950) (refusing to read Fifth Amendment in manner that would put enemy aliens "in a more protected position than our soldiers."). The exigencies presented by fighting a war with a ruthless enemy are undoubtedly greater than the exigencies related to the need to maintain discipline in the armed forces and relied on by Councilman.[15]

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[15] The fact that the Supreme Court in Ex parte Quirin, 317 U.S. 1 (1942), considered the petitioners' claims prior to completion of the military commission proceedings in that case does not support departure from abstention principles here. Quirin was decided over 30 years before Councilman and well before the abstention doctrine underlying Councilman had been established. See Younger v. Harris, 401 U.S. 37 (1971). Moreover, in Quirin, unlike Hicks, the petitioners included a presumed American citizen and were facing the prospect of imminent execution.

Additionally, in Quirin, petitioners, in effect, challenged only their detention as military commission defendants. In the instant case, Hicks is detained as an enemy combatant, as well as a military commission defendant. Petitioner's status as an enemy combatant would justify his continued detention during ongoing hostilities regardless of the military commission proceedings; it is clear that petitioner is subject to at least some form of military jurisdiction. See EC Response § I. Petitioner would not be entitled to release merely because the Court were to conclude that some defect exists in the military commission process.

This fact also distinguishes petitioner's case from the cases of civilians who were tried by military authorities where the sole basis for the military's jurisdiction was the criminal prosecution, and where the Court did not require those persons to exhaust their military remedies before seeking redress in the federal courts. See, e.g., Reid v. Covert, 354 U.S. 1 (1957). Indeed, the Councilman Court recognized this distinction:

II. THE MILITARY COMMISSION IS LAWFULLY ESTABLISHED AND HAS JURISDICTION TO TRY PETITIONER.

Count One of the Petition alleges that the military commission before which petitioner is scheduled to be tried is "invalid and improperly constituted." Petition ¶ 44. Petitioner's argument is without merit.

A. Congress Has Authorized The Military Commission.

When the President issued the Military Order establishing military commissions to try individuals such as Hicks for violations of the laws of war and other offenses triable by military commission, he expressly relied not only on his powers as Commander in Chief,[16] but also on Congressional authorization provided in 10 U.S.C. § 821 and the AUMF.

> Respondents . . . point[] to the several military cases in which this Court has not required exhaustion of remedies in the military system before allowing collateral relief. In those cases the petitioners were civilians who contended that Congress had no constitutional power to subject them to the jurisdiction of courts-martial. . . . In each of these cases, the disruption caused to petitioners' civilian lives and the accompanying deprivation of liberty made it "especially unfair to require exhaustion . . . when the complainants raised substantial arguments denying the right of the military to try them at all. *The constitutional question presented turned on the status of the persons as to whom the military asserted its power.*

420 U.S. at 759 (citations omitted) (emphasis added). See also New v. Cohen, 129 F.3d 639, 644 (D.C. Cir. 1997) ("a person need not exhaust remedies in a military tribunal if the military court has no jurisdiction over him"). Given petitioner's status as an enemy combatant subject to military authority and detention, this case is much more analogous to facts of Councilman than Reid. Accordingly, there is no basis for the Court to intervene in petitioner's military commission proceeding.

[16] As we discuss infra, the President could have relied on his Commander in Chief powers alone, but this Court need not resolve that question because the Supreme Court has squarely held that the federal law on which the President relied constitutes congressional authorization for military commissions.

Section 821 of 10 U.S.C., which is entitled "Jurisdiction of courts-martial not exclusive," states that "[t]he provisions of this chapter conferring jurisdiction upon courts-martial do not *deprive* military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions." 10 U.S.C. § 821 (emphasis added). That language originated in Article 15 of the Articles of War, which was enacted in 1916. See Act of August 29, 1916, 39 Stat. 619, 653. At that time, Congress had decided to extend the jurisdiction of courts-martial to all offenses against the laws of war. The main proponent of Article 15 testified that, in light of the extension of courts-martial jurisdiction, it was important to make clear that the military commissions' "common law of war jurisdiction was not ousted." S. Rep. No. 63-229, at 53 (1914) (testimony of Judge Advocate General Crowder before the House Committee on Military Affairs); see also S. Rep. No. 64-130, at 40 (1916) (the military commission "is our common-law war court" that "has no statutory existence").

When the Supreme Court addressed challenges to the many military commissions convened during and after World War II, it agreed with General Crowder's view about the place military commissions occupied in our legal system, construing Article 15 as congressional recognition and approval of the common-law role military commissions play during wartime in punishing violations of the laws of war.[17] In Ex parte Quirin, 317 U.S. 1 (1942), the Court expressly held that Article 15 – the language of which is virtually identical to today's 10 U.S.C. § 821[18] – "*authorized* trial of

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[17] In Ex parte Quirin, the Court discussed the rich history in the United States of military commissions' use during wartime, including during the Revolutionary War, the Mexican-American War, and the Civil War. 317 U.S. 1, 32 n.10, 42 n.14 (1942).

[18] Compare 10 U.S.C. § 821 with Articles of War, art. 15, 41 Stat. 790 (1920) and art. 15, 39 Stat. 653 (1916).

offenses against the laws of war before such commissions." 317 U.S. at 29 (emphasis added); id. at 28 ("By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military commissions shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases.").

Moreover, by authorizing the use of military force against al Qaeda and the Taliban, Congress provided the President with the authority to establish military commissions. Congress authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, . . . in order to prevent any future acts of international terrorism against the United States . . . ." AUMF § 2(a). In Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004), a plurality of the Court ruled that this authorization triggered the exercise of the President's traditional war powers, in particular, the power to detain enemy combatants.[19] The Court explained that "detention of individuals [that Congress sought to target in passing the AUMF] . . . for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." 124 S. Ct. at 2640. That reasoning applies with equal force to the President's power to punish war criminals. Indeed, the Hamdi plurality justified its own conception of the President's war powers by expressly relying on Quirin for the proposition that "[t]he capture and detention of lawful combatants *and the capture, detention, and trial of unlawful combatants*, by 'universal agreement

[19] The plurality's ruling on this important point enjoys majority support, given Justice Thomas's position in dissent. See Hamdi, 124 S. Ct. at 2679 (Thomas, J., dissenting) ("Although the President very well may have inherent authority to detain those arrayed against our troops, I agree with the plurality that we need not decide that question because Congress has authorized the President to do so.").

and practice,' are 'important incident[s] of war.'" 124 S. Ct. at 2640 (quoting Quirin, 317 U.S. at 28) (emphasis added). Because al Qaeda is the central target of the AUMF, Congress has clearly authorized the President to exercise his war powers by subjecting to military trial individuals such as Hicks who are charged with conspiring to achieve al Qaeda's goals.[20]

Congress's longstanding decision both to recognize and approve the exercise of the President's wartime authority to convene military commissions to try violations of the laws of war reflects Congress's understanding that military exigencies require providing the President flexibility rather than detailed procedures in dealing with enemy fighters. That decision is entitled to just as much deference as Congress' decision to legislate detailed rules for the military's use of courts-martial in the UCMJ. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-636 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."). In these circumstances, the President's action is "'supported by the strongest presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.'" Dames & Moore v. Regan, 453 U.S. 654, 674 (1981) (quoting Youngstown, 343 U.S. at 637 (Jackson, J., concurring)). Hicks could not possibly meet this burden in attacking the lawfulness of the military commissions because, as explained above, the Supreme Court has already squarely rejected the arguments he advances here.

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[20] The ruling in Hamdi reflects the longstanding principle that the President's prerogative to invoke the laws of war in a time of armed conflict, including in respect to the punishment of war criminals, in no way turns on a formal declaration of war. See, e.g., The Prize Cases, 67 U.S. (2 Black) 635, 668, 670 (1862); J. Ely, War and Responsibility 25 (1993) (the suggestion "that congressional combat authorizations must actually be labeled 'declarations of war'" is "manifestly out of accord with the specific intent of the founders").

B. The President Has The Inherent Authority To Create Military Commissions.

Even if the legislative provisions the President expressly invoked did not constitute the congressional authorization that the Supreme Court has held they constitute, the military commissions would still be constitutional. That is because the President's authority to create military commissions is inherent in his position as Commander in Chief. U.S. Const. Art. II § 2.

The Executive Branch's war power has always included the unilateral authority to create military commissions, because that authority is necessary to effectuate the war power. As the Court explained in Eisentrager, "[t]he first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And, of course, grant of war power includes all that is necessary and proper for carrying these powers into execution." 339 U.S. at 788 (citation omitted); see also EC Response § I.A. That war power includes "the power . . . to punish those enemies who violated the law of war." Hirota v. MacArthur, 338 U.S. 197, 208 (1949) (Douglas, J,. concurring). Such "punishment of war criminals" is an essential "part of the prosecution of the war," because it is "directed to a dilution of enemy power and [to] retribution for wrongs done." Id. at 208; see also Yamashita, 327 U.S. at 11 ("An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who . . . have violated the law of war."). Indeed, the laws of war exist to impose limits on belligerent conduct; as leader of the armed forces, the President must have the authority to enforce those limits to protect the nation.

The Executive Branch's unilateral authority to create military commissions not only necessarily inheres in the powers granted the President by the Constitution, but is also borne out by

historical practice.[21] The Court has never called into question the validity of that historical practice. To the contrary, in Ex parte Vallindigham, 68 U.S. 243, 249 (1863), the Court, in the course of concluding that it did not have jurisdiction to review the proceedings before a military commission, explained that military jurisdiction can be "derived from the common law of war." Further, the Court's reasoning in Yamashita v. Styer, 327 U.S. 1 (1946), which concerned the use of a military commission to try a Japanese military governor, is consistent with the position that the President does not require statutory authorization to establish military commissions to try violations of the laws of war. Referring to the same statutes that were dispositive in Quirin on the question of congressional authorization (statutes still in force today), the Yamashita Court observed that the Articles of War "*recognized* the 'military commission' appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war," 327 U.S. at 7 (emphasis added) (citing Ex parte Quirin, supra), and went on to explain that "[a] military commission is our commonlaw war court. It has no statutory existence, though it is recognized by statute law," id. at 19 n.7 (internal quote omitted). The logical implication is that even without Article 15 or § 821 or any other statute, the

[21] In 1780, during the Revolutionary War, General Washington as Commander in Chief of the Continental Army appointed a "Board of General Officers" to try the British Major Andre as a spy, see Quirin, 317 U.S. at 31 n.9, when there was no court-martial authority to try him. See George B. Davis, A Treatise on the Military Law of the United States 308 n.1 (1913). General Andrew Jackson similarly convened military trials in 1818 to try two English subjects for inciting the Creek Indians to war with the United States. See William Winthrop, Military Law and Precedents 464, 832 (2d ed. 1920). In the Mexican American War, General Winfield Scott appointed tribunals called "council[s] of war" to try offenses under the laws of war and tribunals called "military commission[s]" to serve essentially as occupation courts administering justice for occupied territory. See id. at 832-33; Davis, supra at 308. And after the outbreak of the Civil War, military commissions were convened to try offenses against the laws of war, see Davis, supra, at 308 n.2; Winthrop, supra at 833.

President can create commissions on the basis of his inherent authority as Commander in Chief. See also Madsen, 343 U.S. at 346-347 ("Since our nation's earliest days, [military] commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have taken many forms and borne many names. Neither their procedure nor their jurisdiction has been prescribed by statute.").[22]

C. The Military Commission Was Properly Appointed.

Petitioner also claims that the military commission is improperly constituted because it must be constituted under 10 U.S.C. § 822, by a person with the authority to convene a general court-martial, and the Appointing Authority lacks such authority. See Petition ¶¶ 46-49. This claim is also meritless.

The rules set out in the UCMJ, including 10 U.S.C . § 822 (entitled "Who may convene a general courts-martial"[23]) apply to courts-martial, not military commissions. Pursuant to the Military Order, the President designated Hicks as eligible for trial before a military commission. While the UCMJ recognizes the jurisdiction of military commissions to try violations of the laws of war, see 10 U.S.C. § 821 ("The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions . . . of concurrent jurisdiction with respect to

[22] Of course, Hicks cannot claim a separation-of-powers violation with respect to the establishment of the military commissions. Petition ¶ 44. As shown above, Congress has authorized the President to establish these commissions and the President has the inherent authority to establish them; therefore, there can be no issue of separation-of-powers. In any event, as a non-resident alien with no voluntary connections to the United States, Hicks possesses no constitutional rights. See infra § V.A. He thus may allege neither infringements of individual rights expressly recognized by the Constitution nor infringements of rights derived from the structural protections built into the Constitution.

[23] Section 822 provides that general courts-martial may be convened by the President, the Secretary of Defense, a service Secretary, and certain commanding officers.

offenders or offenses that by statute or by the law of war may be tried by military commissions"), it does not purport to subject such commissions to its comprehensive set of provisions governing courts-martial, including § 822.

Indeed, the Supreme Court has recognized that while Congress has prescribed in detailed fashion the jurisdiction and procedures governing courts-martial, it has taken a hands-off approach with respect to wartime military commissions, by recognizing and approving their use, but not regulating their procedures. In Madsen v. Kinsella, 343 U.S. 341 (1952), the Court rejected any suggestion that the procedures found in the Articles of War would apply to the trial by military commission of a person who was subject to both military commission and court-martial jurisdiction for the same offense. In Madsen, the civilian spouse of an Air Force officer was tried for murdering her husband by a military commission in occupied Germany. Id. at 343-44. At the time, the Articles of War provided that she could have been tried by court-martial for the offense.[24] Id. at 345. The issue before the Supreme Court was whether Madsen could also be tried by a military commission for the same offense. Id. at 342.

Before reaching its ultimate conclusion that Madsen could be tried by a military commission, id. at 355, the Madsen Court characterized the unique nature and purpose of military commissions:

> Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have been called our commonlaw war courts. They have taken many

[24] In Reid v. Covert, 354 U.S. 1 (1957), a plurality of the Supreme Court ruled that a U.S.-citizen civilian spouse of a serviceman could not be subjected to the jurisdiction of a court-martial during peacetime. The Reid plurality concluded that Madsen was not controlling because Madsen involved a trial in occupied enemy territory, where "the Army commander can establish military or civilian commissions as an arm of the occupation to try everyone in the occupied area. . . ." 354 U.S. at 35 n.63. Madsen remains good law today, and the Supreme Court has limited Reid to its facts. See United States v. Verdugo Urquidez, 494 U.S. 259, 270 (1990).

> forms and borne many names. *Neither their procedure nor their jurisdiction has been prescribed by statute*. It has been adapted in each instance to the need that called it forth.

Id. at 346-348 (footnotes omitted) (emphasis added). The Court went on to hold that, "[i]n the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States." Id. at 348. The Court explained that, in contrast to Congress' active regulation of "the jurisdiction and procedure of United States courts-martial," id. at 349, Congress had shown "evident restraint" with respect to making rules for military commissions, id. The Court further explained that Article 15 of the Articles of War (now Article 21, UCMJ, 10 U.S.C. § 821) reflected Congress' intent to allow the Executive Branch to exercise its discretion as to what form of tribunal to employ during wartime. Id. at 353.

When the President established military commissions to try unlawful combatants in the ongoing armed conflict with al Qaeda and the Taliban and set out the procedures that will govern them, he exercised the very discretion that the Madsen Court held was implicit in his powers as Commander in Chief and was left unrestricted by Congress. Because, as Madsen explained, Congress did not purport to apply the numerous UCMJ provisions regulating courts-martial to the common law military commissions, those provisions are inapplicable to the military commission

trying petitioner in this case.[25] Thus, there is no requirement that a military commission be constituted as a general courts-martial under § 822.[26]

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[25] Even assuming that only a person empowered to convene a general court-martial may appoint a military commission, the Secretary of Defense has such authority as petitioner concedes, Petition ¶ 46. The Secretary of Defense is authorized by statute to empower others to exercise that authority on his behalf by 10 U.S.C. §§ 113(d), 131(b)(8), authorities which he relied on, in part, in promulgating DoDD 5105.70, which established the Appointing Authority who appointed Hicks's commission.

[26] Furthermore, contrary to petitioner's assertion, Guantanamo Bay is an appropriate venue to try petitioner. Citing only Ex parte Milligan, 71 U.S. (4 Wall.) 2, 127 (1866), petitioner claims that "military commissions have no jurisdiction to try individuals far from the 'locality of actual war.'" Petition ¶ 50 (quoting Milligan). Petitioner's argument must be rejected. First, it is wrong to say that any location in the globe is "far from the 'locality of actual war'" when petitioner was captured in the context of a global war where the enemy has hatched its plans to attack and/or conducted attacks and military operations against the United States and its allies in Europe, Africa, Asia, the Middle East, and in the United States itself, planning and attacks that continue to this day. See supra Statement of Facts ¶3; EC Response § II.B.

Second, petitioner's citation to Milligan is inapposite. To begin with, Milligan involved the military prosecution of an American citizen, and the Court held there that the government as a whole had no power to subject Milligan to military jurisdiction. 71 U.S. at 122. Moreover, Quirin "construe[d]"the "inapplicability of the law of war to Milligan's case as having particular reference to the facts," namely, that Milligan, as a person neither "a part of or associated with the armed forces of the enemy, was a non-belligerent." 317 U.S. at 45; see also Duncan v. Kahanamoku, 327 U.S. 304, 313-14 (1946) (holding that civilians in Hawaii during World War II could not be tried by military tribunals for embezzling stock or brawling with soldiers, but noting that its decision did "not involve the well-established power of the military to exercise jurisdiction over . . . enemy belligerents, prisoners of war, or others charged with violating the laws of war"). In contrast to Milligan, Hicks is an enemy belligerent. Finally, when addressing the application of the laws of war to the current hostilities, a majority of the Supreme Court embraced Quirin, not Milligan, as the controlling precedent. Hamdi, 124 S. Ct. at 2643 (plurality opinion) ("Quirin was a unanimous opinion. It both postdates and clarifies Milligan[.]"); id. (rejecting a reading of Quirin that would limit application of its principles to cases where enemy combatant status is conceded); id. at 2682 (Thomas, J., dissenting) ("Quirin overruled Milligan to the extent those cases are inconsistent.").

III. THE OFFENSES WITH WHICH PETITIONER IS CHARGED MAY BE PROPERLY TRIED BY THE MILITARY COMMISSION.

Petitioner claims that he may not be tried for the offenses with which he is charged because the offenses (1) were created by the President without Congressional authorization, (2) were created after they were committed, and (3) are outside the jurisdiction of the military commission. Petition ¶¶ 52-65. Petitioner's claims are meritless.

A. Congress need not codify the offenses to be tried by a Military Commission.

Petitioner is wrong, first of all, that Congress must codify or specifically authorize any offense to be tried by military commission. The Quirin Court held not only that Congress had authorized the President to use military commissions, but also that Congress did not purport to codify violations of the laws of war over which the commissions could exercise jurisdiction. The Quirin Court assessed whether the petitioners in that case, Nazi saboteurs, had been charged with "an offense against the law of war cognizable before a military tribunal." 317 U.S. at 29. In doing so, the Court did not look to federal statutes, but rather, to other cases tried before military commissions, id. at 31 nn.9 & 10 (discussing cases of confederate soldiers and officers convicted for hostile actions in civilian dress or other disguises, including attempts to derail a train and to set fire to New York City); contemporary secondary sources on military and international law, id. at 31; and the Rules of Land Warfare promulgated by the War Department for the guidance of the Army,[27] id. at 33-34. After canvassing these sources, the Court concluded that the Nazi saboteurs were properly charged with a violation of the law of war because:

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[27] The Court cited provisions of the Rules of Land Warfare identifying persons subject to military trial for violations of the laws of war, including "'persons who take up arms and commit hostilities' without having the means of identification prescribed for belligerents." Id. at 34 (quoting Paragraph 348). This is one of the bases for charging Hicks as an unlawful belligerent.

> By a long course of practical administrative construction *by its military authorities*, our Government has likewise recognized that 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, have the status of unlawful combatants punishable as such by military commission.

Id. at 35 (emphasis added).[28]

The Quirin Court never implied, much less stated, that the alleged violation of the law of war was cognizable because it was defined by Congress or because it resembled a statutory offense. Rather, the Court held that Congress, via UCMJ Article 15, now 10 U.S.C. § 821, acted to define the law of war as incorporating the body of common law applied by military commissions. See Quirin, 317 U.S. at 38 (the "Act of Congress [Article 15], by incorporating the law of war, punishes" violations of common law of war); id. at 28 ("Congress . . . has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals."). The Court explained that the whole point of Article 15 was congressional recognition and approval of the military's enforcement of a body of common law governing the rules of warfare that Congress did not purport to codify:

> Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war . . . and which may constitutionally be included within that jurisdiction. Congress had the choice of crystallizing in permanent form and in minute detail every

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[28] In reviewing the four charges brought against the Nazi saboteurs, Quirin specifically held that one of the charges was properly brought before a military commission – the first charge, which alleged "[v]iolation of the [common] law of war," 317 U.S. at 23, and not an offense prescribed by Congress. The Quirin Court upheld the military commission's authority to try those petitioners based solely on that first charge and specifically declined to address the propriety of the remaining charges. Id. at 46.

> offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.

Id. at 30 (citation omitted); see also Yamashita v. Styer, 327 U.S. 1, 7-8 (1946) (same).

B. The Offenses With Which Petitioner is Charged Properly Involve Violations of the Laws of War.

In this case, contrary to petitioner's allegations, the President did not "define" any offenses. Rather, the President, acted pursuant to his authority in 10 U.S.C. § 836 to prescribe "procedures," including "modes of proof," for "military commissions and other military tribunals." Military Order § 4(c). Pursuant to the President's directive, the Secretary of Defense caused to be promulgated, "Crimes and Elements for Trial by Military Commission," Military Commission Instruction No. 2, April 30, 2003, 32 C.F.R. Part 11 (2003) (hereinafter MCO No. 2); Military Order § 6(a). That regulation sets out a non-exclusive list of violations of the customary laws of war and other war crimes, and their respective elements, that may be prosecuted by a military commission. See 32 C.F.R. §§ 11.3, 11.6. It further specifies, however, that

> [n]o offense is cognizable in a trial by a military commission if that offense did not exist prior to the conduct in question. These crimes and elements derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war. They constitute violations of the law of armed conflict or offenses that, consistent with that body of law, are triable by military commission. Because this document is declarative of existing law, it does not preclude trial for crimes that occurred prior to its effective date.

Id. § 11.3(a).

There can be no doubt that Hicks is charged with offenses that allege violations of the laws of war under Quirin and otherwise. He is charged first with conspiring with an international terrorist organization that has carried out numerous attacks – including the September 11th attacks – that

violate every precept of the laws of war.[29] The particular offenses Hicks is charged with conspiring to commit – attacking civilians, attacking civilian objects, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent, and terrorism – implicate the most basic protections of the laws of war. See 32 C.F.R. §§ 11.6(a)(2) and (a)(3); id. §§11.6(b)(2), (b)(3), and (b)(4); Dep't of the Army, Field Manual 27-10, The Law of Land Warfare ¶ 39 ("FM 27-10") ("[t]he attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited").

The charge of conspiracy has long been recognized as a proper offense under the law of war. Winthrop in discussing the types of conspiracies properly tried by military commissions noted, inter alia, some of the following: conspiracy by a Confederate Army captain with others, including Jefferson Davis, "against the lives and health of Union soldiers held as prisoners of war at Andersonville, [Georgia];" a group that attempted to seize a steamer in Panama in 1864; and a conspiracy involving a William Murphy, Jefferson Davis, and others, to "burn and destroy boats on the western rivers." Winthrop, supra note 21, at 839 n.5. Additionally, the Army's Law of Land Warfare manual recognizes such an offense: "Conspiracy, direct incitement, and attempts to commit, as well as complicity in the commission of, crimes against peace, crimes against humanity, and war crimes are punishable." FM 27-10, ¶ 500. See also Colepaugh v. Looney, 235 F.2d 429 (10th Cir. 1956) (military commission proceeding involving conspiracy); Mudd v. Caldera, 134 F.

[29] The President, the Congress, and NATO have all recognized al Qaeda's attacks as an act of war. See Military Order, § 1(a); AUMF; and Statement of NATO Secy. Gen. (Oct. 2, 2001) (available at http://usinfo.-state.gov.topical/pol/terror/01100205.htm). In any event, whether there exists a state of armed conflict to which the laws of war apply is a political question for the President, not the courts. See The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862); Eisentrager, 339 U.S. at 789; Ludecke v. Watkins, 335 U.S. 160, 170 (1948).

Supp. 2d 138 (D.D.C. 2001) (Friedman, J.) (military commission had jurisdiction to try conspirator in assassination of President Lincoln).[30]

Hicks is also properly charged with "Attempted Murder by an Unprivileged Belligerent." Contrary to petitioner's allegation, this charge does not "criminalize participation in war." Petition ¶ 62. Rather, petitioner is charged with *unlawful* participation in war. As an unprivileged belligerent, any active participation in combat by petitioner is unlawful *per se*. See Quirin, 317 U.S. at 31 ("Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.") (footnote omitted). As the Law of Land Warfare manual further provides, individuals "who take up arms and commit hostile acts without having complied with the conditions prescribed by the laws of war for recognition as belligerents" are not entitled to combatant immunity for their hostile acts, but rather "may be tried and sentenced to execution or imprisonment." FM 27-10, ¶ 80. See also Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 4 (extending POW protections only to lawful belligerents,

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[30] Although the Supreme Court did not specifically address the propriety of that charge in Quirin, those defendants had been charged with a "[v]iolation of the law of war" (charge 1), providing or attempting to provide intelligence to the enemy (charge 2), spying (charge 3), and "[c]onspiracy to commit the offenses alleged in charges 1, 2 and 3" (charge 4). Quirin, 317 U.S. at 23.

Contrary to petitioner's contention, the International Military Tribunal at Nuremberg did not reject "conspiracy" as a valid charge. Petition ¶ 61. Although the Charter establishing the Tribunal did not authorize prosecutions for conspiracy to commit war crimes and crimes against humanity, this does not imply that such charges were not cognizable under the laws of war at the time. And the Charter *did* authorize charges of conspiracy to commit an aggressive war, so prosecutions for conspiracy to violate at least some of the laws of war occurred at Nuremberg. The Nurnberg Trial 1946, 6 F.R.D. 69, 111-12 (1946-47).

which include "militia" members who, inter alia, carry arms openly and wear a fixed distinctive insignia) (hereinafter GPW).

Under these common law sources, the first two charges against Hicks – implicating him in al Qaeda's attacks on the United States and his participation with al Qaeda forces in combat operations directed against the United States and its allies – "plainly allege[] violation[s] of the law of war" properly triable before a military commission. See Quirin, 317 U.S. at 36.

The final charge against petitioner, "Aiding the Enemy," also clearly falls within the jurisdiction of the military commission because Congress explicitly stated that the offense of aiding the enemy could be tried by a military commission:

> Any person who-
> (1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or
> (2) with proper authority, knowingly harbors or protects or gives intelligence to or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly;
> shall suffer death or such other punishment as a court-martial or *military commission* may direct.

10 U.S.C. § 104 (Article 104, UCMJ) (emphasis added). MCO No. 2 addressed the reach of this provision, noting that in order for a person to be convicted of this offense, the defendant's conduct would have to be wrongful, in that the defendant would have to owe "allegiance or some duty to the United States of America or to an ally or coalition partner." See 32 C.F.R. § 11.6(b)(5)(ii)(C). This limitation implicates petitioner because he is a citizen of Australia, a supporting ally of the United States that deployed forces to Afghanistan.[31]

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[31] As the charges properly allege violations of the customary law of war predating the conduct that is the basis for the charges, petitioner's claims that the President created these charges ex post facto, or that they constituted bills of attainder, Petition ¶¶ 55-57, are without merit. In any event, as shown infra § V.A., petitioner cannot avail himself of the protections of the United States

IV. PETITIONER CANNOT CHALLENGE THE MILITARY COMMISSION BASED ON THE GENEVA CONVENTIONS

Petitioner contends that the military commission procedures violate the UCMJ, the Geneva Conventions, and the Constitution. Petition ¶¶ 66-74. As explained elsewhere, the claims under the UCMJ and the Constitution are meritless because the procedural protections of the UCMJ do not apply to Hicks, see supra § II.C., and as a non-resident alien with no voluntary connections with the United States, Hicks cannot invoke the protections of the U.S. Constitution in this case, see infra § V.A. With respect to Hicks's Geneva Conventions claims, because the Geneva Conventions (1) are not self-executing, (2) do not apply to the United States' armed conflict against al Qaeda, and (3) do not afford a basis for relief even if they were self-executing and applied to this conflict, petitioner's claims lacks merit.[32]

Constitution in mounting these challenges.

[32] Petitioner cites the Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (hereinafter GPW), and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 75 (hereinafter "Protocol I"). With respect to Protocol I, the United States refused to ratify Protocol I, and, therefore, it is inapplicable in this case. See 81 Am. J. Int'l L. 910 (President Reagan made the following statement regarding his decision not to submit the Protocol to the Senate for ratification: "It is unfortunate that Protocol I must be rejected. . . . But we cannot allow other nations of the world, however numerous, to impose upon us and our allies and friends an unacceptable and thoroughly distasteful price for joining a convention drawn to advance the laws of war. In fact, we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law."). In any event, the protection petitioner relies upon in Protocol I, "No one shall be compelled to testify against himself or to confess guilt," Article 75, ¶ 4.f, is inapplicable as petitioner has not been compelled to testify, has entered a plea of not guilty, and is contesting the charges in his case.

A. The Geneva Conventions Are Not Self-Executing.

Petitioner's reliance on provisions of the Geneva Conventions fails at the outset, because, as the courts, in virtual unanimity, have held, those Conventions are not self-executing. See EC Response § III.B. Therefore, petitioner cannot assert any claims pursuant to the Conventions.

B. The Geneva Conventions Do Not Apply To The United States' Armed Conflict Against Al Qaeda Under The Terms Of Common Article 2.

The Geneva Conventions do not apply to every conceivable armed conflict. Common Article 2 of the GPW provides for only three circumstances in which the Conventions "apply": (a) in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties;" (b) in 'all cases of partial or total occupation of the territory of a High Contracting Party;" or (c) when a non-signatory "Power[] in conflict" "accepts and applies the provisions [of the Convention]." Because the armed conflict between the United States and al Qaeda satisfies none of these situations, the Geneva Conventions do not apply to al Qaeda fighters such as Hicks.

The President has found that the armed conflict between the United States and al Qaeda does not come within Article 2 of the GPW. See White House Fact Sheet (Feb. 7, 2002) (available at http://www.whitehouse.gov/news/releases/2002/02). This determination is not reviewable, given the foreign policy and national security concerns implicated in the present context and the Presidential prerogatives in those domains.[33] But even if it were, it would at least be entitled to

[33] See, e.g., Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988) ("courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"); Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative.").

substantial deference, see Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."), and, in any event, is undoubtedly correct as a matter of law. The U.S.-al Qaeda armed conflict is not one "between two or more of the High Contracting Parties" within the meaning of Article 2. Al Qaeda has not signed or ratified the GPW. Nor could it. Al Qaeda is not a State; rather, it is a terrorist organization composed of members from many nations, with ongoing military operations in many nations. As a non-State entity, it cannot be a "High Contracting Party" to the Convention. In addition, the U.S.-al Qaeda armed conflict has not resulted in the "occupation of the territory of a High Contracting Party" within the meaning of Article 2. As a non-State actor, al Qaeda has no territory that could be occupied within the meaning of Article 2. Nor is it a "Power in conflict" that can "accept[] and appl[y]" the Convention.[34] In any event, far from embracing the Convention or any other provision of the law of armed conflict, al Qaeda has consistently acted in flagrant defiance of the law of armed conflict.

In sum, the Geneva Conventions are inapplicable to the United States' armed conflict with al Qaeda, and for this reason as well Hicks cannot claim their protections.[35]

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

[35] Even assuming the Conventions did apply to the United States' armed conflict with al Qaeda, Hicks's claims would still fail as a matter of law. Hicks asserts that he has a right to a speedy trial pursuant to GPW art. 103. Petition at ¶ 103. GPW art. 103, however, applies to judicial investigations with respect to prisoners of war. The problem for Hicks is that he is not entitled to

V. PETITIONER'S EQUAL PROTECTION CLAIMS ARE MERITLESS

Petitioner claims that, because they apply to non-citizens only, the President's Military Order and MCO No. 1 violate the equal protection component of the Fifth Amendment and 42 U.S.C. § 1981. See Petition ¶¶ 75-81. Like the other claims the petition raises, there are numerous reasons why this claim lacks merit. First, Hicks, as an alien with no voluntary connection to the United States, has no Fifth Amendment rights. Second, even apart from that reality, Hicks's equal protection claim must fail because Hicks is not a member of a suspect class and, even if he were, courts have historically shown extraordinary deference to the federal government regarding its policies toward aliens, deference that reaches its apex when applied to decisions of the President during wartime that implicate national security and sensitive foreign policy matters. Third,

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prisoner of war status. GPW art. 4 makes clear that prisoners of war status is available only to those who satisfy criteria of lawful combatancy, such as "carry[ing] arms openly" and "conduct[ing] their operations in accordance with the laws and customs of war." Those, like Hicks, who fail to adhere to those conditions are *not* entitled to prisoner of war status and its attendant benefits when captured. Indeed, the President has determined that those affiliated with al Qaeda are not entitled to protections as prisoners of war.

Petitioner also argues that he is entitled to a review of his status pursuant to GPW art. 5 and various United States military guidelines. Petition ¶¶ 104-106. But petitioner never explains why objective doubt has arisen as to his status. Because the President has determined that al Qaeda is not entitled to prisoner of war protection, there can be no doubt about Hicks's unlawful combatant status. In any event, a CSRT has recently confirmed Hicks's enemy combatant status.

Finally, Hicks appeals to Common Article 3, which prohibits "the passing of sentences and the carrying out of executions without previous judgment" and applies only "[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." The United States' armed conflict against al Qaeda, however, is a conflict of "an international character," and it is not limited to the territory of "one of the High Contracting Parties." In any event, Hicks has not been and will not be "sentenced . . . without previous judgment." To the contrary, the proceedings against Hicks are in their preliminary stages.

Hicks's statutory claim fails because the statute is facially inapplicable to federal action, and, in any event offers no greater protection than the Constitution.

A. The Equal Protection Component Of The Fifth Amendment Does Not Extend To Petitioner.

As explained fully in respondents' response and motion pertaining to the enemy combatant aspects of the petition, Hicks, as a non-resident alien with no voluntary connections with the United States in the context of this case, cannot invoke the Constitution of the United States. See EC Response § II.A. (citing, inter alia, United States v. Verdugo Urquidez, 494 U.S. 259 (1990), and Johnson v. Eisentrager, 339 U.S. 763 (1950)). Accordingly, petitioner's equal protection claims with respect to the military commission must be rejected.

B. Even If Petitioner Could Invoke The Fifth Amendment, His Claim Lacks Merit.

Even assuming contrary to Verdugo-Urquidez and Eisentrager that Hicks could raise a claim under the Fifth Amendment's equal protection component, that claim lacks merit. The President found that in order "[t]o protect the United States and its citizens," it was "necessary" to establish military commissions to try non-citizens captured during the ongoing armed conflict for violations of the laws of war. Military Order § 1(e). If this politically sensitive determination is reviewable at all, it is subject to the utmost deference, because it constitutes an exercise of the President's war powers vis-á-vis aliens and implicates pressing national security and foreign policy concerns. As the Supreme Court has repeatedly observed:

> [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Matthews v. Diaz, 426 U.S. 67, 81 n.17 (1976) (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952)). There is no basis for disturbing the President's judgment here.

Petitioner asserts, Petition ¶¶ 76-78, that "[t]he Supreme Court has held that any discrimination against aliens not involving government employees is subject to strict scrutiny," but cites no cases to support that proposition. The two leading cases addressing the equal protection rights of aliens, In re Griffiths, 413 U.S. 717, 721-722 (1973), and Graham v. Richardson, 403 U.S. 365, 372 (1971), stand for the proposition that *lawful*, *resident* aliens are a "suspect class" for equal protection purposes when challenging *state*, not federal, policies, and that policies that differentiate between *that group* and other similarly situated persons are subject to "close judicial scrutiny." See Graham, 403 U.S. at 372. Nothing in either case suggests that the Supreme Court meant to include aliens differently situated from Griffiths and Richardson, who were lawfully admitted resident aliens. See, e.g., Griffiths, 413 U.S. at 722 (according protection to resident aliens on the premise that "like citizens, [they] pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society").

As a representative of the broader unprotected class of aliens, Hicks's challenge would be subject to rational basis review. See, e.g., Dandridge v. Williams, 397 U.S. 471, 485 (1970); United States v. Carolene Products, 304 U.S. 144, 152 (1938); see also Verdugo-Urquidez, 494 U.S. at 273 (rejecting nonresident alien's reliance on Graham as basis for claim for treatment akin to citizens).[36] Under that standard, the Military Order must be upheld as long as a court can

[36] It is, in any event, well established that enemy combatants–the only individuals subject to trial by military commission–possess no constitutional right to be tried for their war crimes in front of an Article III court. See Ex parte Quirin, 317 U.S. 1 (1942) (citizen and alien enemy combatants alike are subject to trial by military commission).

identify any rational basis for it. See Carolene Products, 304 U.S. at 152. Given that the "[e]xecutive power over enemy aliens . . . has been deemed throughout our history, essential to war-time security," Eisentrager, 339 U.S. at 774, it cannot seriously be argued that the President's action, taken in response to attacks executed by a foreign-based terrorist organization, lacks a rational basis.

Moreover, courts have only applied heightened scrutiny to policies regarding aliens that are promulgated by states, as opposed to the federal government. Griffiths and Graham, the two leading cases cited supra, dealt respectively with Connecticut's bar admission rules and Arizona and Pennsylvania's distribution of welfare benefits. In these and other cases involving state action, the Court has made it clear that federal policies regarding aliens are entitled to a much higher degree of deference. See, e.g., Graham, 413 U.S. at 379-80.

Indeed, cases considering federal policies that differentiate against aliens are marked by the Court's extreme deference towards the political branches. In Mathews v. Diaz, 426 U.S. 67 (1976), the Court expressly distinguished state and federal actions for purposes of equal protection doctrine relating to aliens, id. at 84-85, explaining that the relationship between the United States and aliens "has been committed to the political branches of the Federal Government,"id. at 81. The Court went on to apply great deference in upholding a federal law that differentiated against aliens for purposes of determining eligibility for Medicare benefits. A host of other cases echo the judicial deference toward federal policies governing aliens reflected in Mathews. See, e.g., Fiallo v. Bell, 430 U.S. 787, 792 (1977); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953); Harisiades v. Shaughnessy, 342 U.S. 580, 588-589 (1952). The concern motivating the Court's deference – that regulation of aliens is committed to the political branches

of the federal government – is magnified in this case, where the President's Military Order not only regulates aliens, but does so in order to prosecute the war against al Qaeda effectively. See, e.g., Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988) ("courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"). Accordingly, the heightened scrutiny that would apply to state actions differentiating against lawful resident aliens does not apply to the President's exercise of his war powers.

C. The President's Order Does Not Violate 42 U.S.C. § 1981.

Petitioner's argument that the Military Order violates 42 U.S.C. § 1981, Petition ¶¶ 79-81, is equally meritless. Although Petitioner quotes 42 U.S.C. § 1981(a), he fails to quote an additional provision that nullifies his claim. Section § 1981(c) provides that "[t]he rights protected by this section are protected against impairment by *nongovernmental* discrimination and impairment under color of *State* law." 42 U.S.C. § 1981(c) (emphasis added). This provision renders § 1981 facially inapplicable to federal action. For this reason, every federal Court of Appeals that has considered the issue since the law was amended in 1991 to include this provision has held that federal actions cannot give rise to claims under § 1981.[37] See Davis-Warren Auctioneers, J.V. v. F.D.I.C., 215 F.3d 1159, 1161 (10th Cir. 2000); Davis v. United States Dep't of Justice, 204 F.3d 723, 725-726 (7th Cir. 2000); Lee v. Hughes, 145 F.3d 1272, 1277 (11th Cir. 1998), cert. denied, 525 U.S. 1138 (1999); see also Williams v. Glickman, 936 F.Supp. 1, 4-5 (D.D.C. 1996) (Flannery, J.).

[37] Even if § 1981 did apply to the federal government, the Supreme Court has held (in the context of state action, of course) that the section is co-extensive with the Equal Protection Clause. See Grutter v. Bollinger, 539 U.S. 306, 343 (2003); General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 389-391 (1982). Petitioner's § 1981 claim, thus, would fail for the same reasons that doom his constitutional equal protection challenge.

VI. PETITIONER'S SPEEDY TRIAL CLAIM MUST BE REJECTED.

Petitioner argues that he has been denied a speedy trial in contravention of Article 10 of the UCMJ (10 U.S.C. § 810[38]), the Geneva Conventions (see Section IV, supra), and the Sixth Amendment.[39] See Petition ¶¶ 98-109. As an initial matter, Petitioner seeks to conflate his detention as enemy combatant with his designation as a defendant for a military commission. As an enemy combatant who is subject to detention for the duration of the ongoing armed conflict, see EC Response § I., Hicks has no ground on which to raise a speedy trial claim based on the nature or length of his detention. That is because he has no legal entitlement to a particular form of detention (e.g., to stay at Camp Delta, see supra Statement of Facts ¶ 3) even assuming he were not subject to trial by military commission.

As shown below, petitioner's claims lacks merit for at least three additional reasons.

A. The Provisions Of The UCMJ Applicable To Courts-Martial Do Not Apply To Military Commissions.

Petitioner contends that because the President expressly invoked the UCMJ in establishing the military commissions, see supra Statement of Facts ¶ 2, he must afford Hicks the procedural protections set forth in the UCMJ, specifically, 10 U.S.C. § 810. See Petition ¶ 99. As

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[38] Section 810 provides, in pertinent part: "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."

[39] Petitioner cannot invoke the provisions of Army Regulation 190-8 or the Commander's Handbook on the Law of Naval Operations, see Petition ¶ 105. See EC Response § III.C. Although the discussion in the EC Response only discusses the Army regulation, the reasoning of that argument would apply with even greater force to the Commander's Handbook (available at www.cpf. navy.mil/pages/legal/NWP%201-14/NWPTOC.htm), which merely restates and provides guidance concerning the requirements of the laws of armed conflict, see id. §§ 5.1, 11.1, and, furthermore, is not even a regulation. Cf. Schweiker v. Hansen, 450 U.S. 785, 789 (1981) (agency claims manual, for internal use by employees, "has no legal force, and it does not bind" the agency).

demonstrated supra § II.D., however, the rules set out in the UCMJ apply to courts-martial, not military commissions. In any event, that enemy combatants facing military commissions do not receive the protection of § 810 is not "contrary to or inconsistent with" the UCMJ, 10 U.S.C. § 836(a), because, as Congress recognized in taking a hands-off approach with respect to military commissions, see supra § II.C., military commissions convened during wartime to try violations of the laws of war must deal with military exigencies in administering justice. Because of the unique context in which the commissions operate, and the need for flexibility that context presents, it is not "contrary to or inconsistent with" the UCMJ for the commissions to try enemy combatants for violations of the laws of war without adhering to the speedy trial rules that apply to courts-martial.

B. Even Assuming Petitioner Could Avail Himself of 10 U.S.C. § 810 or the Sixth Amendment, His Claim Fails As A Matter Of Law.

Even assuming speedy trial concepts under 10 U.S.C. § 810 applied to Hicks, he has not established any violation for a number of reasons.[40] In order to prevail on a 10 U.S.C. § 810 claim, petitioner must establish that the government has failed to proceed against him with "reasonable diligence." See United States v. Cooper, 58 M.J. 54, 58 (C.A.A.F. 2003). All that petitioner states on this score is that "Hicks has now been held for 32 months without a determination by a neutral tribunal that he is an enemy combatant or a trial to determine whether he has committed war crimes," Petition ¶ 37, and that "respondents have not provided any reason for their inordinate delays in charging Hicks," id. ¶ 102. These conclusory statements are patently insufficient. To

[40] Of course, Hicks cannot claim the protection of § 810, at least insofar as he seeks release from his present confinement, because he is being detained not merely in connection with the commission proceeding, but as an enemy combatant. In light of his combatant status, Hicks has no legal right to seek release from a particular form of confinement based on the length of time he has been held without a trial, even assuming that the speedy trial standards applied and that the military was not complying with them.

begin with, to the extent there is any relevant time period for an individual lawfully detained as an enemy combatant, the § 810 clock would not begin to run until the detainee is "ordered into arrest or confinement" pursuant to a charge. 10 U.S.C. § 810; see Cooper, 58 M.J. at 58 (Article 10 triggered "when a servicemember is placed in pretrial confinement"). Thus, any speedy trial clock here would not have begun to run until on or about July 9, 2003, when Hicks was placed in Camp Echo to facilitate his ability to meet with counsel in connection with the impending charges.

Moreover, the amount of time that has elapsed, standing alone, does not suggest, much less establish, the absence of reasonable diligence. As the military courts have made clear, "[t]here is no 'magic number' of days in pretrial confinement which would give rise to a presumption of an Article 10, UCMJ, speedy trial violation." United States v. Goode, 54 M.J. 836, 838 (N-M Ct. Crim. App. 2001); United States v. Kossman, 38 M.J. 258 (C.M.A. 1993) ("Pointedly, however, the drafters of Article 10 made no provision as to hours or days in which a case must be prosecuted because there are perfectly reasonable exigencies that arise in individual cases which just do not fit under a set time limit.") (internal quotation marks omitted). In the Goode case, the court held that a defendant who spent 337 days in pretrial confinement failed to make out a § 810 or constitutional speedy trial violation. Id. at 838-840. Here, the government has charged Hicks with participating in a foreign-based, far-reaching conspiracy spanning several years. See Charge ¶¶ 4-20.[41] Petitioner concedes that "extraordinary or compelling circumstances" would justify delay. See Petition ¶ 102. The breadth and complexity of the charge, as well as the fact that it was

[41] Although the specific charge of conspiracy covers only the time period between January and December, 2001, Charge ¶¶ 19-20, Hicks joined his first terrorist organization in 2000, id. ¶ 5, and the al Qaeda terrorist group, which is the base of the conspiracy, has been in existence since 1989, id. ¶¶ 10-18.

brought during the ongoing war against al Qaeda and its supporters, are such "extraordinary or compelling circumstances." Cf. Barker v. Wingo, 407 U.S. 514, 531 (1972) (in the context of a constitutional speedy trial claim, "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.").

Petitioner's claim also founders on his failure to show prejudice from the alleged delay. See Barker, 407 U.S. at 533-534 (identifying four factors relevant to constitutional speedy trial claim, including prejudice to the defendant, and holding that defendant was minimally prejudiced by delay of more than five years); United States v. MacDonald, 435 U.S. 850, 858 (1978) (constitutional speedy trial right protects against three types of injury, but "the most serious" is impairment of the defense caused by delay); Cooper, 58 M.J. at 61 (directing military courts to consider Barker factors in evaluating Article 10 [§ 810] claim). Petitioner alleges that "statements against Hicks *may* be introduced at the Commission" from witnesses who have been released and makes general allegations that he will be prejudiced by any delay. Petition ¶¶ 38-40. Accordingly, petitioner's claims allege no concrete prejudice, and are speculative as to any prejudice he may suffer. Such "[g]eneralized assertions of the loss of memory, witnesses, or evidence are insufficient to establish actual prejudice." See United States v. Manning, 56 F.3d 1188, 1194 (9th Cir. 1995). Likewise, the speculative nature of petitioner's allegation cannot form the basis for a finding of prejudice. See id. (rejecting prejudice claim that embraces "pure conjecture").

Moreover, a speedy trial claim has no impact on the Councilman rule, see supra § I, which would still call for the Court to abstain until the military process has run its course. Indeed, federal courts have rejected the contention that alleged speedy trial violations cause irreparable harm that justifies pre-trial intervention by a reviewing court. In Carden v. Montana, 626 F.2d 82 (9th Cir.

1980), for example, the Ninth Circuit held that an alleged speedy trial violation in state court did not constitute "the type of 'special circumstances' which warrant federal intervention" on habeas. Id. at 84. The court noted that the Supreme Court has identified the limited circumstances in which departure from the abstention doctrine is appropriate, namely, "in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown." Id. (quoting Perez v. Ledesma, 401 U.S. 82, 85 (1971)). The Ninth Circuit went on to rule that the petitioners had not shown irreparable injury, because their right to a speedy trial could be vindicated *after* the trial, via dismissal of the charges. Id.

The Supreme Court's holding in United States v. MacDonald, 435 U.S. 850 (1978), makes clear that a speedy trial claim does not generally afford a reviewing court a basis to take the extraordinary step of disrupting or precluding a trial. There, the Court ruled that a criminal defendant may not appeal before trial an order denying his motion to dismiss on speedy trial grounds. The Court explained that "the Speedy Trial Clause does not . . . encompass a 'right not to be tried" which must be upheld prior to trial if it is to be enjoyed at all." Id. at 861. Rather, "[i]t is the delay before trial, not the trial itself, that offends against the constitutional guarantee," and whether that delay prejudiced the defendant's ability to obtain a fair trial cannot generally be determined until after trial. Id.[42] Indeed, the vague and generalized nature of petitioner's claim of prejudice, see supra, only serves to highlight the premature status of this proceeding. See supra § I.

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[42] "Resolution of a speedy trial claim necessitates a careful assessment of the particular facts of the case;" the claim is "best considered only after the relevant facts have been developed at trial." 435 U.S. at 858

Even assuming § 810 and/or the Sixth Amendment applied to Hicks, whatever right he would have under those provisions could be fully vindicated under MacDonald through post-trial review of the impact on Hicks's defense of the allegedly unlawful delay. Because Hicks has shown "no harm other than that attendant to resolution of his case in the military court system," this Court "must refrain from intervention, by way of injunction or otherwise." Councilman, 420 U.S. at 758.[43] Petitioner's speedy trial claim, therefore, must be dismissed.

CONCLUSION

For the reasons stated above, respondents respectfully request that their motions to dismiss or for judgment as a matter of law be granted, that writs of habeas corpus not issue, and that all relief requested by petitioners be denied.

Dated: October 14, 2004

Respectfully submitted,

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[43] Petitioner's final claim is that he should be released because the military commission charges and proceedings against him "are based on unlawfully obtained statements," that is, that statements obtained from him unlawfully will be used against him in the ongoing military commission proceedings. See Petition ¶ 111. As noted supra, however, Hicks cannot be released because his detention is not due solely to the military commission proceedings; he is being held as an enemy combatant irrespective of the military commission proceedings. Moreover, petitioner is asking that this Court flatly enjoin the ongoing military commission proceedings and order his release based on the speculation that allegedly unlawfully collected evidence will be used against him and that he will, indeed, be convicted. As discussed supra § I, under Councilman the proper course for the Court is to abstain from any such intervention and permit the military commission proceedings to run their course.

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