IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Salim Ahmed Hamdan,	)	
	)	
Petitioner	)	
	)	
v.	)	**Civil Action No. 04-CV-1519 (JR)**
	)	
Donald Rumsfeld,	)	**Respondents' Reply Memorandum to**
Secretary of Defense, *et al.*,	)	**Opposition to Cross-Motion to Dismiss**
	)	
Respondents	)	
	)	

INTRODUCTION

Since the founding of this Nation, military commissions have been employed by the Commander in Chief during wartime to try violations of the laws of war. More than 50 years ago, the Supreme Court rejected a slew of challenges to that historic practice, establishing beyond any doubt its constitutional validity. Despite the fact that President Bush relied on the very laws that *Ex parte Quirin*, 317 U.S. 1 (1942), held confirmed the constitutionality of military commissions, Hamdan maintains there is an urgent need for this Court to intercede in the ongoing military proceedings. The 70 pages he spends on that effort, however, only serve to highlight the constitutionally firm ground on which the President's military order rests and provide no basis for the extraordinary relief he requests. This Court should accordingly either decline to address Hamdan's claims until the commission proceedings are completed, or it should dismiss his meritless claims outright.[1]

[1] However the Court resolves Hamdan's legal claims, it should dismiss all respondents except for Secretary Rumsfeld. *See Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2718 n.9 (2004); Sept. 29, 2004 Mem. Op. and Order in *Gherebi v. Bush*, No. 04-CV-1164, at 7-8. Indeed, the President is plainly not a proper respondent. It is long settled that a court of the United States "'has no

I. THE COURT SHOULD ABSTAIN UNTIL THE COMMISSION'S PROCEEDINGS ARE COMPLETED.

Hamdan's contention that this Court must resolve his petition now rests primarily on three grounds: (1) the military abstention doctrine of *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), does not apply here because Hamdan, who alleges that he is a civilian, is challenging the commission's authority to try him at all, Opp. 4-6, 8, 12-14; (2) *Quirin* "conclusively establishes" that abstention is inappropriate, Opp. 2-4; and (3) Hamdan need not exhaust his military remedies because doing so would "occasion undue prejudice to subsequent assertion" of his habeas claims in this Court, Opp. 10-11, 15-16, and would prove "futile" in any case, Opp. 2-3, 9-12, 14. His reasoning fails at every turn.

A. *Councilman* Dictates Abstention.

The fact that Hamdan is challenging the commission's jurisdiction is not a basis for rejecting abstention. The underlying issue in *Councilman* itself was whether a court-martial had jurisdiction to try a serviceman for marijuana possession on grounds that the offense was "service-connected." 420 U.S. at 739-744. The Supreme Court concluded that abstention was appropriate notwithstanding the serviceman's argument that if the court-martial were permitted to decide its own jurisdiction and proceed on the charges against him, he would "suffer great and irreparable damage." *Id*. at 742, 754. The Court distinguished *Reid* v. *Covert*, 354 U.S. 1 (1957), and *United States ex rel. Toth* v. *Quarles*,

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jurisdiction . . . to enjoin the President in the performance of his official duties'" or otherwise to compel the President perform any official act. *Franklin* v. *Massachusetts*, 505 U.S. 788, 803 (1992) (plurality opinion) (quoting *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475, 501 (1886)); 505 U.S. at 825 (Scalia, J., concurring in part and concurring in the judgment); *al-Marri v. Rumsfeld*, 360 F.3d 707, 708 (7th Cir. 2004) ("Naming the President as a respondent [to a habeas petition brought by an alien detainee] was not only unavailing but also improper" because "[s]uits contesting actions of the executive branch should be brought against the President's subordinates"), *cert. denied,* ___ U.S. ___, 2004 WL 817139 (Oct. 4, 2004).

350 U.S. 11 (1955)—cases Hamdan cites to support immediate resolution of his petition, *e.g.*, Opp. 12—because in those cases the habeas petitioners were *undisputed* civilians claiming that their status as such precluded Congress from subjecting them to courts-martial. *Reid*, 354 U.S. at 3; *Toth*, 350 U.S. at 13.

The D.C. Circuit's decision in *New* v. *Cohen*, 129 F.3d 639 (D.C. Cir. 1997), makes clear that Hamdan's case is governed by *Councilman*, notwithstanding his contention that he is a civilian not properly subject to the commission's jurisdiction. In *New*, a medic serving in the armed forces was charged to appear before a court-martial for failing to obey a direct order. 129 F.3d at 640. He filed a habeas petition in the district court, arguing that the military had no jurisdiction over him because he had effectively become a civilian. *Id*. at 640-641, 645-646. The court of appeals affirmed the district court's dismissal of the petition based on *Councilman*. 129 F.3d at 642-647. While citing *Reid* and *Toth* for the proposition that "a person need not exhaust remedies in a military tribunal if the military court has no jurisdiction over him," the court observed that "[i]n the cases embracing this exception [to *Councilman*], it has been *undisputed* that the persons subject to the court-martials either never had been, or no longer were, in the military." *Id*. at 644 (emphasis added). Because the medic's civilian status *was* disputed—and because "*Councilman* . . . made clear that military courts are capable of, and indeed may have superior expertise in, considering challenges to their jurisdiction"—the court required him to "argue [jurisdiction] to the military authorities reviewing his case." *Id*. at 645. And so should Hamdan be required to present his jurisdictional challenge to the military commission: his civilian status is disputed,[2] and he cannot

[2] A Combatant Status Review Tribunal conducted a hearing on October 3, 2004, regarding Hamdan's continuing status as an enemy combatant. A final determination is pending.

colorably contend that the commission lacks the wherewithal to assess the facts relevant to whether he is a civilian or an unlawful belligerent properly subject to a military trial. *Cf. Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648-2651 (plurality opinion) (suggesting that military tribunal can determine whether citizen-detainee is an enemy combatant).[3]

Hamdan seeks to distinguish *Councilman*—and, by implication, *New*—on grounds that those cases involved challenges to the jurisdiction of a court-martial, not a military commission. Opp. 6. But any differences between those cases and this one only operate to Hamdan's detriment. First, unlike the courts-martial at issue in *Councilman* and *New*, the commission established by the Military Order is convened during a time of war, pursuant to the President's finding that such commissions are "necessary" for "the effective conduct of military operations and prevention of terrorist attacks." Military Order § 1(e). If anything, deference to executive judgment and ongoing military proceedings is even more appropriate here than in *Councilman*. *Cf. Hamdi*, 124 S. Ct. at 2649 (plurality opinion) ("[E]xigencies of the circumstances may demand that . . . enemy combatant proceedings [for citizen-detainees] be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."); *Ludecke* v. *Watkins*, 335 U.S. 160, 170 (1948). Second, the petitioners challenging military jurisdiction in *Councilman* and *New* were United States citizens, unlike Hamdan, an alien with no voluntary ties to the United States and charged with violating the laws of war. *See Duncan v. Kahanamoku*, 327 U.S. 304, 313-314 (1946) (holding that

[3] Hamdan's contention that the commission's expertise "[does] not extend to the consideration of [his] constitutional claims," Opp. 5 (quotation omitted), misses the point that the commission possesses "singularly relevant" expertise concerning the law of war and thus concerning its jurisdiction over Hamdan. *Councilman*, 420 U.S. at 760. Its application of that expertise to the specific facts developed during Hamdan's trial will be "indispensable to inform any eventual review in Art. III courts." *Id*.

civilians in Hawaii during World War II could not be tried by military tribunals, 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") (emphasis added). The Supreme Court has emphatically "h[e]ld that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States." *Johnson* v. *Eisentrager*, 339 U.S. 763, 785 (1950).[4] Certainly, then, interrupting military proceedings is no more justifiable here than in *Councilman* and *New*, where *citizen*-servicemen had no access to federal courts pending their courts-martial.

B. *Quirin* Does Not Preclude Abstention.

Hamdan can point to nothing in *Quirin* that requires a departure from *Councilman*, which was decided more than 30 years later. Although he says that "*Councilman* was built on exhaustion cases decided at the time of *Quirin*," Opp. 4 (citing *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943)[5]; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Fenner* v. *Boykin*, 271 U.S. 240 (1926); *Ex parte Royall*, 117 U.S. 241 (1886)), the *Quirin* Court did not apply, discuss, or even so much as cite any of them. That is not surprising, given that those cases had nothing to do with military proceedings and had never been extended to the military context. Nor did the government

[4] This aspect of *Eisentrager*, which discusses the absence of constitutional protections for aliens abroad, remains good law. Unlike the statutory habeas holding, which the Court in *Rasul* found undermined by the Court's earlier holding in *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973), the Court has repeatedly and recently reaffirmed *Eisentrager*'s ruling on the constitutional question. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269, 273 (1990).

[5] *Douglas* was decided over nine months *after Quirin*.

in *Quirin* ask that they be so extended. The government did not cite *Myers*, *Fenner*, or *Royall* in its answer to the habeas corpus petitions, *see* 39 Philip B. Kurland & Gerhard Casper, *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 379-395 (1975), in its brief on the merits, *see id*. at 397-494, or at oral argument before the Court, *see id*. at 495-666. Nor, as far as Respondents can tell, did the government request that the Supreme Court stay its hand pending completion of the military proceedings, pursuant to which the defendants faced the prospect of imminent execution. The government did state in its answer that the Supreme Court "is without jurisdiction to interfere with the due and orderly proceedings of the Military Commission . . . in time of war," *id*. at 393-394, but that contention was part and parcel of the later-withdrawn argument that the federal courts lacked *any* jurisdiction whatsoever—before or after completion of the military proceedings—in light of President Roosevelt's Proclamation "Denying Certain Enemies Access to the Courts of the United States," *id*. at 403; *see id.* at 384, 392-395, 403-405, 498.

The constitutionality of military commissions is well established today, *see* Cross-Motion To Dismiss 13, and nothing in *Quirin* suggests that *Councilman*'s military abstention doctrine does not apply to Hamdan's challenges.

C. Hamdan Has Not Established Irreparable Harm.

Hamdan's contention that exhausting available military remedies will prove "futile" because the commission has "pre-judge[d]" its own constitutionality, Opp. 8, 11, is an insufficient basis for abstention under *Councilman* and neglects the obvious possibility that the commission will ultimately acquit him.[6] Under *Councilman*, that possibility provides a sufficient basis for abstention:

[6] Hamdan incorrectly contends (Opp. 9 n.11) that the regulations governing the commission review process do not authorize the review board, the Secretary of Defense, or the President to consider the type of legal claims he raises here. See 32 C.F.R. § 9.6(h)(4) ("The Review Panel shall

> when the District Court intervened [in the court-martial proceedings], there was no question that Councilman would be tried. But whether he would be convicted was a matter entirely of conjecture. And even if one supposed that Councilman's service-connection contention almost certainly would be rejected on any eventual military review, there was no reason to believe that his possible conviction inevitably would be affirmed.

Councilman, 420 U.S. at 754 (quotation omitted) (alteration added). As an alien enemy combatant charged with violating the laws of war, Hamdan has no greater right than an American serviceman to demand pretrial federal review of his claims.[7]

II. HAMDAN'S DETENTION DOES NOT VIOLATE 10 U.S.C. § 810.

As we pointed out previously, *see* Cross-Motion to Dismiss 26 n.15, Hamdan has no ground on which to raise a speedy trial claim based on the nature or length of his detention, because he is an enemy combatant who is subject to detention for the duration of the ongoing armed conflict, and, as such, he has no legal entitlement to a particular form of detention (e.g., to stay at Camp Delta), even assuming he were not subject to trial by military commission.

In any event, Hamdan's argument (Opp. 20-22) that the UCMJ's court-martial provisions, including Article 10, apply to his military commission, rests on a fundamental misunderstanding of

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review the record of trial and, in its discretion, any written submissions from the Prosecution and the Defense[.]"); id. §9.6(h)(5) (requiring Secretary of Defense to review "recommendation of the Review Panel"); *id*. § 9.6(h)(6) (authorizing the President to review "all recommendations" and to make "final decision").

[7] Contrary to Hamdan's suggestion (Opp. 15), there is no evidence in the record that he has suffered psychological harm. Hamdan complains that, to the extent his mental-harm allegations are "speculative," it is only because the government has not allowed him to call down to Guantanamo Bay his own psychiatrist. Hamdan has only himself to blame for the absence of evidence of his mental condition. The psychiatric staff at Guantanamo Bay visits him once a week, and a psychiatrist or clinical psychologist visits him monthly. Since June, however, Hamdan has been uncooperative. Hamdan's claim that a military psychiatrist could testify against him is incorrect, unless Hamdan places his mental condition at issue. *See* Appointing Authority Regulation No. 1 § 4(B) (setting out protection against disclosure of communications between a psychotherapist and the accused), available at http:///www.defenselink.mil/news/Sep2004/d20040921reg1.

military jurisdiction. The jurisdiction of and procedures governing courts-martial are detailed at length in the UCMJ. By contrast, the jurisdiction of and procedures governing military commissions—which have tried *unlawful belligerents* since the earliest days of the Republic—predated the UCMJ, which did not purport to provide an invariable set of procedures for military commissions. Article 21 of the UCMJ, which renewed Article 15 of the Articles of War, specifically preserved the military commissions' common-law jurisdiction and procedures, as the Supreme Court recognized in *Madsen* v. *Kinsella*, 343 U.S. 341, 346-348, 351 n.17 (1952), a case decided after the UCMJ's enactment.

Without mentioning *Madsen*, Hamdan argues that if Congress "wanted to carve commissions out of the reach" of the UCMJ's court-martial procedures, including 10 U.S.C. § 810, it would have done so clearly and specifically. Opp. 21. But that is *precisely* what Congress did in enacting Articles 21 and 36. *See* 10 U.S.C. §§ 821 and 836 (allowing the President to establish rules for military commissions). In any event, Hamdan's clear-statement argument gets matters exactly backwards. Since the Founding, "the[ ] procedure" for military commissions has not been "prescribed by statute"; rather, "[i]t has been adapted in each instance to the need that called it forth." *Madsen*, 343 U.S. at 346-348; *Yamashita v. Styer*, 327 U.S. 1, 19 (1946) (Congress "gave sanction . . . to any use of the military commission contemplated by the common law of war."). If Congress intended to *depart* from that longstanding practice by subjecting the commissions to a rigid and uniform set of procedures—tying the President's hands during times of war in the process—it surely would have done so more plainly. *Madsen*, 343 U.S. at 346 n.9; *see also Cohen* v. *De la Cruz*, 523

U.S. 213, 221 (1998) (Supreme Court "will not read [a statute] to erode past . . . practice absent a clear indication that Congress intended such a departure" (quotation omitted)).[8]

Even assuming Article 10 applies, Hamdan has not remotely made out a speedy trial violation. Hamdan contends that Article 10's "clock begins to run the moment a defendant is placed in confinement," Opp. 23, and thus calculates that he has been the victim of over "two and a half years" of pretrial "foot-dragging," Opp. 24-25 & n.32. The very case he cites for support refutes his calculation. In *United States* v. *Reed*, 41 M.J. 449 (C.A.A.F. 1995), the United States Court of Appeals for the Armed Forces made clear, in rejecting a speedy trial claim, that Article 10 is "triggered either by *pretrial* restraint or preferral of charges." *Id*. at 451 (emphasis added); *see also United States* v. *Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003) (Article 10 triggered "when a servicemember is placed in *pretrial* confinement" (emphasis added)). Relying in part on due-process principles enunciated in *United States* v. *Lovasco*, 431 U.S. 783 (1977), the *Reed* court pointed out as well that "the prosecution is not required to file charges as soon as probable cause exists." 41 M.J. at 452; *see Lovasco*, 431 U.S. at 791.

Under the foregoing precepts, Hamdan cannot establish that Respondents have failed to proceed with "reasonable diligence" in bringing him to trial. *Cooper*, 58 M.J. at 58. By his own admission, it was not until December 2003 that he was "placed in Camp Echo" "in preparation for

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[8] Hamdan argues (Opp. 22) that, even apart from the UCMJ itself, Army Regulation (AR) 190-8, § 1-5(a)(3), "require[s] consistency with the UCMJ in all military proceedings." He is mistaken; that provision only applies to "enemy prisoners of war," "retained personnel," and "civilian internees." *Id.* It does not apply to "other detainees" like Hamdan, an enemy combatant who does not qualify for prisoner of war protection. *Id*.; *see* Cross-Motion to Dismiss 35-36 (explaining why Hamdan is not a prisoner of war). Moreover, as previously explained, *see id*. at 26, not applying Article 10's speedy-trial clock to military commissions is not inconsistent with the UCMJ. In any event, the provision is not legally enforceable in this Court. *See infra* pp. 14-15.

trial by military commission." Pet. 2. Hamdan, who has been detained as an enemy combatant since his capture, has thus been held in pretrial confinement for (at most) a little over nine months. The military courts have denied speedy trial claims where the pretrial confinement period was substantially longer, *see*, *e.g.*, *United States* v. *Goode*, 54 M.J. 836, 838-840 (N-M. Ct. Crim. App. 2001) (337-day pretrial confinement did not violate Article 10); *cf*. *United States* v. *Reeves*, 34 M.J. 1261, 1261-1263 (N-M. Ct. M.R. 1992) (per curiam) (462-day delay in preferring charges did not violate due process), and there is no reason for a different result here.

Indeed, a far longer period is justified in this instance; Respondents have undertaken painstaking intelligence-gathering and interrogation with respect to hundreds of enemy combatants and suspected members of al Qaeda, a highly-disciplined organization whose agents span the globe and operate in total secrecy. *See generally* Al-Qaida Training Manual ("Manchester Manual"), *available at* <http://www.usdoj.gov/ag/trainingmanual.htm>. It should thus come as no surprise that the Executive has required more time in this case to satisfy itself of provable guilt, *cf*. *Lovasco*, 431 U.S. at 791, than it needs in a garden variety court-martial involving forcible sodomy, *Goode*, 54 M.J. at 838; adultery, *United States* v. *Hatfield*, 44 M.J. 22, 23 (C.A.A.F. 1996); bigamy, *id.*; rape, *Reed*, 41 M.J. at 450; or molestation, *Reeves*, 34 M.J. at 1261. *See Barker* v. *Wingo*, 407 U.S. 514, 531 (1972); *Cooper*, 58 M.J. at 61.[9]

III. HAMDAN CANNOT INVOKE THE GENEVA CONVENTIONS OR ANALOGOUS DOMESTIC REGULATIONS.

[9] Hamdan makes the baseless claim (Opp. 25) that he has been prejudiced by his alleged inability to conduct an investigation. Counsel for Hamdan has visited him on a regular basis throughout the year and has spent substantial time abroad investigating the case.

Hamdan's invocation of the Geneva Conventions is meritless for at least three reasons. First, the Geneva Conventions do not apply to the armed conflict with al Qaeda, a terrorist organization with no treaty relationships with the United States. *See* Cross-Motion to Dismiss 33-34. The President has made that very determination, and it is entitled to deference by this Court. Second, the Geneva Conventions do not create rights enforceable in court by private parties. *See id*. 29-33. Third, even if they did, Hamdan has no standing to enforce them, because, as an enemy combatant affiliated with al Qaeda, he could not qualify for the protection afforded prisoners of war. *See Padilla ex rel. Newman* v. *Bush*, 233 F. Supp. 2d 564, 593 (S.D.N.Y. 2004) (subsequent history omitted).

A. The Geneva Conventions Do Not Apply Here.

Hamdan is an enemy combatant who was captured during the ongoing armed conflict with al Qaeda. Hamdan contends (Opp. 35-36) that the Conventions apply to him because he was captured as part of the campaign against the Taliban in Afghanistan, portions of which our forces "occupied." *See* GPW art. 2(2). The United States is not, and has never been, an occupying power in Afghanistan, because it has never administered or purported to administer the powers of government over any portion of the country. *See* Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention (IV), Oct. 18, 1907, art. 42(1), 36 Stat. 2277, 1 Bevans 631; Department of Defense News Briefing, Tuesday, Oct. 9, 2001 (statement of Secretary of Defense Donald H. Rumsfeld) ("The United States of America, and certainly the United States military, has no aspiration to occupy or maintain any real estate in [Afghanistan].") The Geneva Conventions therefore do not apply to the armed conflict with al Qaeda, and Hamdan cannot claim their protections.

B. Neither the GPW nor AR 190-8 Creates Judicially Enforceable Rights.

Hamdan repeatedly emphasizes that treaty "[o]bligations not to act, or to act only subject to limitations, are generally self-executing." *E.g.*, Opp. 32 (quoting Restatement (Third) of Foreign Relations § 111, Reporters' Note 5). Relatedly, he claims that "[n]one of the conditions recognized as characteristic of a non-self-executing provision exists with respect to Article 103 or Article 5," Opp. 34. In doing so, Hamdan conflates the concepts of whether a treaty binds the political branches upon ratification without further legislation and the distinct – and relevant – question whether a treaty gives rise to judicially enforceable rights. It is entirely beside the point whether implementing legislation is or is not required to bind the *political branches* to the diplomatic promises in the GPW. The relevant question is whether the treaty creates judicially enforceable rights. *See Comm. of U.S. Citizens Living in Nicaragua* v. *Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988) (the "question whether a particular treaty requires implementing legislation is different from the international law question of whether [the] treaty aims at the immediate creation of rights and duties of private individuals which are enforceable" in court (quotation omitted)); Restatement (Third) of Foreign Relations §111, cmt. h ("Whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies."). The answer to that question, under settled interpretive principles and relevant case law, is clearly, "no."

"In determining whether a treaty is self-executing in the sense of its creating private enforcement rights," the D.C. Circuit "look[s] to the intent of the signatory parties as manifested by the language of the instrument." *Reagan*, 859 F.2d at 937 (quoting *Diggs* v. *Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976)). Squarely addressing the language of the GPW, including Article 5 specifically, the Fourth Circuit recently held that the treaty "evinces no . . . intent" "to provide a

private right of action." *Hamdi* v. *Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003) ("Certainly there is no explicit provision for enforcement by any form of private petition. And what discussion there is of enforcement focuses entirely on the vindication by diplomatic means of treaty rights inhering in sovereign nations."), *vacated on other grounds*, 124 S. Ct. 2633 (2004); *see*, *e.g.*, GPW Arts. 11, 132. Even if *Hamdi* retains no precedential effect because of its vacatur in the Supreme Court on other grounds, Hamdan does not explain why this Court should deny credence to the Fourth Circuit's persuasive textual analysis.

Indeed, courts in this jurisdiction have special reason to follow *Hamdi*'s lead. In *Holmes* v. *Laird*, 459 F.2d 1211 (D.C. Cir. 1972), the D.C. Circuit reiterated the Supreme Court's observation in *Eisentrager* that

> [i]t is . . . the obvious scheme of the [Geneva Convention] that responsibility for observance and enforcement of [its protections] is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.

339 U.S. at 789 n.14; *see Holmes*, 459 F.2d at 1222 (recognizing that "the corrective machinery specified in the [1929 Geneva Convention] itself is nonjudicial"). Although Hamdan believes that such reliance on *Eisentrager* is "misplaced"—because that case "involve[d] the GPW's predecessor, the 1929 Convention," Opp. 35—two D.C. Circuit judges have explicitly rejected that notion and none has endorsed it. *See Al-Odah* v. *United States*, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J., concurring) ("[T]he second Geneva Convention, like the first, *see Eisentrager*, 339 U.S. at 789 n.14, is not self-executing for the reasons stated by . . . the Fourth Circuit in *Hamdi*[.]"), *reversed and remanded on other grounds sub nom.*, *Rasul* v. *Bush*, 124 S. Ct. 2686 (2004); *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 808-809 (D.C. Cir. 1984) (Bork, J., concurring); *see also*

Huynh Thi Anh v. *Levi*, 586 F.2d 625, 629 (6th Cir. 1978).[10] Hamdan cannot point to any language in the GPW or in the legislative history to support his claim that parties to that Convention intended a dramatic shift from the diplomatic approach reflected in the 1929 Convention to a judicial enforcement mechanism.

Nor does anything in the language or structure of AR 190-8 suggest that it creates judicially enforceable rights. To the contrary, the regulation implements the GPW with respect to the Executive Branch only. As the preliminary statement to the regulation makes clear, AR 190-8 "implements Department Of Defense Directive 2310.1 and establishes *policies* and *planning guidance* for the treatment, care, accountability, legal status, and administrative procedures for Enemy Prisoners of War, Civilian Internees, Retained Persons, and Other Detainees." AR 190-8, preliminary statement (emphases added); *id*., § 1-1(a). The Executive Branch promulgated AR 190-8 in its discretion, without statutory direction, in order to ensure internal compliance with the Geneva Conventions. Because it is (at most) co-extensive with the Conventions, *see* AR 190-8, § 1-1(b)(4) ("In the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence."), it cannot be understood to open the door to lawsuits not authorized by the Conventions themselves. To conclude otherwise would inject the Court into matters traditionally reserved to the political branches — foreign policy and national

[10] For the same reason, Hamdan cannot colorably claim the protections of the sundry treaties that *amici* discuss. *E.g.*, Amicus Br. of 271 Parliamentarians (invoking, *inter alia*, 1966 International Covenant on Civil and Political Rights (ICCPR)); Amicus Br. of Louise Doswald-Beck *et al*. (same); *see Sosa* v. *Alvarez-Machain*, 124 S. Ct. 2739, 2767 (2004) (ICCPR was ratified "on the express understanding that it was not self-executing and so did not create obligations enforceable in the federal courts"). In any event, because Hamdan himself does not invoke the ICCPR or the other treaties that *amici* cite, this Court is not in a position to consider them. *See Eldred* v. *Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001) (*amici* are "constrained by the rule that [they] generally cannot expand the scope" of a case "to implicate issues that have not been presented by the parties").

security. *See Dep't of the Navy* v. *Egan*, 484 U.S. 518, 529 (1988); *Haig* v. *Agee*, 453 U.S. 280, 292 (1981); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952). Given the Executive's broad constitutional prerogative with respect to military policy, particularly during a time of war, the Court should decline Hamdan's invitation to intervene based on the thin reed of AR 190-8. Opp. 27-28.[11]

C. Even if the GPW or AR 190-8 Created Judicially Enforceable Rights, Neither Would Afford Hamdan Release From Pretrial Confinement.

None of the GPW provisions Hamdan invokes can be stretched to reach his confinement.

a. Article 103 mandates that a "prisoner of war" shall not be held in such confinement for over three months. Hamdan argues that the charges against him relate to the same kind of "support activity" (Opp. 36) provided by "war correspondents, supply contractors, [or] members of labour units . . . responsible for the welfare of the armed forces," GPW art. 4(A)(4), and that the charges do not support a conclusion that he "ever engaged in hostilities against anyone." Opp. 37.

The plain language of the Charge conclusively refute his art. 4(A)(4) claim. A person who delivers weapons and ammunition on behalf of enemy forces, *see* Charge ¶ 13(b)(1), (2), serves as a personal bodyguard for their leader, *id*., ¶ 13(a), (c), and receives training from those forces in the use of weapons, *id*. ¶ 13(d), cannot be said merely to "accompany" armed forces, *id*. ¶ 13(b)(4), (d).

[11] It bears noting that Hamdan does not rely on the Administrative Procedure Act (APA) in stating his AR 190-8 claim. Mem. in Support 34-35; Opp. 27-28. Even if he did, however, it would not afford him relief. AR 190-8 embodies the foreign policy of the United States with respect to international treaties, the implementation of which has historically been left to the sole discretion of the Executive. *See United States* v. *Curtiss-Wright Export Corp*., 299 U.S. 304, 320 (1936) (discussing scope of "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress"). Accordingly, the decision whether and to what extent the regulation applies is a matter "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), one beyond the reach of judicial inquiry. *Cf*. *Haig*, 453 U.S. at 292; *Harisiades*, 342 U.S. at 589. *See also* 5 U.S.C. § 701(b)(1)(G) (relating to military authority exercised in the field in wartime).

Moreover, Hamdan is charged with engaging in these actions with the knowledge that his associates "were involved in the attacks on the U.S. Embassies in Kenya and Tanzania in August 1998, the attack on the USS COLE in October 2000, and the attacks on the United States on September 11, 2001." *Id*. ¶ 13(a). Knowingly contributing to the infliction of harm on a common enemy, the United States, by transporting weapons, protecting the leader of the attacks, and engaging actively in weapons training is the very *definition* of hostile activity. Such conduct cannot be considered analogous to the activity of a "war correspondent" or the like.

b. Nor does Article 5 afford Hamdan relief from pretrial confinement. Contrary to his contention that the Article "provide[s] that all detained personnel are to be afforded the protections of the GPW whenever they *assert* that doubt exists as to a detainee's status," Opp. 37 (emphasis altered), the provision demands more than a mere subjective assertion: "Should any doubt arise as to whether persons, having committed a belligerent act, . . . belong to any of the categories enumerated in Article 4, such persons shall enjoy [GPW] protection[.]" GPW Art. 5. Although no such doubt ever arose under Article 5, Hamdan has received a hearing before a Combatant Status Review Tribunal.

Hamdan turns in the alternative to AR 190-8, § 1-6, in hopes of succeeding on the same grounds: *i.e.*, that he is entitled to treatment as a prisoner of war because he *says* so. Opp. 28, 37. Even if Section 1-6 were enforceable in this Court—and it is not, *see supra* pp. 14-15—it does not aid him:

> *a*. In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the U.S. Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

> *b*. A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

AR 190-8, § 1-6. Although Hamdan tries to conflate these two subsections, they provide for different procedures. Just like Article 5, subsection (a) states that "if any doubt arises" about Hamdan's status, he is entitled to the GPW's protection pending a status determination. Because no doubt ever arose regarding the status of al Qaeda detainees, he is not entitled to protection. Subsection (b) does not suggest to the contrary, because it says nothing about when GPW protection is or is not appropriate. While it arguably requires a tribunal to determine Hamdan's status—because he has "assert[ed] that he . . . is entitled to treatment as a prisoner of war"—it does not say when such a tribunal must be convened or that Hamdan must be treated as a prisoner of war in the meantime. Hamdan's contrary interpretation cannot withstand scrutiny and should be rejected.[12]

IV. HAMDAN'S EQUAL PROTECTION CLAIMS ARE MERITLESS.

Hamdan's equal protection claims fail *ab initio* under *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) (*Verdugo*), which makes clear that non-resident aliens "receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *Id*. at 271. Significantly, Hamdan, who has not developed such contacts, does not attempt to distinguish or explain away this principle; instead, he pretends that it was enunciated by the "plurality" of a "fragmented" Court, Opp. 40-41 nn.52-53; that "Justice

[12] This is especially so given that the regulation is to be construed consistently with the GPW itself, which, absent doubt, does not provide protection pending a status determination. S*ee* AR 190-8, § 1-1(b)(4) ("In the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence.").

Kennedy's concurrence . . . states the *Verdugo* holding," Opp. 40; and that "no single rationale explaining the result enjoy[ed] the assent of five Justices," Opp. 40 n.52 (quotation omitted). He is badly mistaken; Chief Justice Rehnquist "delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined." *Verdugo*, 494 U.S. at 261. The Court was not "fragmented" at all, and the rationale described above "enjoy[ed] the assent of five Justices." Justice Kennedy delivered a concurring opinion, but it was not an opinion concurring merely in the judgment or in the result, and he went out of his way to clarify that his views did not "depart . . . from the opinion of the Court, *which I join*." *Id*. at 275 (Kennedy, J., concurring) (emphasis added).

In rejecting *both* the non-resident alien's equal-protection and Fourth Amendment claims, the Court relied on *Eisentrager* for its "emphatic" rejection of the notion that Fifth Amendment protections extend to non-resident aliens like Hamdan, who engaged in hostilities against the United States on behalf of al Qaeda. *Verdugo*, 494 U.S. at 269, 273; *see Eisentrager*, 339 U.S. at 785 ("We hold that the Constitution does not confer [constitutional rights] upon an alien enemy engaged in the hostile service of a government at war with the United States."). Nothing in Justice Kennedy's concurring opinion can be read to suggest any disagreement with this controlling aspect of the *Verdugo* majority decision.

Contrary to Hamdan's contention, Opp. 39, *Eisentrager* and *Verdugo* stand unaffected by the Supreme Court's recent decision in *Rasul* v. *Bush*, 124 S. Ct. 2686 (2004). In *Eisentrager*, the Court denied the habeas petitions of several German nationals who had been captured in China by United States forces during the Second World War, convicted by a military commission for violating the laws of war, and imprisoned in Germany under control of the United States Army. 339 U.S. at 765-766. The Court rejected the petitioners' attempt to invoke a "constitutional right" to bring their

petitions, reasoning that "at no relevant time were [they] within any territory over which the United States is sovereign." 339 U.S. at 778; *see Verdugo*, 494 U.S. at 269 (*Eisentrager* Court "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States"). In *Rasul*, the Court held as a *statutory* matter under 28 U.S.C. § 2241 that Congress granted federal district courts the authority to entertain habeas petitions filed by non-resident aliens detained at the Guantanamo Bay Naval Base, 124 S. Ct. at 2692-2698, even though "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]." *Id*. at 2690 (alteration in original). It did not purport to say anything about whether detainees at Guantanamo Bay are entitled to substantive *constitutional* protections notwithstanding Cuba's ultimate sovereignty. *Id*. at 2699.[13]

Nor can *Rasul*'s footnote 15 be construed to overrule *Eisentrager* or *Verdugo sub silentio* on the broader constitutional question.[14] *See Rasul*, 124 S. Ct. at 2698 n.15 ("Petitioners' allegations . . . unquestionably describe 'custody in violation of the Constitution or laws or treaties of the

[13] The Court granted certiorari "limited to the following Question: Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba." *Rasul*, 124 S. Ct. at 534.

[14] Hamdan misleadingly cites the dissenting opinion in *Rasul* for the proposition that "it is unclear whether *Eisentrager* remains good law." Opp. 42 n.54. Although Justice Scalia did argue in dissent that *Rasul* "contradict[ed]" *Eisentrager*, 124 S. Ct. at 2701 (Scalia, J., dissenting), he did so only with respect to "*Eisentrager*'s directly-on-point statutory holding." *Id*. at 2703; *see id*. at 2706 ("Today's opinion . . . extends the habeas statute, for the first time, to aliens held beyond the sovereign territory of the United States and beyond the territorial jurisdiction of its courts."). He made this observation in the context of criticizing the majority for not directly confronting whether *Eisentrager*'s statutory holding should be overruled, but instead suggesting that a 1973 decision, *Braden*, undermined the predicate for *Eisentrager*'s statutory holding. *Braden* obviously has no effect on *Eisentrager*'s constitutional holding, as underscored by the Court's repeated post-*Braden* invocation of the constitutional rule of *Eisentrager*. *See, e.g.*, discussion of *Verdugo* and *Zadvydas*, *supra*.

United States.' ")). First, because the Court did not grant certiorari on the constitutional issue, the parties did not brief it, let alone address whether the Court should overturn *Eisentrager*'s constitutional holding; the footnote is therefore best read in the context of the paragraph in which it is embedded, a paragraph book-ended by sentences unmistakably limiting consideration to statutory jurisdiction. *Rasul*, 124 S. Ct. at 2698 ("In the end, the answer to the question presented is clear. . . . We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.").[15] More fundamentally, in light of the Court's repeated and recent invocation of *Eisentrager*'s constitutional holding, it is inconceivable that the Court would jettison that well-entrenched understanding in a single oblique footnote.[16] *See Verdugo*, 494 U.S. at 271; *Zadvydas*, 533 U.S. at 693; *People's Mojahedin Org. of Iran* v. *Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) ("'[A]liens receive constitutional protections [only] when they have come within the territory of the United States *and* developed substantial connections with this country.' " (quoting *Verdugo*, 494 U.S. at 271) (alteration in original) (emphasis added)); *see also Jifry* v. *FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) ("The Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections."). Hamdan has not developed such ties by virtue of his involuntary confinement at Guantanamo Bay, nor could he,

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[15] Supreme Court precedent specifically counsels against conflating jurisdiction and the merits, making clear that allegations determined to meet jurisdictional prerequisites do not necessarily state meritorious claims. *See Feres v. United States*, 340 U.S. 135 (1950).

[16] The footnote did not even specify whether it was a claim under the Constitution, statutes, or treaties of the United States that satisfied 28 U.S.C. 2241(c)(3)'s jurisdictional threshold. In any event, Hamdan's reliance (Opp. 39) on the *Insular Cases* referenced in the footnote is misplaced. Those decisions extended "fundamental constitutional rights" to "*inhabitants* of those territories," *Verdugo*, 494 U.S. at 268 (emphasis added), not to non-resident aliens.

because "this sort of presence—lawful but involuntary—is not of the sort to indicate any substantial connection with our country." 494 U.S. at 271.

For the foregoing reasons, and for reasons stated elsewhere, *see* Cross-Motion to Dismiss 38-44, Hamdan's equal protection claims fail.

V. THE MILITARY COMMISSION THAT WILL TRY HAMDAN DOES NOT VIOLATE THE SEPARATION OF POWERS.

The Supreme Court in *Quirin* held in no uncertain terms that by enacting Article 15 of the Laws of War, a provision which was renewed in materially identical form by the UCMJ and is now codified at 10 U.S.C. § 821, Congress

> explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. 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.

Quirin, 317 U.S. at 28. Hamdan attempts to sidestep the plain import of *Quirin* by suggesting (*inter alia*) that the offense with which he is charged—conspiring to attack civilians and civilian objects and to commit acts of terrorism—was not "clearly designated by Congress as triable by commission," Opp. 49, 63-64, and does not "state a violation of the laws of war," Opp. 64-68. He is wrong on both counts.[17]

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[17] The absence of a formal declaration of war (Opp. 47-48) does not diminish *Quirin*'s controlling force. Recognizing that the September 11 attacks amounted to an act of war, Congress authorized the President to use all necessary and appropriate force against al Qaeda and its supporters. The plurality in *Hamdi* held that that authorization triggered the exercise of the President's war powers. 124 S. Ct. at 2640. Moreover, none of the UCMJ provisions that recognize the President's authority to convene military commissions and on which the President expressly relied requires a formal declaration of war.

In arguing that the charge against him is "in no way tethered to [a] congressionally defined one[ ]," Opp. 49, Hamdan resists what *Quirin* settled long ago: namely, that 10 U.S.C. § 821 recognizes the scope of military commission jurisdiction by incorporating any common law offense against "the law of war."[18] *Quirin*, 317 U.S. at 28 (Article 15 represented exercise of congressional "authority to *define* and punish offenses against the law of nations" (emphasis added)). Indeed, *Quirin* emphatically rejected the very same contention Hamdan now puts forth:

> It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international [common] law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns. . . . [B]y the reference in the 15th Article of War to 'offenders or offenses that . . . by the law of war may be triable by such military commissions,' Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war . . . .

Nor does the location in which the President has decided to convene the military commissions remove this case from *Quirin*'s ambit. Hamdan contends that a military commission must be "'confined to the locality of actual war,'" Opp. 52 (quoting *Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866)), where a military government may be imposed or martial law declared. That patently was not the case in *Quirin*, where the military commission convened in Washington, D.C., a location distant from an active combat zone. While military commissions authorized to administer law generally (*e.g.*, in order to maintain law and order) can only be convened in a military occupation setting, there is no valid rationale for requiring commissions established solely for the far narrower purpose of prosecuting violations of the laws of war to operate in a war zone. Indeed, *Quirin* plainly did not impose any such requirement. In any event, the war zone in this armed conflict with al Qaeda is global in nature.

[18] Hamdan also ignores that "the specifications of the . . . charge[s]" against him actually do "mirror[ ]" an offense Congress has "clearly designated" for trial by military commission. Opp. 49. UCMJ Article 104 ("Aiding the enemy") provides in pertinent part that "[a]ny person who . . . aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things . . . shall suffer death or such other punishment as a court-martial or *military commission* may direct." 10 U.S.C. § 904 (emphasis added). The "specifications" against Hamdan include the allegation that he "delivered weapons, ammunition or other supplies to al Qa[e]da members and associates" with knowledge of al Qaeda's attacks on the United States. Charge ¶ 13(a), (b)(1).

Id. at 29-30. The only question that remains, then, is whether the offense charged—conspiring, *inter alia*, to attack civilians and civilian objects—describes "an offense against the law of war." *Id*. at 29. There can be no doubt that it does.

In upholding the trial by military commission of the Nazi saboteurs who attempted to destroy certain facilities within the United States, the *Quirin* Court recognized that "[b]y universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations." 317 U.S. at 30. The Court likewise confirmed that "an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property" is an "offender[ ] against the law of war." *Id*. at 31. Under these precepts, al Qaeda's attacks on American civilian targets were obviously law-of-war violations. Hamdan does not contend otherwise; instead, he argues that the law of war "do[es] not recognize a conspiracy offense," Opp. 64, and in any event does not extend to allegedly "low-level" al Qaeda functionaries like himself, Opp. 66.[19]

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[19] Hamdan also complains (Opp. 66) that the charge includes conduct that occurred before the September 11 attacks. Conspiracy is a continuing offense, however, and the charge on its face alleges that Hamdan was a member of the conspiracy until on or about November 24, 2001. *See, e.g.*, Charge § 13(b)(4) (alleging that Hamdan served as a driver in convoy transporting bin Laden after the September 11 attacks). Moreover, the September 11 attacks only confirmed that al Qeada had been waging war on the United States since at least the African Embassy bombings in August 1998. Hamdan further contends (Opp. 67) that the definition of conspiracy is problematic because it permits conviction not only on proof that he joined an unlawful agreement, but alternatively on proof that he "joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission." 32 C.F.R. § 11.6(c)(6)(i)(A). That latter definition borrows from customary international law, see, *e.g.*, cases cited *infra* n.20, and is not "impermissibly vague." To prove the conspiracy, the prosecution must also establish that Hamdan knew the unlawful nature of the agreement or enterprise, that he "joined in it willfully," and that an overt act was committed. 32 C.F.R. § 11.6(c)(6)(i)(B), (C).

Here again, Hamdan cannot escape *Quirin*. The petitioners there were charged with three substantive counts and a fourth that asserted "[c]onspiracy to commit the offenses alleged in charges 1, 2 and 3." 317 U.S. at 23. The petitioners contended that conspiracy "is not triable by military commission." Kurland & Casper, *supra*, at 334. In the Court's July 31, 1942, *per curiam* decision—which was supplemented but not superseded by a full opinion issued on October 29, 1942, *see* 317 U.S. at 1 & nn.3-4—the Court held, *inter alia*, "[t]hat the charge*s* preferred against petitioners on which they are being tried by military commission . . . allege an offense or offenses which the President is authorized to order tried before a military commission." *Id*. at 18 n.* (bound volume) (emphasis added). Whether or not the Court believed one of the first three counts was independently sufficient to sustain the military commission's jurisdiction, *cf*. Opp. 49 (suggesting that "the first charge was pendant to the others"), the Court never questioned that conspiracy to commit a war crime is itself a war crime. *See also Colepaugh* v. *Looney*, 235 F.2d 429, 432 (10th Cir. 1956) (upholding trial by military commission of Nazi saboteur who was convicted, inter alia, of conspiracy, where the "charges and specifications before us clearly state an offense of unlawful belligerency, contrary to the established and judicially recognized law of war"); Charles Howland, *Digest of Opinions of the Judge Advocate General of the Army* 1071 (1912) ("During the Civil War a very great number and variety of offenses against the laws and usages of war . . . were passed upon and punished by military commissions" including "conspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy").[20]

[20] Contrary to Hamdan's belief, Opp. 64-66, several law-of-war sources have prohibited and punished the very sort of conspiracy with which he is charged. For instance, the Convention on the Prevention and Punishment of the Crime of Genocide (GC), Dec. 9, 1948, 78 U.N.T.S. 277, specifically prohibits "[c]onspiracy to commit genocide." GC Art. 3(c). Similarly, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has interpreted Article 7 of the ICTY statute

Just as significant is the precedent that was established at Nuremberg following the Second World War. In a December 1947 "Preface" summarizing the Nuremberg proceedings, Robert Jackson—who represented the United States as Chief Counsel—noted that the law of war as applied there incorporated "the principle of conspiracy by which one who joins a common plan to commit the crime becomes responsible for the acts of any other conspirator in executing the plan." Robert H. Jackson, *Report to the International Conference on Military Tribunals*, Preface, at 4 (1949), *available at* <http://www.yale.edu/lawweb/avalon/imt/jackson/preface.htm>. Hamdan's reliance on the Nuremberg precedent, for the proposition that "international law . . . has emphasized that any conspiracy charges must be against leaders," Opp. 66 & n.93, is therefore incorrect. As Justice Jackson put it, the charter establishing "the principles of the Nuernberg [sic] trial"—which principles were subsequently "given general approval by the General Assembly of the United Nations"—"provide[d] that orders of a superior authority shall not free a defendant from responsibility." Preface, at 4.

CONCLUSION

For the reasons stated above, and for those stated in the Cross-Motion to Dismiss, Respondents respectfully request that Hamdan's habeas petition be denied, the Cross-Motion be granted, and a judgment of dismissal be entered in favor of Respondents.

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to cover "joint criminal enterprise liability" where the defendant (1) is among a "plurality of persons"; (2) shares with them a "common plan" involving the commission of a crime listed in the statute; and (3) participates in the "execution of the . . . plan." *Prosecutor* v. *Krstic*, Case No. IT-98-33-T, at ¶ 611 (ICTY Trial Chamber Aug. 2, 2001); *see Prosecutor* v. *Furundzija*, Case No. IT-95-17/1-A, at ¶ 119 (ICTY Appeals Chamber July 21, 2000) ("There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise." (quotation omitted)).

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