No. 05-184

IN THE
Supreme Court of the United States

SALIM AHMED HAMDAN,
Petitioner,
v.

DONALD RUMSFELD ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Reduced to its essence, the government's argument is that the federal judiciary has no real power to review actions taken by the President in the name of fighting terrorism. The Court should reject that proposition, as it did two years ago in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Rasul v. Bush*, 542 U.S. 466 (2004), and earlier in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and *Ex parte Milligan*, 71 U.S. 2 (1866).[1] Here, the President seeks not merely to detain temporarily but to dispense life imprisonment and death through a judicial system of his own design. Anyone, anytime, may be swept into this system and forced to endure years of waiting before their cases are even heard.

This jerrybuilt tribunal is not, the President claims, constrained by the Constitution (Govt. Br. 43), the statutory rules for courts-martial (*id.* 44), or even the most rudimentary protections of the laws of war (*id.* 48-49). Instead, when we are in "this context" (*id.* 23)—a state of being determined by the President (*id.* 24)—the governing rule is that he alone has the final say. The President's assertion of absolute dominion over human subjects and trial and punishment cannot be reconciled with the constitutional checks vested in Congress by Article I, and in the courts by Article III.[2]

"[T]he Framers harbored a deep distrust of executive military power and military tribunals." *Loving v. United States*, 517 U.S. 748, 760 (1996). The President cannot avoid that constitutional heritage through the legerdemain of titling an adjudicatory body a "commission," in an attempt to claim the power, *inter alia*, to admit testimony obtained by

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[1] *See United States v. Bollman*, 24 F. Cas. 1189 (C.C.D.D.C. 1807) (pre-trial habeas case, wherein Chief Judge Cranch stated: "[W]hen wars, and rumors of wars, plots, conspiracies and treasons excite alarm, it is the duty of a court to be peculiarly watchful lest the public feeling should reach the seat of justice…although we may thereby bring one criminal to punishment, we may furnish the means by which an hundred innocent persons may suffer. The constitution was made for times of commotion.").

[2] The government stresses the "protections" afforded to Hamdan in Pentagon Military Order No. 1, but it fails to mention that the Order specifies that the protections are neither "enforceable" nor "rights." Pet. 2.

torture,[3] eliminate the right to be present (Pet. App. 39a-47a), and charge offenses that do not violate the laws of war, all in a conflict of indefinite geographic scope and duration.

In fact, the President already has broad power to detain and try Hamdan—but not in the lawless, autocratic, ever-shifting way he seeks to do here. The President can charge Hamdan with a violation of the laws of war stemming from the U.S. conflict with Afghanistan. Those laws of war apply to Hamdan because he was captured in that conflict, and they also vest him with rights under the GPW. (Such war-crimes charges can be brought in a court martial, 10 U.S.C. 818; a civilian court, 18 U.S.C. 2241; or a properly constituted military commission.) Likewise, the President can charge Hamdan with a violation enumerated in Common Article 3, under which Hamdan is protected because it sets a minimal baseline for even stateless conflicts. But Hamdan is *not* being prosecuted under that Article, *nor* is he being prosecuted for a crime occurring from the Afghani conflict. Instead, this case arises from a charge, concocted for an undefined "separate" conflict, unknown to the laws of war and to the long history of commissions.

The longstanding restrictions on commissions are not such disposable niceties. Rather, they are time-tested barriers to the dangerous seepage of martial law into our civilian order. To fail to enforce these limits would be to allow a dangerous and unprecedented expansion of Executive authority whose legal premise must be that the fight against terrorism justifies a reallocation of constitutional power. There would be no principled way to prevent that precedent from becoming the edifice upon which any number of actions could be grounded, even against U.S. citizens, from surveillance to indefinite detention, on the mere allegation that they are affiliates in that "war." If fighting terrorism requires such a basic shift in our legal order, it is for Congress, not the Executive, to say so; and Congress must say so in the most explicit of terms.

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[3] The Pentagon recently confirmed, as *Amicus Br. Human Rights First et al.* warned, commission rules "allow for" "evidence gained through torture." Carol Rosenberg, *Hearings May Consider Torture*, MIAMI HER., Mar. 2, 2006.

I. Abstention Is Unwarranted

Hamdan and his *amici* have already addressed in depth the government's argument that the Court should not reach the questions upon which certiorari was granted. *E.g.*, Pet. Opp. Mo. Dis. 22 (citing several briefs); *see also* Pet. App. 3a-4a, 23a-24a (lower court opinions rejecting the abstention doctrine). The government's argument requires this Court to ignore the fact that the *predicate* for abstention—an insulated system "*established by Congress and carefully designed* to protect not only military interests but [the defendant's] *legitimate interests* as well," *Schlesinger v. Councilman*, 420 U.S. 738, 760 (1975) (emphasis added)—is wholly absent here. Unlike *Councilman*, where Congress had defined the offenses and explicitly authorized the tribunal to try them, here the rules are set by the prosecuting branch, shift constantly and without notice, and recognize no enforceable rights.

Moreover, there is at least a substantial question whether the tribunal and the charge against Hamdan are authorized. As such, the governing principle (affirmed in *Councilman*) is that abstention is inappropriate because Hamdan, like the *Quirin* defendants, challenges the ability of the commission to try him at all.[4] Abstention, moreover, would be futile and the *ad hoc* commission has no speedy trial rights or timetable for a final decision.[5] Abstention might be appropriate when

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[4] The government suggests, citing nothing, that *Quirin* did not involve an injunction and that it was decided because a citizen faced the death penalty. Govt. Br. 13. Both claims are in error. Rather, the Court decided the case, *before the commission's verdict*, because of the "public importance of the questions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty." *Ex parte Quirin*, 317 U.S. 1, 19 (1942). Attorney General Biddle himself declared abstention futile because the commission could not question their commander-in-chief. Pet. Br. App. 79a. *Councilman* did not reject, it reaffirmed, *Quirin*. 420 U.S. at 759 (rejecting argument that "'the expertise of military courts extended to the consideration of constitutional claims'") (citation omitted). Finally, nothing in *Councilman* or other cases turned on citizenship; as the court of appeals noted, the point cuts the other way. *See* Pet. App. 3a (stating *Councilman* was concerned exclusively with military discipline).

[5] *Amicus Br. of Richard Rosen* 13-25; *McCarthy v. Madigan*, 503 U.S. 140, 147 (1992) (inapplicable if "indefinite timeframe for administrative action").

the ground rules are set, the jurisdiction of the tribunal and the governing law are not in question, and judicial review is guaranteed. None of those conditions is met here.

The DTA further undermines the case for abstention. Its plain text defers judicial review only of claims brought "under" the DTA itself, DTA § 1005(e)(3), not claims brought under other authority. Not one word suggests any intent to break from the long tradition—one already applied in this case below—that the abstention doctrine is inapplicable. Rather, the DTA left untouched the Court's grant of certiorari, and both lower courts' rejection of abstention, deferring only disputes about procedural minutiae until after final decisions. *See Amicus Br. of Norman Dorsen et al.* 10 (Dorsen Br.). In fact, according to the government's own argument, if this Court abstains now, it will be barred *forever* from deciding whether the commission complies with the GPW. Govt. Br. 37 n.13. And if the President fails to make a "final decision," Hamdan will have *no* review at all—an extraordinary turn away from the Founding's *pre-trial* habeas right. *Amicus Br. of Center for Nat'l Security Studies et al.* 19-21; R. SHARPE, THE LAW OF HABEAS CORPUS 6-7, 127-29 (1989). Congress could have made such a break only on the assumption that the Court would decide the structural questions now.

II. Hamdan's Commission Is Unauthorized

The inescapable fact is that the conflict with al Qaeda is not equivalent to the only war in which this Court approved commissions. Congress has not declared war; the laws of war have not been extended to these nonstate, nonterritorial actors; the conflict is in its fifth year; and Congress stands ready to act. So far, Congress has only authorized "force," conditioning even that grant by requiring it to be "necessary and appropriate" to promote specific (not general) deterrence. Pet. Br. 14-18; *Amicus Br. of Generals Brahms and Cullen* (Brahms Br.) 10-29. The Court need not decide whether these differences with World War II are sufficient to prohibit *all* commissions since *Hamdan's* commission is impermissible. Only if the Court rejected this limited position would it be necessary to confront the broader question of whether commissions as a whole are authorized today.

1. The DTA Did Not "expressly recogniz[e] and ratifl[y]" Hamdan's Commission. Govt. Br. 15. Citing neither the DTA itself nor precedent, the government claims that the DTA ratified the commissions. But the statute is in fact silent on that question; it conspicuously avoids referring to the President's November 13 Order. The Act concerned only the federal courts, and not a single word of its text, or even the *post hoc* colloquy and briefing by Senators Graham and Kyl, suggest otherwise.[6] The DTA did establish a procedure to challenge the latest DOD Order—hardly a ratifying action. Instead, the DTA explicitly stated in § 1005(e)(3)(D) and § 1005(f) that it would not even take a position on whether the Constitution and laws apply. It is unthinkable that the momentous decision to approve the first military commissions in a half-century would have been made without a single word to that effect—particularly when two of the co-sponsors for over a month (and many other Senators) said the opposite.[7] *See Gooding v. United States*, 416 U.S. 430, 457-58 (1974) ("congressional silence…is not easy to interpret [and] it would be unusual for such a significant change as that proposed…to have entirely escaped notice").

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[6] Senator Graham and Kyl's *amicus* brief suggests that their December 21 colloquy took place on the Senate floor (Br. at 16). A C-SPAN recording of the Senate debate on the Conference Report, however, shows that the colloquy was inserted in the Record after the fact. The recording is at http://www.hamdanvrumsfeld.com/C-Span-12-21-05-T3.mpg, and counsel has verified it with individuals present in the chamber at the time.

[7] The government does not confront the many legislative statements that flatly reject its claim. *See Amicus Br. for Brennan Center and William Eskridge* (Brennan/Eskridge Br.) 6-7 & n.3; 151 Cong. Rec. S12803 (Nov. 15, 2005) (co-sponsor Sen. Reid); *id.* at S14275 (Dec. 21, 2005) (co-sponsor Sen. Reid) ("[T]his legislation does not represent congressional acquiescence in or authorization of the military commissions unilaterally established by the executive branch at Guantanamo Bay. Whether these commissions are legal is precisely the question the Supreme Court will soon decide in the *Hamdan* case. Rather, this legislation reflects the fact that the military commissions are currently legal under the DC Circuit's decision in *Hamdan*."); *id.* at S14254 (Sen. Feingold); *id.* at S14245 (Dec. 21, 2005) (Sen. Leahy); *id.* at H12201 (Dec. 18, 2005) (Conference co-chair Rep. Skelton) ("Congress has not authorized these procedures and their legality is currently being challenged in federal court").

The government attempts to convert a legislative reference into ratification. But this Court has never approved a military tribunal when the legislature has been anything less than explicit.[8] See Pet. Br. 13 n.2, 19; Brahms Br. 17-25.[9] A contrary rule would diminish the political accountability of both the legislative and executive branches, each of whom could pin responsibility on the other. *Cf. New York v. United States*, 505 U.S. 144, 168-69 (1992). At most, the DTA is "exactly the type of equivocal, back-door statutory activity that cannot satisfy a clear statement rule." Dorsen Br. 29 n.26.

2. Hamdan's Commission Transgresses Statutory Limits. Even read most broadly, the statutes do not authorize this commission. It is one thing for a commission to charge an individual carrying weapons on a battlefield in a conventional conflict between nation-states (such as the conflict with Afghanistan, at issue in *Hamdi*, and in which Guantanamo detainees have been detained and charged before commissions). It is entirely a different matter to think that the DTA or UCMJ authorizes Hamdan's commission, which breaks from that mold. Brennan/Eskridge Br. 4-22.

a. *The Laws of War Do Not Apply to this Stateless, Nonterritorial Conflict.* The government acknowledges that Hamdan is not a traditional war-crimes defendant. It does not allege that he is a soldier in a nation's armed forces, as in *Quirin* and *Yamashita*, nor does it allege his membership in a rebel group in civil war, as in *Milligan*. It alleges, instead,

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[8] The authorization that Congress has provided for commissions has been explicit, not "elliptical" (Govt. Br. 23). *E.g.*, 10 U.S.C. 904; *id.* § 906.

[9] The government evidently recognizes that the single case in which the Court read a silent statute to constitute authorization, *Dames & Moore v. Regan*, 453 U.S. 654 (1981), is inapposite and does not cite it. *See id.* at 661 (stating the extremely fact-specific nature of its holding); *id.* at 680 (noting that President exercised power 10 times since 1952, in contrast to not a single completed commission in 50 years). Unlike the *Dames* statutes, which gave power to the President, *id.* at 677, the DTA only creates a jurisdictional framework to hear challenges to the actions of tribunals. Congress regularly develops such frameworks, *e.g.*, Bipartisan Campaign Finance Reform Act of 2002, Pub. L. No. 107-155, § 403. Congress's provision of judicial review implies nothing about its view of the merits. If Congress used jurisdictional language to direct merits outcomes, it might run afoul of *United States v. Klein*, 80 U.S. 128 (1872).

that Hamdan conspired with a terrorist group to commit crimes that have, heretofore, been the subject of criminal trials in civil courts (with near-uniform government success).

It is true that Hamdan came into U.S. custody after being captured by bounty hunters in a country in a state of war. But the government does *not* charge him with any offense arising from that conflict. Instead, it asserts that Hamdan conspired with al Qaeda. Pet. App. 65a. The place of apprehension has no relevance to Hamdan's charge. Indeed, the charge would be no different, and the government could still insist on its right to try him before a commission, if he had been arrested by the police in a Chicago airport instead of turned over to the U.S. military in Afghanistan.

By the same token, nothing in the government's argument turns on the fact that petitioner is a non-citizen. Petitioner is subject to trial by commission because he is alleged to belong to a terrorist group. The government has repeatedly insisted that in this context, citizenship makes no difference, and it has asserted the President's right to declare any person (citizen or non-citizen) captured anywhere (Chicago or Afghanistan) to be an "enemy combatant" because of an association with al Qaeda. *See* Govt. Br., *Hamdi, supra*, at 24-36; Govt. Br., *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), at 31-32. And while the President has not yet exercised his asserted power to try Americans by commission, the government leaves no doubt that accepting its arguments in this case would confirm the President's power to do so in the future.

Such are the necessary consequences of an uncritical extension of the laws of war to the "war on terror" by simple analogy. The undefined, unlimited, and potentially unending nature of the conflict eliminates pragmatic restraints on military authority that traditionally limit the risk that ordinary Americans and other innocent individuals will be denied civilian trials and relegated to truncated proceedings affording no guarantee of independence or fairness. In the war on terror, there are no uniforms, battle lines or even a general geographic area bounding the conflict and the universe of potential alleged combatants. Because of the nebulous nature of the conflict, many millions could be

plausibly accused of being an unlawful combatant. Indeed, the cases that have reached this Court illustrate this point, ranging from persons captured by bounty hunters in Afghanistan to U.S. citizens in Illinois. The government has further acknowledged that it holds in Guantanamo citizens from dozens of nations, ranging from Yemen to Australia.

The laws of war, by contrast, were written with the understanding that 1) there was a physical state to have recourse against (or a rebel group with territory) and 2) there would be an end to the conflict. As this Court has held, the laws of war are to mitigate the harms of war. *See The Prize Cases*, 67 U.S. 635, 667 (1863).[10] Yet the government's claim means that the laws of war do not impose a *single* restriction on the United States' treatment of al Qaeda. This startling result, totally at odds with the entire body of law it purportedly describes, illustrates the fundamental deficiencies with the government's position. Indeed, *Hamdi* limited its holding to the war in Afghanistan, and warned that its understanding of the laws of war may "unravel" if a conflict was sufficiently different. 542 U.S. at 521 (plurality). The government's position here forces that unraveling.

The government's reliance on past law-of-war commissions ignores a key fact: none has been applied to stateless, territory-less actors like al Qaeda.[11] Many groups

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[10] The government's citation to the *Prize Cases* (Govt. Br. 25) distorts its meaning by omitting the sentences preceding and following its quotation: "The parties belligerent in a public war are independent *nations*. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents, *claims sovereign rights* as against the other." 67 U.S. at 666 (emphasis added). The government also omits the territorial limitation: "When the party in rebellion occupy and hold in a hostile manner a *certain portion of territory*…have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war." *Id.* at 666-67 (emphasis added). In those areas, civilian courts are closed. *Id.* at 667. *See also id.* at 690-93 (Nelson, J., dissenting). The Court's deference language was confined to circumstances where such conditions were present. None exists here. Similar problems infect the government's use (Br. 25) of INGRID DETTER, THE LAW OF WAR 134 (2d ed. 2000)—as her cited cases make clear.

[11] The only potentially contrary example is the Modocs, but that

assert engagement in war, but nations reject such claims.[12]

The analogy between the struggle against terrorism and the traditional wars for which the law of war was developed is at best partial. The differences surely make the struggle more difficult for the government. But they also increase the need for traditional criminal protections. Hamdan does not argue that alternative tribunals cannot be created to try cases arising from this new conflict. He simply argues that any such extension—with all its complications and balancing of fundamental interests—must be taken by Congress under its Article I power to, *inter alia*, define and punish such offenses. Pet. Br. 11-13. Thus far Congress has maintained confidence in the federal judiciary to determine responsibility even for acts of horrific terrorism and treason by stateless organizations, such as the Oklahoma and first World Trade Center bombings. It may be that the President could make a persuasive case that this confidence is misplaced, but that argument must be made to Congress, not to this Court.[13]

b. *The Conspiracy Charge Does Not State a Violation*. Commissions can only try violations of the laws of war, not domestic offenses. *Quirin* requires the Court to "*first* inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal." 317 U.S. at 29 (emphasis added). Conspiracy is not such an offense.[14]

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precedent cuts the other way. The Attorney General stated that because the Modocs were a sovereign nation "recognized as independent communities for treaty-making purposes…they may properly…be held subject to those rules of warfare." 14 Op. A.G. 249, 253 (1873). Al Qaeda, according to the government (Br. 39), cannot negotiate treaties as a sovereign, and cannot be encompassed by the full laws of war.

[12] *E.g.*, *U.K. Reservation to A.P. I of GPW* (1998) ("the term `armed conflict' …is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation")

[13] The government attacks an argument of its own imagination when it asserts that the GPW did not field-preempt the laws of war. Hamdan argues the opposite. Pet. Br. 2. His point is simply that there is no text at all—GPW or otherwise—that applies the full laws of war to a stateless, nonterritorial group as al Qaeda. The best, indeed, the only, hook is the GPW itself, but the government claims the GPW does not apply.

[14] Pet. Br. 28-30; *Amicus Br. of Conspiracy Specialists* (Conspiracy Br.); C.A. *Amicus Br. of Profs. Danner & Martinez*, at *http://www.law.georgetown.edu/faculty/nkk/documents/dannermartinezamicus.pdf*.

The government rests its argument on the law of conspiracy that it claims existed in 1942. Govt. Br. 27-28. Whatever the law of conspiracy was then, developments since that time, from Nuremberg and Tokyo to the Rome Statute, have long superceded it. Conspiracy Br. 13-18; 1 THE TOKYO JUDGMENT 31-33 (Roling & Ruter eds. 1977). These iconic treatments *reject* conspiracy as a triable war crime.[15]

Moreover, no federal court, before or after Nuremberg, has ever found, or even implied, that conspiracy is an offense against the laws of war. With good reason. A single nation's practice cannot define the meaning of the laws of war. Conspiracy Br. 6.[16] Federal courts, including *Quirin* itself, have studiously avoided even hinting at recognizing conspiracy. *Id.* at 22-24.[17] Unlike defendants in past

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[15] The government misperceives the significance of the War Crimes Act. It relies on language in the 1996 House Report stating that the 1996 Act did not affect commission jurisdiction. Govt. Br. 28. Hamdan has never argued otherwise or suggested a "'repea[l] by implication.'" *Id.* (citation omitted). The 1996 Act did not purport to define "war crimes," only the 1997 amendments did–as this Court invited Congress to do in *Quirin*. Pet. Br. 29. That is to say, one year after the 1996 Act and the government's legislative history, *Congress for the first time defined and codified an exhaustive list* of war crimes. The list did *not* include conspiracy. Pub. L. No. 105-118, § 583, 111 Stat. 2436 (1997). A new report, H.R. Rep. No. 105-204 (1997), accompanied that revolutionary change. It repeated some language from the 1996 report, but it *omitted* the commission-jurisdiction disclaimer. Its only reference to commissions was to those pages from the 1996 Report that express doubt about their legality, finding *Quirin* to create "uncertainty." *Id.* at 9 & n.10 (citing H.R. Rep. No. 104-698, at 6 (1996)).

[16] "The test bringing these offenses within the common law of war has been their almost universal acceptance as crimes by the nations of the world….By definition, the law of war must be a concept which changes with the practice of war and the customs of nations. It is neither formalized nor static." *United States v. Schultz,* 1 C.M.A. 512, 522 (1952).

[17] Those who aided the saboteurs were tried by civilian courts, not commissions. *See* MICHAEL DOBBS, SABOTEURS 267 (2004). *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956), affirmed a 1945 conviction based on a *statutory* charge. Although the trial took place before the judgments at Nuremberg and Tokyo, *Colepaugh* did not approve the conspiracy charge. Rather, it found a direct violation by shedding military dress and carrying concealed sidearms and false identification, while lurking about military fortifications. *Id.* at 432. *Colepaugh* also contradicts the government's DTA argument by stating that removal of federal jurisdiction would "subvert

commissions, Hamdan is charged only with conspiracy, so the issue cannot be sidestepped as it was in past federal cases. The authority *vel non* for the conspiracy charge against Hamdan is of pressing moment because *all* of the current commission defendants (10 of 10) face the charge of conspiracy, and 7 of those 10 face *only* that charge. *See http://www.defenselink.mil/news/Nov2004/charge_sheets.html*.

The government's citation to Winthrop (Govt. Br. 27) backfires. Winthrop's discussion is of *occupation courts trying ordinary domestic offenses* (such as robbery, battery, and conspiracy). W. WINTHROP, MILITARY LAW AND PRECEDENTS 839 & n.5 (1920). For commissions trying "violations of the laws of war," Winthrop lists over 25 offenses. Conspiracy is not one of them. *Id.* at 839-40.[18]

A charge for "[a]nything in excess of existing International Law" "is a utilization of power and not of law." 11 Trials of War Criminals Before the Nuremberg Military Tribunals 1240 (1950). The only crime the government has charged Hamdan with is conspiracy—an offense rejected internationally as notoriously subject to government overreaching.[19] It has no support in any law-of-war treaty or implementing legislation. The government's argument creates a blank check whereby it not only picks the procedures and judges, but defines the very offenses triable after they are alleged to have been committed.

c. The Government's Efforts to Distinguish Milligan Fail. The government claims that Milligan was not "a part of or

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the rule of law to the rule of man." *Id.* at 431.

[18] Winthrop corrected some loose language in C. Howland, Digest of Opinions of the Judge Advocates General of the Army 1071 (1912). Howland's mention of conspiracy cited a number of commission cases, but those cases (which are kept in the National Archives) do not reveal a single conspiracy charge (and certainly not the approval of one) in them.

[19] Justice Jackson's remarks about the American crime, defined by statute under America's unique criminal procedural protections, apply with far greater force here. *See Krulewitch v. United States*, 336 U.S. 440, 446 (1949) (Jackson, J., concurring) ("[T]he growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself…constitutes a serious threat to fairness in our administration of justice. The modern crime of conspiracy is so vague that it almost defies definition.").

associated with the armed forces of the enemy," Govt. Br. 29 (quoting *Quirin*). Milligan was *convicted* of trying to arm the rebels and free prisoners of war. If Milligan could not be tried for those acts by commission, then neither could Hamdan be so tried for conspiracy. The government's claim that *Milligan* turned on citizenship was *rejected* in *Quirin*, 317 U.S. at 37-38, the decision that the government asserts clarifies *Milligan*. Govt. Br. 29. [20] Without indicia showing someone to be an unlawful combatant (*e.g.*, the burying of uniforms or a concession), in a conflict governed by the laws of war, law-of-war commission jurisdiction is foreclosed.[21]

d. Commissions Must Comply With the UCMJ. The government asserts that (1) Hamdan's reading requires identical procedures for courts-martial and commissions, thus "eliminating" commissions, and (2) commission history discloses unlimited Executive authority. Both are wrong.

The government does not address, much less justify, the result those arguments produce: that Congress has sanctioned a process that excludes an accused from his own trial, and that this Court is powerless to halt that process. The government also avoids meaningful discussion of the fact that this commission has *already* denied Hamdan the right to be present. No authority permits the government to exclude involuntarily a nondisruptive defendant from his criminal trial. *Diaz v. United States*, 223 U.S. 442, 455 (1912).[22]

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[20] The government also misportrays the *Hamdi* plurality. Govt. Br. 29. *Hamdi* concerned a person picked up on an Afghani battlefield carrying a gun in a war between two nations, not an unarmed individual crossing the border while attempting to save his pregnant wife, picked up by a bounty hunter, and alleged to be part of a stateless, territory-less group.

[21] Hamdan was never charged with being a "personal assistant," or "terrorist training," Govt. Br. 1, 3, nor was he charged with a "desire" to destroy the U.S. *Amicus Br. Former Attorneys General et al.* 13 n.3. In fact, the indictment ascribes no *mens rea* to Hamdan at all—not even that he knowingly delivered weapons. The charge, unlike the unsupported insinuations in the government's brief, never states that the delivery of weapons or Hamdan's training was related to *any* conflict with the U.S., as opposed to the internal Afghani and Tajiki conflicts. Pet. App. 76a.

[22] Exclusion of disruptive defendants is not at issue; such defendants are deemed to "consent" to exclusion. Nuremberg's rules permitted exclusion for disruption and when a defendant could not be found. *See* 2 Trial of the

Enforcing the plain language of § 836(a) does not require identical procedures for courts-martial and commissions. The Code does not establish a comprehensive procedural regime, rather it sets statutory minimums for any military court. *Amicus Br. Am. Jewish Cmte.* 16-18. To that end, the UCMJ contains fewer than 50 procedural sections. The full rules for courts-martial, by contrast, are found in the 867-page Manual for Courts Martial (M.C.M.). Hamdan does not contend that every M.C.M. rule applies to commissions, only that commissions must be consistent with the UCMJ.[23] It is implausible that Congress would have expressly made the Code's procedures applicable to commissions in § 836(a), only to have that moderate constraint subject to Executive waiver. *Cf. Loving*, 517 U.S. at 772 (delegation under § 836 is "set within boundaries the President may not exceed").

The government has no answer to Judge Robertson's conclusion that the modification of UCMJ Article 2 extends UCMJ protections to Hamdan. Pet. App. 43a. This change nullified that aspect of *Yamashita*. Pet. Br. 23-24.[24] And the government's historical claims are inaccurate; commissions have been exceptional in their personal jurisdiction, not their procedure. *See Madsen v. Kinsella,* 343 U.S. 341, 353 n.20 (1952) (Gen. Crowder was motivated to propose Article 15 because

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Major War Criminals Before the I.M.T. 484 (1995) (exclusion "unjust" unless defendant disruptive); *id.* at 26-28; *id.* R. Pro. 5. Like *Quirin* and *Madsen*, there was no exclusion for classified or unclassified (protected) evidence—and certainly not for someone the government claims it can detain indefinitely and thereby prevent any potential leak.

[23] M.C.M. rights may exceed the UCMJ baseline. *United States v. Davis*, 47 M.J. 484, 486 (C.A.A.F. 1998). Even here, commission and M.C.M. rules may differ, where neither is inconsistent with the UCMJ. *Compare, e.g.,* Mil. Order No. 1 § 5(M) (minimal procedures during sentencing) and R.C.M. 1001(c) (detailed procedures) *with* 10 U.S.C. 856 (not barring either rule).

[24] The only detailed opinion read § 836(a)'s predecessor to apply procedural limits to commissions. *In re Yamashita*, 327 U.S. 1, 71-72 (1946) (Rutledge, J., dissenting). The majority did *not* dispute that reading, relying instead on the old Article 2. *Id* at 19-20. *Madsen* did not question it either, as no procedural challenge was raised. Pet. Br. 21 n.12. Madsen's commission guaranteed the right to be present, *id.*, and incorporated Federal Rules of Evidence and aspects of the M.C.M. *See* U.S. Military Govt. Courts for Germany, No. 31, 14 Fed. Reg. 129 (1949).

"'no civil court'" or court-martial could try American soldiers for homicide of Cubans). The government's argument is also contradicted by a more complete reading of its sources.[25] *See* S. Rep. No. 64-130, at 41 (1916) ("Both classes of courts have the same procedure.") (Gen. Crowder).[26]

Ignoring 4 of 5 authorities in footnote 10 of Petitioner's Brief, the government (Br. 45) claims that this footnote's quotation of the M.C.M. is "roughly half the common sense of the matter" and points to the M.C.M.'s mention of the President's regulatory authority. The omitted clause is irrelevant; Petitioner has never claimed that the President cannot depart from the M.C.M. (as opposed to the UCMJ). And the government itself tellingly omits from its "sense of the matter" the first part of the same sentence: "*Subject to any applicable rule of international law* or to any regulations prescribed by the President or by other competent authority, military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial." M.C.M., Pt. 1, Para. 2(B)(2) (2005) (emphasis added). As Petitioner's opening brief made clear, the military's own view has been

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[25] *Compare* Govt. Br. 46-47 (citing Birkhimer), *with* W. BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW 541 (1914) ("[R]egarding the martial-law tribunal: 'It should proceed…upon sworn evidence *given in the presence of the accused*.'") (emphasis added); *compare* Govt. Br. 46 (citing Winthrop) *with* WINTHROP at 842 (commissions "will ordinarily and properly be governed, upon all important questions, by the established rules and principles of law and evidence. Where essential…to the doing of justice, these rules and principles will be liberally construed and applied."). ICTY permits exclusion only for disruptive conduct, ICTY R.P. & Evid. 80(B).

[26] The government selectively quotes the UCMJ legislative history. Br. 47. This history does not, and could not, say that the UCMJ leaves commissions unregulated—a reading that would contradict the UCMJ's plain text. Mr. Larkin stated that the provision applied to commissions. *UCMJ: Hearings H.R. 2498*, 81st Cong., 1st Sess. 1017 (1949). *See also id.* (Vice-Chair Rivers); *id.* at 846, 976, 1061. The government's quote follows a colloquy about a different subsection, § 836(b), which required M.C.M. rules to be reported to Congress. It merely confirms that M.C.M. rules do not bind commissions. It does not dispel § 836(a)'s text or Crowder's authoritative statement that both tribunals have the "same procedure."

that the GPW *strictly limits* the President's ability to depart from court-martial rules. Pet. Br. 37; Pet. Br. App. 34a.

Finally, the commission violates 10 U.S.C. 3037, which does not limit itself to presidential commissions, and which Hamdan can invoke to show lack of authorization.

Each of the above distinguishes this case from *Quirin* and eliminates the need to consider the extravagant claim of "inherent" presidential power, or to examine whether the President could establish a different form of commission.[27]

III. Hamdan's Commission Violates the GPW

Hamdan's commission is improperly constituted and lacks personal jurisdiction under the laws of war because he is entitled to the minimal guarantees of Common Article 3, and, as a presumptive POW, parity under GPW article 102.

1. Hamdan's Rights Are Enforceable. When treaties confer private rights, the presumption is in *favor* of judicial enforceability. *Head Money Cases*, 112 U.S. 580, 598 (1884); *Amicus Br. of Louis Henkin et al.* 9-19. This is the command of the Constitution, U.S. CONST. art. III, § 2, art. VI, and this Court. *See Foster v. Neilson*, 27 U.S. 253, 314 (1829).[28]

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[27] The government's sweeping claim of inherent power is contradicted by the text of the Constitution, Pet. Br. 11-12; precedent, *e.g.*, *Hamdi*, 542 U.S. at 536 (plurality); *Toth v. Quarles*, 350 U.S. 11, 14 (1955); *Yamashita*, 327 U.S. at 7; *Quirin*, 317 U.S. at 28; and history, *Amicus Br. of Jack Rakove et al*.

Quirin itself appears confined to *statutorily defined* offenses against the laws of war. The government is correct that *Quirin* reached only Count 1, Govt. Br. 29 n.6, even though its brief earlier suggests *Quirin* reached the conspiracy offense, *id.* 27. The Court approved only the first specification of Count 1, which mirrored an offense triable by commission by explicit statute. Pet. Br. 26 n.17. *Quirin* acknowledged other offenses *may* be triable by commission "*so far as* it should be recognized and deemed applicable by the *courts*." 317 U.S. at 30 (emphasis added). Such ambiguity is not a stable edifice. Pet. Br. 36; *Amici Br. of Richard Epstein et al.*

[28] The government, Br. 31, quotes a *portion* of the *comment* to Restatement (Third) of the Foreign Relations Law, but that section's very first clause is "[a] private person having rights against the United States under an international agreement may assert those rights in courts in the United States of appropriate jurisdiction either by way of claim or defense." *Id.* § 907(1). The government's quote says that treaties in general do not create rights; it does not speak to enforceability of those (like the GPW) that do create such rights. Henkin Br. 24 n.17.

Relying on *dicta* in a footnote, the government contends that *Johnson v. Eisentrager*, 339 U.S. 763 (1950), precludes GPW enforcement. But the 1929 treaty did not protect Eisentrager's individual rights and could not implicate the presumption of enforceability. Pet. Br. 44. The GPW altered that 1929 language to ensure the new treaty gave private rights to those charged with war crimes. For example, the government's own source states that Article 5 "was based on the view that decisions which might have the gravest consequences should not be left to a single person….The matter *should be taken to a court*." ICRC Commentary, *supra*, at 77 (emphasis added). Accordingly, even the panel below found that the GPW protects individual rights. Pet. App. 10a.

The GPW's diplomatic-enforcement provisions in no way preclude judicial enforcement. The GPW text provides no basis for restricting such enforcement, and no reservation was made during ratification.[29] The Court has enforced treaties via habeas even when those treaties provide for diplomatic enforcement. Pet. Br. 44. Moreover, diplomatic enforcement would be thoroughly ineffectual for Common Article 3, which presumes no other negotiating party.

The military has enforced Article 5 without harm for 50 years.[30] The current implementing regulation, AR-190-8, is enforceable via mandamus—just as past military regulations have been.[31] In any event, Hamdan's claim to judicial

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[29] *Compare* ICRC Commentary 92 (GPW enforceable "in those countries at least in which individual rights may be maintained before the courts") *with* 31 I.L.M. 645, 659 (1992) (Senate reservation on ICCPR's self-execution).

[30] The contention that such hearings would be disruptive is belied by history, and contradicted by the government's own claim that the CSRTs are even more protective than Article 5 hearings. Govt. Br. 42 n.18. The U.S. has convened Article 5 tribunals during every major conflict since GPW ratification. After the first Gulf War, for example, 1196 Article 5 tribunals took place, with 886 detainees found to be civilians. Dept. of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* 663 (1992).

[31] Pet. Br. 38; *Amicus Br. Natl. Inst. Mil. Just.* 4-5. AR 190-8 lacks the clause in Mil. Order No. 1 stating it is not privately enforceable. *See supra* note 2.

Moreover, the government ignores Hamdan's argument that the GPW codifies customary laws of war, so judicial enforceability is irrelevant. Pet. Br. 28 n.19. These "customary rules become fully applicable in the case of a prisoner whose country…is not a party to the international instruments

enforcement rests on a *defensive* use. Pet. Br. 37-41; Henkin Br. 11-13. He claims that the government cannot derive authority from the laws of war if those laws block his trial.[32]

2. Hamdan Is Protected by the GPW. The government contends that there are two conflicts in Afghanistan. The factual premise is in doubt,[33] and it is irrelevant. Article 2 focuses on where the conflict takes place. If the conflict occurs within a Party's territory, and involves another Party, Article 2 protections apply. *Goodman/Jinks/Slaughter Br.* 4-6.[34]

The government argues that whether we are in a separate war with al Qaeda is a decision "solely for the Executive." Govt. Br. 38. But that rule would vest the Executive with unbridled discretion to invoke war powers whenever and wherever the Executive wished. The government's cited cases do not remotely support that proposition.[35] Unlike

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governing the laws of war." ICRC Commentary *supra*, at 471.

[32] The government suggests (Br. 36 n.11) that the *Charming Betsy* canon does not apply to an action by the President made pursuant to a federal statute. This fundamentally misunderstands the canon. The canon is a standard tool of statutory construction—in this case, it demonstrates that the President has *not* acted pursuant to either the AUMF or the UCMJ. *Amicus Br. of Urban Morgan Institute* at 9-25. Nor is the canon's role somehow disabled by the Commander-in-Chief power. *Hamdi* illustrates that this Court does not simply defer to the President when interpreting war-related statutes. *Hamdi*, 542 U.S. at 518-22 (plurality); *id.* at 573-74 (Scalia, J., dissenting) (same). A contrary rule bootstraps Executive power.

[33] If Hamdan is sufficiently linked to the Taliban, the "separate" al Qaeda conflict is irrelevant because Article 4 protects him. And the government has never established that there were two conflicts; its statements at the time emphasized a unitary conflict. Pet. Br. 46. DOD documents show that 43% of suspected combatants appearing before CSRTs were alleged to be affiliates of *both* the Taliban and al Qaeda. *See Amicus Br. of Ryan Goodman, Derek Jinks & Anne-Marie Slaughter* 8 (*Goodman/Jinks/Slaughter Br.*).

[34] The government claims that the U.S. rejected Additional Protocol I to avoid granting terrorists rights (Govt. Br. 39 n.15). That claim misstates the history. *See Goodman/Jinks/Slaughter Br.* 11 n.8. In any event, an Article 5 hearing is necessary to determine Hamdan's status as a "terrorist."

[35] Pet. Br. 47; *Amicus Br. of Retired Generals & Admirals* 9-11; *Doe v. Braden*, 57 U.S. 635, 657 (1853) ("It is [the court's] duty to interpret [a treaty] and administer it according to its terms."). *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) stated that the "operations of the nation… must be governed by treaties [and] international understandings…" *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), rejected the Executive's

other settings where the meaning of treaties is in dispute by private litigants, the Executive has created this predicament—it could provide Hamdan an Article 5 hearing or modify Hamdan's prosecution and avoid these problems.

In interpreting a treaty, the "conduct of the parties in implementing [the treaty] in the first 50 years of its operation cannot be ignored." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 260 (1984). For a half-century, the military has provided such hearings—even to the Viet Cong and guerillas. Pet. Br. 46. Doubt exists for multiple reasons about whether Hamdan is a POW, from the circumstances of his capture (bounty hunters) to the CSRT proceeding itself.[36] If Hamdan's factual allegations are correct, he would fall within the POW categories specified in GPW Article 4.[37]

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foreign-policy argument that the Cuban government be barred from U.S. courts. Likewise, *Doe v. Braden*, 57 U.S. 635 (1853), merely held that the Executive determines whether a treaty was ratified. All of this is vastly different from deferring to a *post-hoc* Executive proclamation that what the nation thought was a single war is actually two separate ones, one of which is being prosecuted domestically as well as abroad, against a covert enemy that could be alleged to reside in any town in America.

[36] The government has switched its position from below, where it claimed the CSRT had "zero effect" on this case. J.A. 182-83. For that reason, the CSRT is not in the record and Hamdan has had no opportunity to rebut it. *See Dorchy v. Kansas*, 272 U.S. 306, 311 (1926) ("Mere reference to it by the court…did not incorporate its record into that of the case at bar.") If anything, the CSRT's determination that Hamdan is an enemy combatant *supports* Hamdan's POW claim, since most POWs are enemy combatants. *Goodman/Jinks/Slaughter Br.* 6-17. Citing nothing at all, the government also says that the CSRT determined Hamdan to be "affiliated" with al Qaeda. Even if accurate, it is not clear what "affiliated" means, and the government has taken a broad view. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005) (appeal pending) (pointing out that the government theory could make "a little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities" an enemy combatant). For these, and many other reasons, the CSRT does not meet Article 5 standards, as Respondents admit. DOD Briefing on CSRTs, *at* http://defenselink.mil/transcripts/2004/tr20040707-0981.html ("[T]hey're not really Geneva Convention procedures....we're not implementing requirements [of] the Geneva Convention."). The CSRTs do not address the specific affiliation questions required under GPW art. 4.

[37] The government pretends that Hamdan invoked (4)(a)(2) below, when

3. Hamdan's Commission Violates Common Article 3. Common Article 3 requires "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" when "armed conflict not of an international character occur[s] in the territory of one of the High Contracting Parties." As Judge Williams concluded, its plain text applies to Hamdan. Pet. App. 17a.

The government seizes on the word "one," but that word merely means that the Article applies whenever the territory of a Party is involved. The text, history, and structure of Article 3 reject the notion that "one" is a ceiling. It does not say the Article applies *only* to conflicts in one country. Rather, it provides a "minimum yardstick" for all conflicts.[38]

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he actually mentioned 4(a)(1) and 4(a)(4). *See* Hamdan C.A. Br. 47-48; Hamdan D. Ct. Br. 36-37. Neither is raised for the "first time" (Govt. Br. 41 n.17) here. Each is an example of Hamdan's basic point, that he has had no opportunity to raise *any* theory of POW protection, under *any* provision, because he has not had a POW hearing. *See* J. Elsea, Cong. Rsch. Serv., *Terrorism and the Law of War* 15 (Dec. 11, 2001) ("Members of al Qaida captured in Afghanistan may be entitled to POW or civilian status…even if they are accused of previously violating the law of war.").

[38] *E.g.*, Pet. Br. 49; *Amicus Br. of Assoc. of New York Bar* 8-11. The Article's plain text does not say one "nation," but one "Part[y]." The government's reading therefore requires conflicts spilling into neighboring nations to receive Article 3 protection when the neighboring nations are *not* parties to the Geneva Convention, but strips a conflict of Article 3 protection when the neighboring nations ratified the Convention. This is nonsensical.

The government mentions an ICRC draft, Govt. Br. 49 n.24, but that was a draft of Article 2. ICRC Commentary, *supra*, at 31. That draft was rejected because it brought full GPW protection to non-international conflicts—not for any other reason. *Id.* at 34-35. The new Article 3 was premised on the view that it was "equally applicable to civil and to international wars" so "its observance does not depend upon preliminary discussions on the nature of the conflict." *Id.* at 35. Absolutely nothing in the commentary states that the conflict must be within a single country. This may "generally" be the case, but "the scope of application of the article must be as wide as possible." *Id.* at 36, 37. The government's source is explicit: "Representing, as it does, the minimum which must be applied in the least determinate of conflicts, its terms must *a fortiori* be respected in the case of international conflicts proper, when all the provisions of the Convention are applicable. For 'the greater obligation includes the lesser,'" *id.* at 38; *see also id.* at 16. Otherwise, a party to a civil war could evade Article 3 by crossing a border. *Goodman/Jinks/Slaughter Br.* 22-23.

In any event, Common Article 3's minimal guarantees are binding as customary international law in all conflicts. *Goodman/Jinks/Slaughter Br.* 18-25. Congress explicitly implemented it, rendering the government's reliance on *The Paquete Habana*, 175 U.S. 677 (1900), misplaced. *See, e.g.*, 1996 War Crimes Act, 18 U.S.C. 2441(c)(3) (criminalizing "conduct …which constitutes a violation of common Article 3"). Instead of a "controlling Executive Act" to abrogate Article 3, the Executive implemented it and recognizes its universality.[39] Finally, the President has never been able to break with customary international law when customary law is the basis for the President's action in the first place. Since the President claims the power to enforce laws of war through commissions, it cannot be that the President can then disregard those laws when they forbid the tribunal. To hold otherwise writes the "blank check" that *Hamdi* rejected.

The government has no answer to the ICRC's lengthy analysis of Common Article 3's requirements, such as its clear proviso that the court be independent of the Executive and not an *ad hoc* tribunal created, appointed, and overseen by him. Pet. Br. 48. The argument that a commission is "regularly constituted" because one existed a half-century ago stretches "regularly" past any breaking point. ICRC, IV Geneva Commentary 340 (1960) ("'[R]egularly constituted' …wording definitely excludes all special tribunals. It is the ordinary military courts…which will be competent."). Separately, the commission does not provide the requisite minimal guarantees, as its "protections" are not enforceable and permit denial of the right to be present at trial and introduction of testimony obtained by torture. *N.Y. Bar Br. 11-21; Amicus Br. of 422 Current and Former Members of the United Kingdom et al. 16-25; Goodman/Jinks/Slaughter Br. 25-27.*

CONCLUSION

The judgment below should be reversed.

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[39] *E.g.*, U.S. Dept. of Army, Law of War Handbook 144 (2005) ("This expanded view of Common Article 3 is consistent not only with U.S. Policy (which extends its application even into non-conflict operations other than war through DODD 5100.77), but also with the original understanding of its scope as expressed in the official commentary.").

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