IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

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In this brief, respondents respond to petitioner's lengthy brief in opposition to respondents' motion to dismiss and in support of petitioner's cross-motion for partial summary judgment. In addition, respondents also demonstrate why Hamdan v. Rumsfeld, Civ. Action No. 04-1519, 2004 WL 2504508 (Nov. 8, 2004) (D.D.C.), should not be followed.

ARGUMENT

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

As respondents stated in our Response, this Court should abstain until the military commission's proceedings pertaining to petitioner are completed. See Respondents' Response and Motion to Dismiss or for Judgment as a Matter of Law with Respect to Challenges to the Military Commission Process Contained in Petitioner's Second Amended Petition for Writ of Habeas Corpus Complaint for Injunctive, Declaratory, and Other Relief at 12-16 (dkt. no. 88) ("Response"). Each of petitioner's arguments against abstention fails.

A. *Councilman* Abstention May Be Properly Considered in This Case.

Petitioner incorrectly claims, Opp. at 84, that Ex Parte Quirin, 317 U.S. 1 (1942), rebuts respondents' argument that the "Executive Branch, not this Court, bears the responsibility for protecting the nation from foreign attack and is in the best position to determine appropriate procedures for trying enemy combatants charged with violations of the laws of war and other appropriate offenses consistent with national security and the need to provide a full and fair trial," see Response at 14 (citing Military Order §§ 1(f); 4(c)(2)). Petitioner ignores the fact, previously noted in Respondents' Response at 15 n.15, that Quirin was decided well before the abstention

doctrine now applicable in this case had been established. See Younger v. Harris, 401 U.S. 37 (1971).

Petitioner similarly argues that the Court since Quirin has repeatedly confirmed that there is no abstention or exhaustion requirement for the federal courts to entertain jurisdictional challenges to the authority of military courts. Opp. at 85. But that argument is undermined by the fact that all but one of the cases petitioner cites were decided before the abstention doctrine was established in 1971. Indeed, each of the cases petitioner cites is inapposite to the instant case. The Supreme Court in Schlesinger v. Councilman, 420 U.S. 738, 758-59 (1975), distinguished United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955), Reid v. Covert, 354 U.S. 1 (1957), and McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960), because in those cases the habeas petitioners were indisputably civilians claiming that their status as such precluded Congress from subjecting them to courts-martial.[1] In contrast, as respondents will show in the following discussion of Councilman, Hicks is not indisputably a civilian.

The D.C. Circuit's decision in New v. Cohen, 129 F.3d 639 (D.C. Cir. 1997), makes clear that Hicks' case is governed by Councilman, despite Hicks' contention that he is a civilian not properly subject to the commission's jurisdiction. Opp. at 87. In New, a medic in the armed forces was charged to appear before a court-martial for failing to obey a direct order. 129 F.3d at 640. The medic filed a habeas petition in district court, asserting that the military had no jurisdiction over him because he had effectively become a civilian. Id. at 640-41, 645-46. The D.C. Circuit affirmed the

[1] Petitioner also cites Machado v. Commanding Officer, 860 F.2d 542, 546 (2d Cir. 1988), which is inapposite because there is no indication in the case that petitioner was anything but a United States citizen, and at the very least he was a former serviceman, and as a member of either of these groups he was entitled to constitutional rights not afforded an alien enemy combatant such as Hicks.

district court's dismissal of the petition based on Councilman. Id. at 642-47. Although the court cited 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 stated 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 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. Similarly, Hicks should be required to present his jurisdictional challenge to the military commission: Hicks' civilian status is disputed; in fact, he has been determined by a Combatant Status Review Tribunal to be a member of or affiliated with al Qaeda. See Respondents' Factual Return to Petition For Writ of Habeas Corpus by Petitioner David M. Hicks at 11 (dkt. no. 83) (Exhibit A (Unclassified Summary of Basis for Tribunal Decision)) ("The detainee is properly classified as an enemy combatant and is a member of or affiliated with al Qaida."). And Hicks cannot colorably contend that the commission lacks the wherewithal to assess the facts at trial 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, 2648-51 (2004) (plurality opinion) (suggesting that military tribunal can determine whether citizen-detainee is an enemy combatant).[2]

Hicks seeks to distinguish Councilman – and, by implication, New – on grounds that those

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[2] Hicks' contention that the commission's expertise "does not extend to the consideration of constitutional claims," Opp. at 89, misses the point that the commission possesses "singularly relevant" expertise concerning the law of war and thus concerning its jurisdiction over Hicks. Councilman, 420 U.S. at 760. Its application of that expertise to the specific facts developed during Hicks' trial will be "indispensable to inform any eventual review in Art. III courts." Id.

cases involved challenges to the jurisdiction of a court-martial, not a military commission, and were brought by members of the U.S. armed services. However, any differences between those cases and the instant one only operate to Hicks' 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 service members who were United States citizens, unlike Hicks, 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 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).[3] 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. Indeed, if a United States servicemember does not have access to the federal courts pending his court-martial, surely a nonresident alien captured during wartime should have no greater access pending his military trial. Cf. Eisentrager, 339 U.S. at 783 (refusing to read Fifth Amendment in manner that would put enemy aliens "in a more protected position than our soldiers.").

B. The Recognized Justifications for Requiring Exhaustion are Present Here.

As respondents have stated previously, Response at 14, the principles that led the Councilman Court to reject federal court intervention in ongoing military proceedings apply with even greater force here.

Comity. Contrary to petitioner's assertions, Opp. at 87, the same notion of comity that required federal courts to defer to a military court system authorized by Congress in Councilman is also present here where the President in his capacity as Commander in Chief, and with the approval of Congress,[4] established military commissions upon finding that they are "necessary" for "the

[3] 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 v. Bush, 124 S. Ct. 2686, 2695 (2004), 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, 694 (2001); United States v. Verdugo-Urquidez, 494 U.S. 259, 269, 273 (1990). See also Respondents' Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support, § II.A (dkt. no. 82) ("EC Response").

[4] As respondents have previously discussed in greater detail, Response at 14 n.14 and 16-19, the Supreme Court has repeatedly held that one of the provisions President Bush expressly invoked in establishing the military commissions, 10 U.S.C. § 821, constitutes authorization for

effective conduct of military operations and prevention of terrorist attacks." Military Order § 1(e). These military commissions and the elaborate set of procedures governing their use, which include multiple levels of review, see Response at 3-8 (Statement of Facts ¶ 2), deserve the same deference from this Court as the Supreme Court afforded in Councilman.

Need. The same balance that was deferred to by the Councilman Court needs to be deferred to by this Court in the instant case. The Councilman Court "respected" Congress's attempt to balance "military necessities against the equally significant interest of ensuring fairness to servicemen charged with military offenses" and stated that "it must be assumed that the military court system will vindicate servicemen's constitutional rights." 420 U.S. at 757-58. Petitioner mistakenly asserts that the Councilman Court's reasoning does not apply to petitioner because the treatment of petitioner, "who is not a United States serviceman, has no bearing on maintaining the discipline or preparedness of United States servicemen." Opp. at 88. However, the Court's reasoning is deeper than petitioner characterizes it, and it does apply to petitioner.

The Councilman Court focused on the military as "a specialized society separate from civilian society with laws and traditions of its own (developed) during its long history." 420 U.S. at 757 (citations and quotation marks omitted). The Court respected the laws and traditions governing military discipline because "they are founded on unique military exigencies as powerful now as in the past. Their contemporary vitality repeatedly has been recognized by Congress." 420 U.S. at 757. Similarly, the laws governing military commissions are founded on unique military exigencies that are as, if not more, powerful in the post-September 11th world as

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the President to convene military commissions during wartime to try violations of the laws of war.

in the past. As Congress tried to do in Councilman, the President, with Congress's authorization, has attempted to balance military necessities against the significant interest of ensuring fairness to detainees. The exigencies presented by fighting a war with a ruthless enemy are undoubtedly greater than the exigencies related to the need to maintain discipline in the armed forces and relied on by Councilman.[5]

This Court, like the Councilman Court, should abstain from entertaining petitioner's habeas petition until "all available military remedies have been exhausted." Id. at 758 (citing Gusik v. Schilder, 340 U.S. 128 (1950); Noyd v. Bond, 395 U.S. 683 (1969)).

Other Factors. Exhaustion also should be required because none of the three circumstances recognized by the Supreme Court in which exhaustion of administrative remedies would be particularly inappropriate, controls here. The Supreme Court has recognized that "an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it." McCarthy v. Madigan, 503 U.S. 140, 148 (1992). Petitioner's contention that "the commission process is biased against" petitioner and that "the commission similarly has prejudged the legality of the commission itself," Opp. at 89, is an

[5] Judge Robertson in Hamdan is correct that Councilman involved "a court-martial, not a military commission." Hamdan, 2004 WL 2504508 at *2. However, as respondents have shown above, the Councilman Court's reasoning regarding courts-martial is equally applicable to military commissions in the instant case. In both cases, a balance was struck between military necessities and the interests of individuals charged with offenses, by Congress in Councilman, 420 U.S. at 757-58, and by the President with the authorization of Congress in the instant case. The Councilman Court's deference to the balance that had been struck to protect military discipline arose from the Court's respect for and understanding of the existence of military exigencies. Id. at 757. Greater exigencies exist today and necessitate a similar deference to the balance that has been struck to fight a war against an international terrorist organization. Thus, although Councilman and Hicks involve a court-martial and a military commission, both deserve the same judicial deference.

insufficient basis for abstention under Councilman and neglects the obvious possibility that the commission will ultimately acquit him. Under Councilman, that possibility provides a sufficient basis for abstention:

> 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 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. As an alien combatant charged with violating the laws of war, petitioner has no greater right than an American serviceman to demand pretrial federal review of his claims.

Petitioner also claims, Opp. at 89, that exhaustion is not appropriate where "the question of the adequacy of the administrative remedy . . . [is] for all practical purposes identical with the merits of the lawsuit." McCarthy, 503 U.S. at 148. McCarthy is inapposite on this point, however, because a different type of administrative system was in place, he was seeking a different type of relief than Hicks, and the petitioner was entitled to different rights than Hicks: the prisoner in McCarthy was incarcerated by the Federal Bureau of Prisons and faced a system which did not provide any type of hearings or for any type of relief rather than the U.S. military which provides both, the prisoner was only seeking money damages, he was not a combatant, and there is no indication in the case that he was anything but a United States citizen. 503 U.S. 140. Even if McCarthy was not inapposite, however, petitioner's argument should fail because the adequacy of the administrative remedy here is not identical with the merits of Hicks' lawsuit: almost all of Hicks' arguments address the military commission process rather than the remedy. As articulated in the previous paragraphs, Councilman makes clear that federal courts should

abstain from entertaining petitioner's habeas petition until "all available military remedies have been exhausted." 420 U.S. at 758.

Finally, petitioner is wrong that permitting the commission to proceed would "'occasion undue prejudice to subsequent assertion of a court action.'" Opp. at 89 (quoting McCarthy, 503 U.S. at 146-47). Councilman shows that Hicks having to try his case before the military commission is not prejudicial. Councilman, the Court observed, was "'threatened with (no) injury other than that incidental to every criminal proceeding brought lawfully and in good faith.'" 420 U.S. at 754 (quotation omitted). The Court rejected Councilman's contention that the threat of being deprived of his liberty by a court lacking jurisdiction constituted "irreparable harm" justifying federal court intervention. The Court explained that "'(c)ertain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, (can) not by themselves be considered "irreparable" in the special legal sense of that term.'" Id. at 755 (quoting Younger, 401 U.S. at 46) (parentheses in Councilman). Thus, Councilman shows that Hicks' claim of undue prejudice lacks merit.

The Hamdan Decision. In Hamdan, Judge Robertson concluded that he would not require the petitioner in that case to exhaust his military commission remedies, stating that none of the "policy factors identified by the Supreme Court [in Parisi v. Davidson, 405 U.S. 34 (1972)] . . . support[] [applying] the doctrine of comity . . . here." Hamdan, 2004 WL 2504508 at *3. Respondents respectfully disagree with this conclusion. In Hamdan, Judge Robertson states that in "the context of this case, according comity to a military tribunal would not 'aid[] the military judiciary in its task of maintaining order and discipline in the armed services,' or 'eliminate [] needless friction between federal civilian and military judicial systems,' nor does it deny 'due

respect to the autonomous military judicial system created by Congress,' because, whatever else can be said about the Military Commission established under the President's Military Order, it is not autonomous and it was not created by Congress." Id. (citing Parisi, 405 U.S. at 40).[6] Judge Robertson was wrong to rely on Parisi rather than Councilman, however. The factors that Judge Robertson cites from Parisi are not a test set out by the Court but rather a recitation by the Court of the respondents' arguments in the case, and the Court makes no judgment regarding the merits of these arguments. Parisi, 405 U.S. at 40. Further, Parisi is inapposite because the Court clearly differentiates that case from the instant case by stating: "But the issue in this case does not concern a federal district court's direct intervention in a case arising in the military court system." Id. at 41.

Judge Robertson's mistaken reliance on Parisi may be partially attributable to the New Court's misreading of Parisi. The New Court stated that the three policy factors Judge Robertson cites were "suggested in Parisi," 129 F.3d at 643, when the Supreme Court in Parisi only listed and then did not reach the respondents' arguments. However, Judge Robertson's reliance is less understandable in light of New's acknowledgment that "[a]ny doubt about the narrow reach of the judgment in Parisi," which involved conscientious objection to military service, "was put to rest in Schlesinger v. Councilman." Id.

Even if Judge Robertson did not mistakenly rely on Parisi, respondents respectfully

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[6] Although Judge Robertson cites Parisi for this quotation, it appears that he is actually quoting New's interpretation of Parisi. New states that as "suggested in Parisi," the doctrine of comity gives "due respect to the autonomous military judicial system created by Congress." 129 F.3d at 643 (emphasis added). Parisi, on the other hand, states that "Congress has created an autonomous military judicial system, pursuant to Art. I, s 8 (sic), of the Constitution." 405 U.S. at 40.

disagree with his interpretation of Parisi. First, Judge Robertson was wrong to give undue weight to Parisi's policy factor of aiding "the military judiciary in its task of maintaining order and discipline in the armed services." Hamdan, 2004 WL 2504508 at *3. Unlike Parisi and Councilman, the task of the military judicial proceedings in both Hamdan and Hicks, because they involve non-servicemen enemy combatants before a military commission as opposed to servicemen before courts-martial, is to help fight the war on terrorism and police the boundaries of lawful belligerent conduct rather than support military discipline. Thus, comity is applicable here because according comity to the military commissions would aid the military judiciary in its task of fighting the war on terror. Second, respondents also respectfully disagree with Judge Robertson's conclusory statement that according "comity to a military tribunal would not . . . 'eliminate [] needless friction between the federal civilian and military judicial systems.'" 2004 WL 2504508 at *3 (citing Parisi, 405 U.S. at 40). In the wake of the Hamdan decision, the friction between the federal civilian and military judicial systems has been so great that the pending military commission proceedings have either stopped (in Hamdan) or are in a state of uncertainty. This friction is needless and could have been avoided if the Hamdan Court had followed the Supreme Court's abstention teaching in Councilman. Third, Judge Robertson gave too much weight to the fact that the military commissions were not directly created by Congress, and too little weight to the fact that they were created by the President with Congress's authorization. Moreover, although the military commissions do not have the same structure as courts-martial, they have an elaborate set of procedures governing their use, which include multiple levels of review. Finally, Judge Robertson fails to mention two other policy factors mentioned in Parisi, both of which help respondents' argument in the instant case: "civilian

courts, out of respect for the separation-of-powers doctrine and for the needs of the military, have rightly been reluctant to interfere with military judicial proceedings." 405 U.S. at 40.

Respondents also respectfully disagree with Judge Robertson's conclusion in Hamdan that abstention was not required because of jurisdictional issues. 2004 WL 2504508 at *2. The Hamdan decision states that the Councilman Court repeated its observation in Noyd that it is "especially unfair to require exhaustion . . . when the complainants raised substantial arguments denying the right of the military to try them at all." 2004 WL 2504508 at *2 (citing Noyd, 395 U.S. at 696 n.8). This proposition leads the Hamdan Court to state that a "jurisdictional argument is just what Hamdan present (sic) here." Id. However, the jurisdictional argument in Hamdan and Hicks is different in character and quality than the jurisdictional arguments in Councilman and the three other cases the Hamdan Court cites: Toth, Reid, and McElroy. In those cases, the Court had to determine whether individuals would be tried by a military court at all. See Councilman, 420 U.S. 738; Toth, 350 U.S. 11; Reid, 354 U.S. 1; and McElroy, 361 U.S. 281. In Hamdan, Judge Robertson never questions whether a military court should have jurisdiction over Hamdan, but only whether a military commission or a courts-martial should be used. In this way, Hamdan lacks the kind of major jurisdictional issue present in all of the Supreme Court cases the Hamdan Court cites. Thus, abstention was both required and appropriate in Hamdan.

Accordingly, abstention is appropriate based on the need for comity and for deference to military necessity and because none of the factors traditionally counseling against exhaustion are present here. This Court should abstain from hearing challenges to the military commission proceedings until the proceedings are completed and petitioner has exhausted his military

remedies.

II. THE MILITARY COMMISSION IS VALIDLY CONSTITUTED.

Even if the Court reaches the merits of petitioner's arguments, those arguments, including that the military commission that will try Hicks lacks jurisdiction, must be rejected. Petitioner attacks the jurisdiction of the military commission on three grounds, and each of those grounds is erroneous.

A. The Commissions were Established by the President with Congressional Authorization.

1. There is Statutory Authorization for the Commissions.

By enacting Article 21 of the Uniform Code of Military Justice ("UCMJ"), Congress explicitly granted jurisdiction and sanctioned Executive use of military commissions. The precursor to Article 21 was contained in Article 15 of the Articles of War. The Supreme Court has interpreted Article 15 as an explicit congressional grant of jurisdiction to military commissions. Quirin 317 U.S. at 28 ("By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals have jurisdiction to try offenders against the law of war . . . ."). See also Yamashita v. Styer, 327 U.S. 1 (1946); Eisentrager 339 U.S. 763. When Congress enacted the Uniform Code of Military Justice in 1951, it incorporated this authorization for military commissions from the Articles of War into 10 U.S.C. §821, using identical language and explicitly relying on the Supreme Court's decision in Quirin.

Any question about the continuing vitality of UCMJ Article 21 is dispelled by Congress's use of identical language in the "Military Extraterritorial Jurisdiction Act." 18 U.S.C. §3261

(2004). This law, enacted in 2000, extended federal court jurisdiction over "persons employed by or accompanying the Armed Forces outside the United States." Id. In so doing, Congress recognized the continuing role of military commissions and was careful to preserve their traditional jurisdiction and historic place in American law using the same operative language found in Article 21: "Nothing in this chapter [18 U.S.C. §3261 et seq.] may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal." Id. (emphasis added).

By long-standing historical precedent, offenders of the laws of war, which include unlawful combatants, may be tried by military commission. "In the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions." Madsen v. Kinsella, 343 U.S. 341, 348 (1952). Congress, in its Authorization for the Use of Military Force of 2001 ("AUMF"), granted the President the authority to use "all necessary and appropriate force against those nations, organizations or persons" responsible for the "acts of treacherous violence" perpetrated on September 11th, 2001. 115 Stat. 224. A plurality of the Supreme Court recently reaffirmed the principle that "the capture, detention and trial of unlawful combatants, by 'universal agreement and practice' are 'important incidents of war.'" Hamdi 124 S. Ct. at 2640 (quoting Quirin, 317 U.S. at 28). The Hamdi Court found that detention of enemy combatants, as an important incident of war, was authorized by the AUMF. Id. at 2641. Likewise, the trial by military commission of unlawful

enemy combatants, also an important incident of war, was so authorized. Id. at 2642-43.

Petitioner, to oppose respondents' argument that the President had Congressional authorization to establish the military commissions, attempts to distinguish the Quirin case cited by respondents in our Response. All of the ways petitioner tries to distinguish Quirin from the instant case fail.

First, petitioner mistakenly argues that in Quirin two statutes no longer in existence "explicitly conferred jurisdiction on military commissions over precisely the charges leveled against the petitioners in that case." Opp. at 33. While it is true that "[t]hose statutes," which existed when Quirin was decided, "do not remain in existence today," petitioner concedes that "[t]he Quirin Court, admittedly, located the relevant Congressional grant of jurisdiction to military tribunals in 'the Articles of War, and especially Article 15.'" Opp. at 33 (quoting Quirin, 317 U.S. at 28). As petitioner further admits, Article 15 was "the predecessor to the linguistically-similar § 821 of the UCMJ," Opp. at 33, which is still in existence today. So the same statutory basis for jurisdiction in Quirin exists for the military commission at issue in this case.[7]

Second, the absence of a formal declaration of war, Opp. at 33, does not diminish Quirin's controlling force. Recognizing that the September 11th attacks amounted to an act of war, Congress authorized the President to use all necessary and appropriate force against al Qaeda and its supporters, which includes the power to address violations of the laws of war. See

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[7] While the Hamdan Court believed that the military commissions at issue in Hamdan and in the instant case were inconsistent with UCMJ § 821 as not compliant with the "law of war," 2004 WL 2504508 at *1, 5-6, respondents demonstrate elsewhere that no such inconsistency exists. See infra § VI.A. (Madsen); § IV.B. (Geneva Conventions).

Response at 19 n.20. 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.

Finally, petitioner's argument that the Quirin Court took care to emphasize that its holding was extremely limited is incorrect. Opp. at 35. The Court did not emphasize that its holding was "extremely limited," but rather stated that its was only addressing the issue before it. The Court stated that it did not "define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals." 317 U.S. at 45-46. The instant case, however, fits within those boundaries: petitioner, as explained below, committed offenses against the law of war which are properly tried by military commissions.

2. The Commander in Chief Power Does Comprehend Authorization of Commissions.

Even if the legislative provisions the President expressly invoked did not constitute the congressional authorization that the Supreme Court has held they constitute, see Hamdi 124 S. Ct. at 2640 (plurality opinion) ((AUMF), 115 Stat. 224); Quirin, 317 U.S. at 10-11 (Article 15, now 10 U.S.C. 821), the military commissions would still be constitutional.[8] That is because,

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[8] Petitioner's, and Judge Robertson's reliance in Hamdan, on Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) for the propositions that the President in establishing the military commissions violated the separation of powers, Opp. at 32, and took measures incompatible with the will of Congress, 2004 WL 2504508 at *5, is misplaced for at least three reasons. First, President Truman did not rely on any statutory authorization for the seizure of the Nation's steel mills. 343 U.S. at 585. Here, the President expressly invoked Article 21 of the UCMJ, which the Supreme Court has interpreted to embody congressional recognition and approval of the President's wartime authority to convene military commissions to try offenses against the laws of war. The President's judgment that he is acting in accord with a federal statute cannot lightly be brushed aside, especially where it involves an exercise of his core authority over foreign affairs and enemy forces in wartime. Second, the Youngstown Court found that Congress had expressly rejected giving the President the authority he exercised. 343

despite petitioner's argument to the contrary, Opp. at 35-37, the President's authority to create military tribunals is inherent in his position as Commander in Chief, U.S. Const. Art. II § 2, as shown previously. Response at 20-22.

B. The Commission Has Authority to Sit at Guantanamo Bay.

Finally, the location in which the President has decided to convene the military commissions does not remove this case from Quirin's ambit. Hicks contends that a military commission must be "'confined to the locality of actual war,'" Opp. at 38 (quoting Ex Parte 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.

U.S. at 586. Petitioner here can point to no action by Congress implying, much less demonstrating, that Congress has rejected the President's use of military commissions in these circumstances. Indeed, Congress has never acted to restrict military commissions. Thus, even if it is assumed that the commissions here go beyond historical practice in some alleged respect, Article 21 cannot be read to have prohibited such use, but rather, simply not to have addressed it. Finally, Youngstown is inapposite because it called for action in the civilian sector in the form of a directive to the Secretary of Commerce to assume control over private industry. In sharp contrast, an order directed to the military to try enemy combatants for offenses against the laws of war is a quintessentially military measure concerning the military's actions towards the enemy's forces. And the military's actions vis-a-vis the enemy's forces lie at the core of the Commander in Chief authority. See Quirin, 317 U.S. at 28-29; Hirota v. MacArthur, 338 U.S. 197, 208 (1949).

III. THE COMMISSION POSSESSES SUBJECT MATTER JURISDICTION TO HEAR THE OFFENSES WITH WHICH HICKS HAS BEEN CHARGED.

A. The Commission Possesses Jurisdiction to Try Hicks for "Aiding the Enemy".

Hicks is correct in admitting that "aiding the enemy" is an offense "over which Congress has expressly conferred jurisdiction to military commissions." Opp. at 14. 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). However, Hicks' argument that, as an Australian national unaffiliated with the U.S. military, he had no obligation to the United States that would make his alleged aid to the enemies of the United States a charge subject to adjudication by military commissions is incorrect. First, and most importantly, allegiance to the United States, while perhaps an element of the offense of treason, is not an element of the offense of aiding the enemy. As respondent stated previously, Response at 31, "Crimes and Elements for Trial by Military Commission," Military Commission Instruction No. 2, April 30, 2003, 32 C.F.R. Part 11 (2003) (hereinafter MCO No. 2), addressed the reach of 10 U.S.C. § 104 (Article 104, UCMJ), noting that in order for a person to be convicted of this offense, the defendant's conduct would have to be wrongful. Hence, in the case of a lawful belligerent, the prosecution may have to demonstrate that the defendant owed "allegiance or some duty to the United States of America or to an ally or coalition partner." See 32 C.F.R. § 11.6(b)(5)(ii)(C). This does not appear to pertain to an unlawful belligerent, as Hicks is alleged to be. Nonetheless, petitioner is implicated by this limitation even if it applied because he is a citizen of Australia, a supporting ally of the United

States that deployed forces to Afghanistan.

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

The charge against Hicks for attempted murder is also valid. First, Hicks was an unprivileged belligerent. Those who commit acts of belligerency during an armed conflict while they did not enjoy combatant immunity have historically been treated harshly under the laws of war, even with summary execution. See, e.g., Winthrop, Military Law and Precedents, 783 (1895, 2d Ed. 1920).

The single alleged act that Hicks was guarding a Taliban tank does not show, as petitioner asserts, that "Hicks's alleged participation in combat was as part of the Afghan armed forces." Opp. at 17. As petitioner notes, in addition to members of the armed forces, "privileged belligerents include members of militias who are under responsible command, who carry arms openly, have a distinctive sign recognizable at a distance," and who are part of a force that operates in accord with the law of war." See GPW arts. 4(A)(1), (2), (6). Hicks is being held as an enemy combatant and a member of or affiliated with al Qaeda, see Respondents' Factual Return to Petition For Writ of Habeas Corpus by Petitioner David M. Hicks at 11 (dkt. no. 83) (Exhibit A (Unclassified Summary of Basis for Tribunal Decision)), and al Qaeda is an organization that does not operate in accord with the law of war. See Response at § IV.B.[9] Accordingly, Hicks is properly charged as an unprivileged belligerent.

Second, acts of belligerency by an unlawful combatant are unlawful and may be tried by military commission. See Quirin, 317 U.S. at 31 ("Unlawful combatants are likewise subject to

[9] See also Respondents' Reply Memorandum In Support of Motion to Dismiss or For Judgment as a Matter of Law, § VI.A., B. (to be filed Nov. 16, 2004) ("EC Reply").

capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.") (footnote omitted). Petitioner is incorrect that Quirin is inapposite. Opp. at 20. Quirin concerned unprivileged belligerents generally and nothing in the decision indicates it was limited, as petitioner argues, merely to the spy subgroup of unprivileged belligerents. Quirin applies to Hicks as an unprivileged belligerent.

C. The Commission Possesses Jurisdiction to Try Hicks for Conspiracy.

Petitioner is also wrong that the charge of conspiracy falls outside the jurisdiction of military commissions. There is no doubt that the offense charged—conspiring, inter alia, to attack civilians and civilian objects—describes “an offense against the law of war.” Quirin, 317 U.S. at 29. As such, military commissions have jurisdiction over conspiracy charges.

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. Hicks does not contend otherwise; instead, he argues that "'conspiracy' is not a recognized crime in the law of war," Opp. at 25, and in any event "much greater involvement was required than has been alleged against Mr. Hicks." Opp. at 29.

Here again, Hicks 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. 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 id. at 1 & nn.3-4—the Court held, inter alia, "[t]hat the charges 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." 317 U.S. at 2 (emphasis added). Whether or not the Court believed one of the first three counts was independently sufficient to sustain the military commission's jurisdiction, 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").[10]

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[10] Contrary to Hicks' belief, Opp. at 22-25, several law-of-war sources have prohibited and punished the 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 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

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>. Hicks' reliance on the Nuremberg precedent for the proposition that international law has emphasized that any conspiracy charges should be against leaders, Opp. at 29, 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.

D. The Offenses Hicks is Being Tried for Were Not Created *Ex Post Facto*

As respondents have previously argued, Response at 31 n.31 , because the charges against Hicks properly allege violations of the customary law of war that predated the conduct that is the basis for the charges, petitioner's claims that the President created these charges ex post facto, Opp. at 30-31; Petition ¶¶ 55-57, are without merit.

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

Petitioner argues that he has been denied a speedy trial in contravention of Article 10 of the UCMJ (10 U.S.C. § 810), the Geneva Conventions, and the Sixth Amendment. As

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omitted)).

previously noted by respondents, Response at 40, but ignored in petitioner's Brief in Opposition, as an enemy combatant subject to detention for the duration of the ongoing armed conflict, see EC Response § I., Hicks has no ground on which to raise a speedy trial claim based merely on the nature of his detention. Further, petitioner's claim lacks merit for at least three additional reasons.

A. The Provisions of the UCMJ Applicable to Courts-Martial Do Not Apply to Military Commissions.

Hicks' argument, Opp. at 72-74, that the UCMJ's court-martial provisions, including Article 10 governing speedy trials, apply to his military commission, rests on a fundamental misunderstanding of 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, 343 U.S. at 346-48, 351 n.17, a case decided after the UCMJ's enactment. Further, although the UCMJ governs the treatment and trial of POWs, see 10 U.S.C. § 802(9), it does not apply to Hicks because, as previously explained, he is not a prisoner of war. See Response at 34 n.35.[11]

Additionally, Congress has made it clear when particular provisions apply to military

[11] Judge Robertson's decision in Hamdan that some doubt exists on this point, 2004 WL 2504508 at *10, we respectfully submit, is incorrect for reasons explained in the EC Reply § VI.A.

commissions. A plain reading of the articles of the UCMJ make it clear that Congress intended them for regulation of courts-martial, not military commissions. When Congress intended for an article to apply to military commissions, they so stated. For instance, Congress explicitly made Article 104 of the UCMJ triable by military commission. As another example, Article 48 states, "A court-martial, provost court, or military commission may punish for contempt . . . ." 10 U.S.C. § 848 (emphasis added). Article 10 makes no mention of military commissions, and is not one of the articles that Congress intended to apply to military commissions.

Even were Article 10 to apply, Hicks has not remotely made out a speedy trial violation. Hicks asserts that Article 10's "clock for determining whether a detainee has been afforded the right to a speedy trial begins to run at the time of his detention," and thus calculates that he has been detained for 32 months of pretrial "foot-dragging." Opp. at 71, 74. In the alternative, Hicks concedes that if the procedural clock was not deemed to run until President Bush formally designated Hicks eligible for trial by military commission in July 2003, his trial has still been unduly delayed: Respondents did not charge Hicks until almost a year after this designation was made. Opp. at 72 (citing Charge Sheet). However, Hicks' calculation is refuted by the case law. 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, Hicks cannot establish that he has been in pretrial restraint, let alone that respondents have failed to proceed with "reasonable diligence" in bringing him to trial. Cooper, 58 M.J. at 58. Hicks is held, first and foremost, as an unlawful enemy combatant, and even if he were not being prosecuted by military commission, he would continue to be detained as such. Thus, he cannot categorize his detention as "pretrial."

Furthermore, by his own admission, it was not until July 9, 2003 that he was moved to Camp Echo. Petition at 8. While still not "pretrial confinement," Hicks was held under the conditions of Camp Echo for a little over 16 months. The military courts have denied speedy trial claims where the pretrial confinement period was a similar amount of time, see, e.g., United States v. Goode, 54 M.J. 836, 838-40 (N-M. Ct. Crim. App. 2001) (337-day pretrial confinement did not violate Article 10); cf. United States v. Reeves, 34 M.J. 1261, 1261-63 (N-M. Ct. M.R. 1992) (per curium) (462-day delay in preferring charges did not violate due process), and there is no reason for a different result here.

Indeed, a much longer period is justified in the instant case; 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 the more common 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 also Barker v. Wingo, 407 U.S. 514, 531 (1972); Cooper, 58 M.J. at 61.

B. The Geneva Conventions Do Not Apply to Hicks.

Hicks argues that respondents' actions have violated Hicks' right to a prompt trial under the Geneva Conventions. Opp. at 75. However, as respondents have previously explained, Response at § VI., the Geneva Conventions do not apply to Hicks. Our upcoming brief on enemy combatant issues extensively addresses this issue. See EC Reply Brief at § VI.B.

C. This Court Should Abstain from Considering Hicks' Argument Regarding a Speedy Trial.

If this Court does not reject Hicks' speedy trial claim out of hand, the Court should follow Judge Robertson's recent decision, which though contrary to the government on a number of issues, nonetheless abstained from deciding speedy trial claims. See Hamdan, 2004 WL 2504508 at *15-16. Similar to Hamdan, Hicks' UCMJ speedy trial rule and Article 103 of the Third Geneva Convention claims "were more urgent before" Hicks "was transferred out of Camp Echo and back to Camp Delta and before the Supreme Court made it clear, in Hamdi, that, whether or not Hamdan has been charged with a crime, he may be detained for the duration of the hostilities in Afghanistan if he has been appropriately determined to be an enemy combatant." Id. at 16. As Judge Robertson pointed out, the UCMJ's "speedy trial requirements establish no specific number of days that will require dismissal of a suit." Id. Also, Article 103 of the Third Geneva Convention "does bar pretrial detention exceeding 90 days, but it provides no mechanism or guidance for dealing with violations." Id. Just as in Hamdan, the record in the instant case does "not permit a careful analysis of speedy trial issues under the test for the correlative Sixth

Amendment right by Barker v. Wingo, 407 U.S. 514 (1972)." Id. Finally, this Court should heed Judge Robertson's conclusion that it is "well established in any event that the critical element of prejudice is best evaluated post-trial." Id. (citing U.S. v. MacDonald, 435 U.S. 850, 858-9 (1978)).

V. PETITIONER'S EQUAL PROTECTION CLAIMS ARE MERITLESS.

Petitioner's claim that because the President's Military Order applies to non-citizens only it violates the equal protection component of the Fifth Amendment and 42 U.S.C. § 1981, Opp. at 76, lacks merit for a number of reasons.

First, as respondents have previously explained, Hicks, as a non-resident alien with no voluntary connections with the United States in the context of this case, cannot invoke the Constitution of the United States. See EC Response § II.A. For this reason, petitioner's equal protection claims with respect to the military commission must be rejected.

Second, petitioner is wrong to claim that there is no rational basis for the different treatment of non-citizens and citizens. As respondents have previously stated, Response at 37-38, given that "[e]xecutive power over enemy aliens . . . has been deemed throughout our history, essential to war-time security," Eisentrager, 339 U.S. at 774, it cannot seriously be argued that the President's action, taken in response to attacks executed by a foreign-based terrorist organization, lacks a rational basis.

Petitioner's argument that "the Executive Branch itself appears to disbelieve there is any reason for such differential treatment," Opp. at 77, is incorrect. As respondents have stated previously, differential treatment is justified by the fact that U.S. citizens have constitutional rights and aliens with no voluntary connection to the United States do not have the same rights.

See Response at 35; EC Response § II.A. Petitioner is also wrong that the fact that Congress did not suggest any condition on the authority it gave the President in the AUMF means that Congress "does not appear to believe there is any reason to distinguish based on alienage." Opp. at 77. Petitioner is constructing an argument from Congress' silence. The fact that Congress did not mention making distinctions based on alienage does not mean that Congress did not believe such distinctions should be made.

Third, petitioner incorrectly asserts that the Presidential Military Order, 66 Fed. Reg. 57833 (Nov. 13, 2001) ("PMO"), Second Am. Pet. Ex. 4, is subject to strict scrutiny. As respondents' noted previously, Response at 37, petitioner does not support this assertion with any applicable case law. In the main case petitioner cites, Wong Wing v. United States, 163 U.S. 228 (1896), the Supreme Court did not apply strict scrutiny.

Further, Wong Wing is inapposite to the instant case. Petitioner cites the case for the proposition that "while the federal government may discriminate against non-citizens in the immigration and foreign affairs areas, it may not punish non-citizens under different procedures." Opp. at 80. However, in Verdugo, 494 U.S. at 271, the Supreme Court described Wong Wing as a case that establishes "only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country," (citations omitted); thus, Wong Wing was decided in the context of applicable constitutional rights. Respondent in Verdugo, similarly to Hicks, was "an alien who has had no previous significant voluntary connection with the United States, so [this] case avail[ed] him not." 494 U.S. at 271; see EC Response § II.A. Additionally, Hicks has not "come within the territory of the United States." Verdugo, 494 U.S. at 271. Thus, the Supreme Court's decision in Verdugo

clearly differentiates Wong Wing from the instant case.

Even if Wong Wing was not inapposite, the principle that petitioner claims Wong Wing affirms hurts rather than helps petitioner. Petitioner claims that since "Wong Wing, the Supreme Court has repeatedly reaffirmed and expanded upon the principle that while the federal government may discriminate against non-citizens in the immigration and foreign affairs areas, it may not punish non-citizens under different procedures." Opp. at 80 (emphasis added). The instant case falls squarely within the foreign affairs area. The military commissions focus on foreign affairs: trying aliens who are charged with violations cognizable under the laws of war. Thus, the principle petitioner claims Wong Wing articulated works against petitioner's equal protection claim.

Hicks is further distinguishable from Wong Wing because Hicks will be tried by a military commission instead of receiving a summary punishment. Hicks is getting a process that the Supreme Court has repeatedly approved, see Yamashita, 327 U.S. 1; Eisentrager, 339 U.S. 763, even for citizens. See Quirin, 317 U.S. 1. Also, Wong Wing does not suggest, as petitioner does in the instant case, that aliens cannot be subject to a process that citizens can lawfully be subject to, but simply have not been.

Petitioner also argues that Wong Wing and its progeny “answer the government’s argument that lawful, resident aliens are different from other aliens with respect to the Equal Protection Clause.” Opp. at 81. However, the aliens in all of the cases cited by petitioner were similarly situated to the aliens in Wong Wing (they had voluntary contacts with the United States and were within the territory of the United States), and dissimilar to petitioner (an alien who had no previous voluntary contact with and was not within the territory of the United States). See

Zadvydas, 533 U.S. at 684-85 (one petitioner was "resident alien" who had lived in the United States for over forty years and the other petitioner was "resident alien" who had lived in the United States for over sixteen years at the time of trial before the Supreme Court); Chan Gun v. United States, 9 App. D.C. 290 (D.C. Cir. 1896) (petitioner was alien who had "been continuously a resident of the United States," with only one brief absence, for over thirty-five years); Rodriguez-Silva v. INS, 242 F.3d 243, 245-47 (5th Cir. 2001) (petitioner was an alien who had established seven years of residence in the United States).

Additionally, all of the "more general cases on access to the courts" that petitioner cites, Opp. at 81, have nothing to do with federal court interference with military justice during wartime or the President's exercise of war powers, and all of the petitioners there were civilians. See Rinaldi v. Yeager, 384 U.S. 305 (1966); Tennessee v. Lane, 124 S. Ct. 1978 (2004); M.L.B. v. S.L.J., 519 U.S. 102 (1996).

Also, petitioner is incorrect that respondents' appeal to deference based on national security is unavailing. Opp. at 81-82. As previously described in greater detail, cases concerning federal policies that differentiate against aliens are marked by the Court's extreme deference towards the political branches. Response at 38-39 (citing Mathews v. Diaz, 426 U.S. 67 (1976); Fiallo v. Bell, 430 U.S. 787, 793 (1977); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952). Petitioner cites Hamdi, 124 S. Ct. at 2650, for the proposition that the Supreme Court has held that the fight against terror does not give the government a "blank check" to discard the most basic safeguards underlying the rule of law, particularly with respect to the process due an individual facing a loss of liberty. Opp. at 81-82. However, this proposition does not undermine respondents' argument

that the Court has shown extreme deference towards the political branches in issues involving aliens because there is a large difference between granting deference and providing a blank check.

Finally, petitioner's claim that the Presidential Military Order's "discriminatory treatment of non-citizens also violates 42 U.S.C. § 1981 (2004)" fails. Petitioner correctly acknowledges the caselaw support for respondents' contention that a 1991 amendment narrowed § 1981 and made it inapplicable to federal action. Opp. at 82. However, petitioner still makes the conclusory statement that respondents' contention is "wrong and has been rejected elsewhere." Id. The only case petitioner offers in support of this statement, La Compania Ocho, Inc. v. U.S. Forest Service, 874 F. Supp. 1242, 1251 (D.N.M. 1995), was not followed by a subsequent appellate court case, Davis-Warren Auctioneers, J.V. v. F.D.I.C., 215 F.3d 1159, 1161 (10th Cir. 2000) ("We join the Seventh and Eleventh Circuits in holding that § 1981 is inapplicable to alleged discrimination under color of federal law."). In fact, as respondents stated previously, every federal Court of Appeals that has considered the issue since the law was amended in 1991 to include this provision has held that federal actions cannot give rise to claims under § 1981. Response at 39.

For the foregoing reasons, and for reasons stated elsewhere, see Response at 35-39, Hicks' equal protection claims fail.

VI. THE MILITARY COMMISSION'S PROCEDURES DO NOT VIOLATE THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS, OR STATUTORY OR INTERNATIONAL LAW.

At the outset, respondents point out again that Hicks, as a non-resident alien with no voluntary connections with the United States in the context of this case, cannot invoke the

Constitution of the United States. See EC Response § II.A. (citing, inter alia, Verdugo, 494 U.S. 259, and Eisentrager, 339 U.S. 763). For this reason alone, petitioner's Due Process claims with respect to the military commission may be rejected. However, regardless of whether the Constitution could be invoked by petitioner, his challenges to the military commission procedure fail.

A. The Commission Procedures Are Not Fatally Deficient as Inconsistent with the UCMJ.

Petitioner is wrong that the commission procedures are fatally deficient. Although petitioner takes issue with three different procedures, Opp. at 41-45, he makes essentially the same argument for each one: the military commission does not have the same procedures as courts-martial under the UCMJ. Opp. at 41-48. This argument is defeated by the fact that the Supreme Court has held that military commissions do not need to have the same procedures as courts-martial under the UCMJ. Madsen, 343 U.S. 341. As stated previously, Congress made clear which provisions of the UCMJ apply to military commissions; military commission procedures are in full compliance with those provisions. Further, since these issues involve the potential for prejudice which has not yet occurred, they are best evaluated post-trial.

As respondents previously explained at length, Response at 22-25, the Supreme Court has recognized that while Congress articulated the jurisdiction and procedures governing courts-martial, it has taken a hands-off approach with respect to wartime military commissions, by recognizing and approving their use, but not regulating their procedures. In Madsen, which involved the use of a military commission to try the spouse of a serviceman posted in occupied Germany, the Supreme Court characterized the unique nature and purpose of military

commissions: "Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adapted in each instance to the need that called it forth." 343 U.S. at 347-48. The Court further held that "[i]n the absence of attempts by Congress to limit the President's power, it appears that, as Commander in Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States." Id. at 348. In contrast to Congress' active regulation of "the jurisdiction and procedure of United States courts-martial," id. at 349, Congress had shown "evident restraint" with respect to making rules for military commissions. Id. The Court also explained that Article 15 of the Articles of War (now Article 21, UCMJ, 10 U.S.C. § 821) reflected Congress' intent to permit the Executive Branch to exercise its discretion as to what form of tribunal to employ during wartime. Id. at 353.

The President exercised the discretion the Madsen Court held was implicit in his powers as Commander in Chief and was left unrestricted by Congress when he established military commissions and procedures to try unlawful combatants in the ongoing armed conflict with al Qaeda and the Taliban. As the Madsen Court explained, because Congress did not purport to apply the numerous UCMJ provisions regulating courts-martial to the common law military commissions, those provisions are inapplicable to the military commission trying petitioner in the instant case. In this way, there is no requirement that a military commission be constituted as a UCMJ courts-martial and petitioner's claims regarding the commission's procedures fail.[12]

[12] Respondents respectfully disagree with Judge Robertson's interpretation of Madsen in Hamdan. First, Judge Robertson is incorrect to view Madsen as providing a guide to what procedures are necessary for military commissions. Even though Judge Robertson admits that

Further, petitioner's three challenges to the procedures, ("commission is not an impartial

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"Madsen presented no procedural issue," he states that "the Supreme Court did generally review the procedures applicable to Madsen's trial." 2004 WL 2504508 at *14. However, at best, this review is dicta and is not binding legal precedent.

Second, Judge Robertson is wrong that respondents have not articulated what need calls for the military commission's procedures. Judge Robertson says that the government's best argument, drawing on Yamashita and Madsen, is that a "'commonlaw war court' has been 'adapted in each instance to the need that called it forth.'" 2004 WL 2504508 at *14 (citing Madsen, 343 U.S. at 347-48 (citing Yamashita, 327 U.S. at 18-23)). However, Judge Robertson states that "[n]either the President in his findings and determinations nor the government in its briefs has explained what 'need' calls forth the abandonment of the right Hamdan would have under the UCMJ to be present at every stage of his trial and to confront and cross-examine all witnesses and challenge all evidence brought against him." 2004 WL 2504508 at *14. We respectfully submit that Judge Robertson was incorrect: both the President, and the government in its brief, stated that the need to combat terrorism made military commissions, rather than courts-martial that follow the UCMJ, necessary. See Military Order § 1(e) (that, in order "to protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to" the Military Order to "be detained, and, when tried, . . . be tried for violations of the laws of war and other applicable laws by military tribunals."); Response at 14, 36.

Further, the military commissions in Hamdan and Hicks require different procedures than the military commission in Madsen or standard courts-martial because they arise in a completely different context. In Madsen, which concerned a military commission policing a mainly civilian population in post-World War II occupied German, "[t]he volume of business, the size of the area, the number of civilians affected, the duration of the occupation and the need for establishing confidence in civilian procedure emphasized the propriety of tribunals of a nonmilitary character . . . less . . . than that of courts-martial." 343 U.S. at 358. Standard courts-martial, on the other hand, try individuals, either service members or their dependents. Judge Robertson presumes that "the problems of dealing with classified or 'protected' information underlie the President's blanket finding that using the regular rules is 'not practicable,'" and notes that courts-martial deal with classified material. Hamdan, 2004 WL 2504508 at *14. However, in Hamdan and Hicks, rather than dealing with individuals in a defeated country or soldiers and their dependents whose ability or motivation to exploit classified information if it ever came up in such proceedings might be limited, the military commissions are trying members or affiliates of an active international terrorist organization that can use classified information against the United States and its allies.

trier of fact or law," Opp. at 41, "commission does not provide for an adequate review process,"[13] Opp. at 43, and "commission will rely on unsworn evidence and coerced confessions," Opp. at 45), are all based on speculation regarding the commission's procedures and how Hicks' case will proceed before the commission. In these circumstances, the Court should await the outcome of Hicks's military prosecution before considering his legal challenges to that proceeding.

B. The Military Commission is not Illegal under the UCMJ.

Petitioner incorrectly asserts that Hicks, because he is being detained at a naval base that is leased from the Cuban government but subject to the "complete jurisdiction and control" of the United States, see Rasul, 124 S. Ct. at 2690-91 & n.2, clearly falls within the language of the UCMJ, and is therefore entitled to its protections. However, there is a crucial flaw in petitioner's logic. Pursuant to the Military Order, the President designated Hicks as eligible for trial before a military commission. See Military Order § 2(b). While the UCMJ recognizes the jurisdiction of military tribunals to try violations of the laws of war, see Article 21 ("The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions"), it does not purport to subject such tribunals to its comprehensive set of rules governing courts-martial. Indeed, the Supreme Court has repeatedly recognized that while Congress has prescribed in detailed fashion the jurisdiction and procedures

[13] Respondents agree with Judge Robertson's conclusion in Hamdan, 2004 WL 2504508 at *11, that "the fact that final review of a finding of guilt would reside in the President or his designee is not 'contrary to or inconsistent with' the UCMJ." Judge Robertson also notes that the President has established a Review Panel that will review the trial record and make a recommendation to the Secretary of Defense, or, if the panel finds an error of law, return the case for further proceedings. "The President has appointed to that panel some of the most distinguished civilian lawyers in the country." Id. at *11.

governing courts-martial, it has taken a hands-off approach when it comes to wartime military tribunals, by authorizing their use but not endeavoring to regulate their procedures. That court-martial jurisdiction extends to Hicks thus has no bearing on whether the other provisions of the UCMJ, designed to regulate the conduct of courts-martial, apply to military commissions.

In Yamashita, 327 U.S. 1, the Supreme Court expressly rejected the contention that a military tribunal convened to try General Yamashita, an enemy combatant, was subject to the procedures in the Articles of War (the precursor to the UCMJ) governing courts-martial. The Court explained that, by Article 15 of the Articles of War (now Article 21 of the UCMJ), Congress "recogniz[ed] military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles," and "gave sanction . . . to any use of the military commission contemplated by the common law of war." Id. at 20. Although the Court relied in part on the fact that General Yamashita did not fall into any of the categories of persons that the Articles of War made subject to the jurisdiction of courts-martial in concluding that the Articles did not apply to his military tribunal, it also based its holding on the additional fact that "the military commission before which he was tried, though sanctioned, and its jurisdiction saved, by Article 15, was not convened by virtue of the Articles of War, but pursuant to the common law of war," Id. (emphasis added). Moreover, to the extent the Court in relying on the fact that General Yamashita fell outside the jurisdiction of courts-martial suggested that the Articles of War would apply to the trial by military tribunal of a person within the jurisdiction of courts-martial, the Court in Madsen, 343 U.S. 341, subsequently rejected that dicta when it upheld the trial by military tribunal of a person within the jurisdiction of courts-martial, notwithstanding that such trial was not conducted in accordance with the Articles of War.

The Madsen Court characterized the unique nature and purpose of military commissions:

> Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have been called our commonlaw war courts. They have taken many forms and borne many names. Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adapted in each instance to the need that called it forth.

Id. at 346-48 (footnotes omitted) (emphasis added). The Court further held that, "[i]n the absence of attempts by Congress to limit the President's power, it appears that, as Commander in Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States." Id. at 348. The Court concluded that the President, in subjecting Madsen, the civilian spouse of a serviceman, to a military tribunal with authority to enforce the German Criminal Code and governed by procedures different from those applicable to courts-martial, see id. at 356-58, had properly exercised such power in Madsen's case. The Court explained that, in contrast to Congress' active regulation of "the jurisdiction and procedure of United States courts-martial," id. at 349, Congress had shown "evident restraint" with respect to making rules for military commissions. Id. The Court further explained that Article 15 (now UCMJ Article 21) reflected Congress' intent to allow the Executive Branch to exercise its discretion as to what form of tribunal to employ during wartime. Id. at 353.

The President exercised the very discretion the Madsen Court held Congress granted him by establishing military commissions to try unlawful combatants in the ongoing armed conflict with al Qaeda and the Taliban and by setting out the procedures that will govern them. See 32 C.F.R. Parts 9-17 (2004). Because, as Madsen held, Congress did not purport to apply the

numerous UCMJ provisions regulating courts-martial to the common law military tribunals, the military commission Hicks will be tried by is not illegal under the UCMJ.

C. The UCMJ's Court-Martial Provisions Do Not Apply to Military Commissions.

While recognizing that "[i]n most respects, the procedures established for the Military Commission . . . define a trial forum that looks appropriate and reassuring when seen through the lens of American jurisprudence," 2004 WL 2504508 at *10 (citing 32 C.F.R. § 9.3), the Hamdan Court concluded that they are "contrary to or inconsistent with" the UCMJ under UCMJ Article 36 because they are not coextensive with the full panoply of protections accorded to court-martial defendants. 2004 WL 2504508 at *1, 11-15 & n.12, 16-17. The district court's conclusion rests on a fundamental misunderstanding of that statute, which is directed almost exclusively to the procedures governing courts-martial and whose animating purpose was "to unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard," S. Rep. No. 81-486 (1949), 1950 U.S.C.C.A.N. 2222, 2222, such that "personnel of the armed forces, regardless of the Department in which they serve, will be subject to the same law and will be tried in accordance with the same procedures." Id. at 2223. The UCMJ does not purport to establish similarly uniform procedures for military commissions; indeed, only nine of the statute's 158 articles even mention these latter tribunals, which predated the UCMJ and have tried enemy combatants since the earliest days of the Republic under such procedures as the President has deemed fit.

Hamdan's reliance on UCMJ Article 36 to a contrary effect was misplaced. Article 36 provides, in pertinent part, as follows:

President may prescribe rules

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

10 U.S.C. § 836 (emphasis added). In interpreting Article 36 to constrain the President to prescribe only such commission procedures as are "consistent with" the protections accorded to court-martial defendants by the UCMJ's many court-martial provisions, Hamdan erroneously conflated the two types of tribunals, thus neglecting long-settled Supreme Court precedent.

The Supreme Court's decisions in Yamashita, 327 U.S. 1, and Madsen, 343 U.S. 341, make clear that the Commission convened to try Hamdan need not afford him all of the protections that the UCMJ provides in court-martial proceedings. The Yamashita Court rejected Yamashita's procedural objections, reasoning in part that "the military commission before which he was tried . . . was not convened by virtue of the Articles of War, but pursuant to the common law of war." 327 U.S. at 20. A similar result should obtain in Hicks and Hamdan, because the military commissions are convened to try Hicks and Hamdan for violations of the law of war as opposed to an offense "arising under" the UCMJ's specific prohibitions. 10 U.S.C. § 836(a); see generally 10 U.S.C. §§ 877-934.

Hamdan attempted to distinguish Yamashita on the basis that the UCMJ, which was enacted on May 5, 1950, was not yet in effect at the time of the Supreme Court's decision. It obviously was in effect, however, in 1952 when the Court observed in Madsen, 343 U.S. at 346-48, that UCMJ Article 21 specifically preserved the military commissions' common-law-of-war jurisdiction and procedures. The Madsen Court went on to hold that "[i]n the absence of attempts by Congress to

limit the President's power, it appears that, as Commander in Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions." Id. at 348 (emphasis added). To be sure, as Hamdan pointed out, 2004 WL 2504508 at *14, the petitioner in Madsen did not raise any specific procedural objection under the UCMJ. Certainly, though, the Court would not have confirmed so emphatically, and without qualification, the President's prerogative to establish procedures for "our commonlaw war courts" if the UCMJ had just two years earlier constrained the President's war-time authority in as dramatic a fashion as the district court here believed; the reversal of a practice recognized since "our nation's earliest days" would not have escaped the Court's attention, whether a procedural objection under the UCMJ were squarely presented or not. Madsen, 343 U.S. at 346-347.

In these ways, the Hamdan Court's analysis was incorrect and the UCMJ's court-martial provisions do not apply to the military commissions that are trying Hicks and Hamdan.

D. The Military Commissions are Legal Under *Hamdi* and *Rasul*.

Petitioner's reliance on Hamdi, 124 S. Ct. at 2633, for a calculus to be used in determining whether an alleged enemy combatant is being denied due process of law is misguided because Hamdi is inapposite. Opp. at 51. Hamdi, unlike Hicks, was a "United States citizen," detained "on United States soil as an 'enemy combatant.'" 124 S. Ct. at 2635.[14] As respondents have extensively explained above, see § V, as neither a citizen nor an alien with voluntary contacts with the United States, Hicks has no right to due process of law under the United States Constitution.

[14] Although Hamdi was initially transferred to the United States Naval Base in Guantanamo Bay after being captured in Afghanistan, he was transferred to a naval brig in Norfolk, Virginia after authorities learned that he was an American citizen. He was later transferred to a brig in Charleston, South Carolina. Hamdi, 124 S. Ct. at 2636.

Also, petitioner's argument that the Supreme Court's holding in Rasul, 124 S. Ct. 2686, means that petitioner is entitled to the protections of the Due Process Clause is wrong. Although the Rasul Court found that federal courts have habeas jurisdiction over petitioner, the Court did not find that petitioner was entitled to constitutional rights. See EC Response § II.A.; EC Reply § I.A.

Hicks' Due Process Clause claims also fail ab initio under Verdugo, 494 U.S. 259, 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, Hicks, 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. at 57 n.37; that "Justice Kennedy's concurrence . . . states the Verdugo holding," Opp. at 57; and that "no single rationale explaining the result enjoy[ed] the assent of five Justices," Opp. at 57 n.37 (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). See EC Reply § I.B.

For the foregoing reasons, Hicks' Due Process Clause claims fail.

E. The Military Commissions are Legal Under International Law.

Petitioner argues that his trial by the military commission is contrary to the Geneva Conventions. Opp. at 60-70. Respondents have demonstrated elsewhere, however, that detainees

such as petitioner cannot avail themselves of the protection of the Conventions, see EC Response § III.B.; EC Reply § VI.A., B.; thus, petitioner's claim should be rejected.[15]

CONCLUSION

For the reasons stated above, and for those stated in the Response, respondents respectfully request that Hicks' habeas petition be denied, petitioner's Cross-Motion be denied, and a judgment of dismissal be entered in favor of respondents.

DATED this 15th day of November, 2004.

Respectfully submitted,

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[15] The EC Reply also addresses aspects of Judge Robertson's Hamdan decision discussing this issue.

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