No. _____

IN THE
Supreme Court of the United States

SALIM AHMED HAMDAN,
Petitioner,

v.

DONALD H. RUMSFELD, ET AL.,
Respondents.

On Petition for Writ of Certiorari Before Judgment to the United States Court Of Appeals For The District Of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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Date: November 22, 2004

QUESTIONS PRESENTED

1. Whether Respondents are free to try Petitioner and others similarly situated at Guantanamo Bay Naval Station in military commissions under procedures that do not comply with the laws of war or the Geneva Conventions.

2. Whether Respondents may put Petitioner and others similarly situated at Guantanamo Bay Naval Station on trial before a military commission that lacks jurisdiction and is improperly constituted because it has not been affirmatively authorized by Act of Congress and violates the Uniform Code of Military Justice and other federal guarantees.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below.

The Petitioner here and in the United States Court of Appeals for the District of Columbia is Salim Ahmed Hamdan, a citizen of Yemen who is currently detained at Guantanamo Bay.

The Respondents here and in the United States Court of Appeals for the District of Columbia are Donald H. Rumsfeld, United States Secretary of Defense; John D. Altenburg, Jr., Appointing Authority for Military Commissions, Department of Defense; Brigadier General Thomas L. Hemingway, Legal Advisor to the Appointing Authority for Military Commissions; Brigadier General Jay Hood, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; George W. Bush, President of the United States.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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Mr. Salim Ahmed Hamdan petitions for a writ of certiorari before judgment in a case pending on appeal to the United States Court of Appeals for the District of Columbia.

OPINION BELOW

The opinion of the district court (App. A., *infra*) is reported at 2004 WL 2504508.

JURISDICTION

The judgment of the district court was entered on November 8, 2004. The notice of appeal (App. D, *infra*) was filed on November 16, 2004. The case was docketed in the court of appeals on November 16, 2004, as No. 04-5393. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(e).

CONSTITUTIONAL, STATUTORY, AND INTERNATIONAL LAW PROVISIONS INVOLVED

The relevant constitutional, statutory, and international law provisions involved are set forth in an appendix to the petition. App. B, *infra*.

STATEMENT OF THE CASE

A. The Underlying Facts

On November 13, 2001, the President of the United States issued a Military Order stating that internal and external attacks by international terrorists constituted a national emergency justifying the use of military commissions. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed.Reg. 57, 833 (Nov. 13, 2001). The rules that govern these military commissions stand in stark contrast to the fundamental protections mandated for an accused by Congress in the Uniform Code of Military Justice. *See, e.g.,* Military Order No.1, available at http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf. These rules, for example, permit the exclusion of the accused from portions of his trial, *id.*, at § 6(B)(3); deny the accused the ability to represent himself, permit the admission of sworn or un-sworn statements

against the accused in lieu of testimony, *id.*, at § 6(D); and reserve for the Secretary of Defense or his designee the judicial power to rule in matters that terminate the proceedings, *id.,* at § 6(H)(1)-(6). The rules further provide that the limited protections available to defendants, such as the protection against being forced to testify and the presumption of innocence, are not "rights" that are "enforceable" in any way, *id.,* at § 10, and further provide that even these protections, such as they are, can be stripped at any time. *Id.,* at § 11.

In late November 2001, Petitioner Hamdan was captured while attempting to flee Afghanistan and return his family to his native country of Yemen. After being turned over to American forces, Petitioner was taken to the United States Naval Base at Guantanamo Bay, where he was placed with the general detainee population at Camp Delta.[1] On July 3, 2003, the President announced that there was "reason to believe" that Petitioner was eligible for trial by a military commission. In anticipation of that, Petitioner was placed in solitary confinement in Camp Echo, where he remained from December 2003 until late October 2004 (approximately four days before this case was argued in the District Court). During those eleven months, Mr. Hamdan was denied contact with the other detainees and permitted only very limited access to a translator. App. 60-61. Additionally, Mr. Hamdan was initially denied outdoor exercise during daylight hours and denied medical treatment despite his repeated requests. App. 60.

On December 18, 2003, the Chief Defense Counsel, pursuant to a request by the Prosecutor that defense counsel be appointed for the limited purpose of negotiating a pretrial agreement, detailed Lieutenant Commander Swift to serve as Mr. Hamdan's military counsel in the commission proceedings. Mr. Hamdan first met with Lieutenant Commander Swift on January 30, 2004. On February 12, 2004, Mr. Hamdan, through his counsel, filed a demand with the Appointing Authority for charges and a speedy trial under Article 10 of the Uniform Code of Military Justice

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[1] Affidavit of Salim Ahmed Hamdan, Feb. 9, 2004, attached as Exhibit B to the Petition for Writ of Mandamus Pursuant to 28 U.S.C. § 1361 or, in the Alternative, Writ of Habeas Corpus, *infra* App. H., 58-61.

("UCMJ"). The Appointing Authority rejected Mr. Hamdan's speedy trial demand on February 23, 2004, concluding that Mr. Hamdan's detention did not fall under the ambit of the UCMJ. On July 9, 2004, more than two and a half years after Mr. Hamdan was first detained by the United States and eight months after the beginning of his solitary detention in Camp Echo, the Department of Defense formally charged Mr. Hamdan with the offense of conspiracy. Charge Sheet, App. 43.

B. The District Court Proceedings

On April 6, 2004, Lieutenant Commander Swift, standing as Mr. Hamdan's "next friend", filed a Petition for Mandamus or, in the Alternative, Habeas Corpus in the United States District Court for the Western District of Washington. App. 2. In an order dated August 9, 2004, the Honorable Robert S. Lasnik transferred the case from the Western District of Washington to the United States District Court for the District of Columbia pursuant to the Supreme Court's holding in *Rasul v. Bush*, 124 S. Ct. 2686 (2004) and the Ninth Circuit's holding in *Gherebi v. Bush*, 374 F.3d 727 (9th Cir. 2004). The case was then docketed in the District Court for the District of Columbia on September 2, 2004.

On October 25, 2004, the District Court for the District of Columbia heard oral arguments on Petitioner's petition and Respondents' motion to dismiss. In its Memorandum Opinion dated November 8, 2004, the District Court granted the petition in part and denied Respondents' motion. App. 1. The District Court first rejected Respondents' contention that it was required to abstain from considering Petitioner's petition pending his trial before the military commission. App. 4-6. The District Court ruled that abstention was not required, and would not be appropriate, because Mr. Hamdan had "'raised substantial arguments denying the right of the military to try [him] at all.'" App. 5 (citing *Schlesinger v. Councilman*, 420 U.S. 738, 763 (1975)).

The District Court next ruled that military commissions may be used only to try offenses that are triable under the laws of war, including the Third Geneva Convention; that the convention is self-executing and judicially enforceable; and that, as long as his prisoner-of-war status is in doubt, the convention requires that Petitioner be tried by court-martial.

Id. 6-18. The District Court found that the procedures established by the President's Military Order do not satisfy the requirements of the Third Geneva Convention as embodied in the UCMJ, particularly in depriving Petitioner the right to attend portions of his hearing before the military commission and hear the evidence presented against him. *Id.* 18-29. For the President to go beyond the limits of the UCMJ in establishing military commissions, the District Court found, would place the President in the zone where his power is at "its lowest ebb" under *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). App. 9.

C. Proceedings on Appeal

On November 16, 2004, the government filed a notice of appeal to the United States Court of Appeals for the District of Columbia Circuit, App. 46-47. The Court of Appeals has jurisdiction pursuant to, *inter alia*, 28 U.S.C. §1292(a). The government's notice of appeal was timely filed within the 30 days allowed by Federal Rule of Appellate Procedure 4. The appeal was docketed in the court of appeals on November 16, 2004. The Government then filed a Motion for Expedited Appeal on November 16, 2004, which was granted by the United States Court of Appeals for the District of Columbia Circuit on November 17, 2004. App. 48-54. The Court of Appeals has set a briefing schedule under which the briefing will be complete on January 10, 2005. *Id.*

No oral argument date has been set. The case is nonetheless "in the court[] of appeals" within the meaning of 28 U.S.C. § 1254. *See* Robert L. Stern, et al., *Supreme Court Practice*, Sec. 2.4, at 75 (8th ed. 2002).

REASONS FOR GRANTING THE PETITION

Petitioner seeks certiorari before judgment because of the gravity of the questions presented and the need for their early definitive resolution by this Court. The United States has asserted that the decision below "derailed ongoing military commission proceedings" and "has substantial implications beyond this case."[2] App. 49. Although Petitioner

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[2] Mot. of the United States for Expedition of Appeal, *Hamdan v. Rumsfeld*, No. 04-5393, Nov. 16, 2004 ("U.S. Mot. to Expedite"), App. E,

believes the District Court did not "derail" the proceedings but instead concluded, correctly, that they had jumped the track, only this Court can provide the requisite finality demanded by matters of such importance. Petitioner, moreover, has been imprisoned for three years without process and is entitled to an expeditious resolution of his claims. The international dimension of this case also compels this Court's early resolution. Dozens of other countries have nationals being held at Guantanamo Bay who either are facing similar proceedings or may face them in the future.

Unless this Court grants certiorari before judgment, it is quite likely that final resolution of the Questions Presented would take more than a year from the present date without a Special Session of this Court. This one-year period is nearly inevitable from the schedule adopted by the Court of Appeals in agreeing to expedite briefing. App. 56-57. Such a delay would not only leave Petitioner detained at Guantanamo for an additional, fourth, year, it would leave the military commission process in limbo, cast a significant cloud over the Government's compliance with its international obligations, and promote continuing uncertainty in the courts in other cases. Such delay is particularly problematic since the decision by the district court below contains final decisions on matters that benefit each party in this litigation. In cases similar to this one, such as *Ex Parte Quirin*, 317 U.S. 1 (1942) (challenge to military commission) and *Reid v. Covert*, 351 U.S. 487 (1956) (challenge to court martial for a civilian), certiorari before judgment was granted. In this case, the need for certiorari before judgment is even greater, given the interests at stake, the centrality of Supreme Court precedent, and the likelihood that the Court's resolution will provide guidance to the courts of the District of Columbia in other cases.

This is not a case in which there exist plausible dispositions of the case by the intermediate appellate court that would moot the need for this Court's plenary review. If Petitioner were to prevail in the D.C. Circuit, it is clear that the United States would seek certiorari for many of the reasons it has set forth in its November 16 filing in that court

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infra. The United States has also called the decision "an unprecedented judicial intrusion into the prerogatives of the President" with "potentially very broad and dangerous ramifications." App. 50.

urging expedition of the appeal. If the government were instead to prevail in the D.C. Circuit, the Petitioner would seek certiorari for the same reasons as those set forth in this petition. The issues are purely legal in character and no finding by the Circuit Court, and no disposition of those issues, would diminish their import.

Furthermore, after *Padilla v. Rumsfeld*, 124 S. Ct. 2711, 2725 n.16 (2004), the benefits of so-called "percolation" in the rulings of the several circuits are absent inasmuch as only one circuit can hear these cases. And, of course, Petitioner is being confined for purposes of a proceeding that a ruling in his favor on the Questions Presented would preclude. Each month that passes while the D.C. Circuit ponders precisely the same legal questions that would come to this Court on certiorari is a month that can never be returned if, as Petitioner believes, he has committed no offense and has indeed done nothing that warrants the continued deprivation of his liberty. And it is another month in which uncertainty in the lower courts and at Guantanamo Bay will persist.

A. A Writ of Certiorari Before Judgment Is Appropriate in the Extraordinary Circumstances of this Case

1. A petition for a writ of certiorari before judgment will be granted "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. *See* Petition of the United States for Certiorari Before Judgment, *United States v. Fanfan*, No. 04-105, at 9 (discussing Rule's meaning), *cert. granted*, 125 S. Ct. 12 (Aug. 2, 2004).

2. This case meets the stringent standard of the Court's Rule 11, as it involves: (a) intricate questions about the power of the Executive during military conflict, *e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 937 (1952) (certiorari before judgment granted); *Ex Parte Quirin*, 317 U.S. 1 (1942) (certiorari before judgment granted); (b) important questions about the relationship of the Executive Branch to the other two coordinate Federal Branches, *e.g.*, *United States v. Nixon*, 417 U.S. 927 (1974) (certiorari before judgment granted); (c) the relationship of the United States with other nations, *e.g., Dames & Moore v. Regan*, 453 U.S.

654, 667-68 (1981) (certiorari before judgment granted); *Wilson v. Girard*, 354 U.S. 524, 526 (1957) (certiorari before judgment granted); *The Three Friends*, 166 U.S. 1, 5 (1897) (certiorari before judgment granted); and (d) the administration of military justice, *e.g., Reid v. Covert*, 351 U.S. 487, 488 (1956) (certiorari before judgment granted); *Kinsella v. Kruger*, 351 U.S. 470, 473 (1956) (certiorari before judgment granted).

In the past, the Court has typically found any one of these four factors sufficient to warrant granting certiorari before judgment. All four factors are present here. Indeed, this case raises the same sorts of questions as those presented in *Ex Parte Milligan*, 71 U.S. 2 (1866), *Quirin*, *Youngstown*, and *Reid*. The latter three are all cases in which certiorari before judgment was granted, the first one preceded the enactment of the Expediting Act, 28 U.S.C. § 1254(1).[3] And none of the reasons ordinarily supporting a denial of certiorari before judgment is present.

3. This case, like *Ex Parte Quirin*, requires the Court to determine the proper balance between individual rights and Executive power during armed conflict. In *Quirin*, which involved a similar challenge to a military commission, the Court granted certiorari before judgment on the request of the military-commission defendants:

> In view of the public importance of the questions raised by [the saboteurs'] petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay, we directed that petitioners' applications

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[3] Even before the Act, however, the Court moved quickly to hear *Ex Parte Milligan* after District Judge David McDonald and Circuit Justice Davis disagreed on the legal question. "By advancing the *Milligan* case on its calendar, the Supreme Court indicated that the issues presented were of extraordinary importance." William H. Rehnquist, All the Laws But One 118 (1998).

> be set down for full oral argument at a special term of this Court.

317 U.S. at 19.

The challenge to the military commission in *Quirin*, like the challenge here, raised far reaching questions of national security and separation of powers in war time and controlled the fate of individuals who, like Petitioner, claimed that the procedures to which they had been subjected were unlawful. The need here for certiorari before judgment is even stronger in this case than in *Quirin*. In *Quirin*, the district court denied habeas, and the Court could have stayed its hand, awaiting decision by the Court of Appeals, without concern for the effect of the district court's decision on the Executive Branch. Here, the District Court has granted habeas. App. 31. Even if the Court of Appeals were to reverse the District Court, the questions presented by the petition are too momentous for this Court *not* to decide: "Had this tribunal the legal power and authority to try and punish this man? No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people." *Milligan*, 71 U.S. at 118-19. *See also Amicus Curiae Brief of 16 Professors of Constitutional Law, Hamdan v. Rumsfeld* (D.D.C. 2004), available at http://www.law.georgetown.edu/faculty/nkk/documents/constllawprofessors.pdf.

4. The Court has also granted certiorari before judgment in cases which implicate the scope and administration of military justice. In *Reid*, 351 U.S. at 488, and *Kinsella*, 351 U.S. at 473, two civilians had been tried by court-martial abroad, and challenged the constitutionality of those courts' jurisdiction over them. The Court granted the writ before judgment in the court of appeals "because of the serious constitutional question presented and its far-reaching importance to our Armed Forces stationed in some sixty-three different countries throughout the world." *Kinsella*, 351 U.S. at 473. Like *Reid* and *Kinsella*, this case calls upon the Court to examine swiftly whether the military is improperly meting out justice to those who deserve greater procedural protections, and like *Reid* and *Kinsella*, this Court's answer will have far-reaching effects on the Armed Forces' conduct. In those two cases, the Court ultimately found that the court-martial process unconstitutionally deprived civilians of their rights. *Reid v. Covert*, 354 U.S. 1 (1957).

5. Writs of certiorari before judgment are particularly appropriate in cases which – like this case of a Yemeni national, and like the many cases bound to follow involving the citizens of any number of other nations captured in the global war on terror and set to be tried before one of the President's military commissions – implicate presidential power in the context of foreign relations. The very first grant of certiorari before judgment occurred during the Cuban Revolution that preceded the Spanish-American war. *The Three Friends*, 166 U.S. at 40. In that case, the government had seized a ship, claiming that it violated a federal law that prohibited outfitting a ship for a "foreign colony, district, or people." *Id.* at 58. The ship owners successfully argued to the district court that Cuban revolutionaries were not a "foreign colony, district, or people" despite the Government's broad claim that they were. *Id*. The Supreme Court granted certiorari before judgment in view of the public importance of the matter. *Id.* at 49; James Lindgren & William P. Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 S. Ct. Rev. 259, 268-69 (1986). As the Court put it later that Term in phrases that echo today:

> [Certiorari before judgment was granted in *The Three Friends* because] the question involved was one affecting the relations of this country to foreign nations, and therefore one whose prompt decision by this court was of importance, not merely for the guidance of the Executive Department of Government but also to disclose to each citizen the limits beyond which he might not go in interfering in the affairs of another nation without violating the laws of this.

Forsyth v. City of Hammond, 166 U.S. 506, 514 (1897). *See also McCulloch v. Sociedad Nacional*, 372 U.S. 10, 17 (1963) ("the presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial resolution of the controversy"); Lindgren & Marshall, *supra*, at 292-93 ("A foreign nation may deserve a definitive ruling from our nation's highest legal

authority….Also, the appellate process may lead to conflicting results at each stage of review. Effective foreign policy, on the other hand, requires consistent signals.").

The Court granted certiorari before judgment in *Dames & Moore*, 453 U.S. at 667-68, which presented an immediate need for resolving the disposition of Iranian assets seized pursuant to an Executive Agreement. *See also Wilson*, 354 U.S. at 526 (granting certiorari before judgment to evaluate whether it was proper for the Secretaries of State and Defense to deliver an American serviceman for trial in Japanese courts pursuant to an Administrative Agreement between the two nations). As the opinion below has unequivocally ruled, the military commission that Mr. Hamdan would now confront but for its Judgment granting habeas relief violates Geneva Convention obligations, imperiling relationships with other nations and threatening the ability of our Government to demand compliance with the Geneva Conventions when American soldiers are captured. App. 15. *See Amicus Curiae Brief of 271 British and European Members of Parliament, Hamdan v. Rumsfeld* (D.D.C. 2004), available at http://www.law.georgetown.edu/faculty/nkk/documents/271europeanmembersofparliment.pdf, at 10 ("When it disregards international law, the United States risks setting precedents that will adversely affect its own citizens abroad."); *Amicus Curiae Brief of International Law Professors, Hamdan v. Rumsfeld* (D.D.C. 2004), available at http://www/law.georgetown.edu/faculty/nkk/documents/intllawbrief.pdf.

Furthermore, this case raises questions that profoundly affect the administration of justice. In *Mistretta v. United States*, 488 U.S. 361, 371 (1988), and, just recently, in *United States v. Fanfan*, 125 S. Ct. 12 (2004), this Court granted certiorari before judgment to pass upon the constitutionality of the sentencing guidelines – an issue of "imperative public importance." *Mistretta*, 488 U.S. at 371.[4]

6. The fact that Mr. Hamdan prevailed in the district court below does not counsel against granting this petition.

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[4] Certiorari before judgment has also been used in times when the Court needs to protect the institutional authority of the judiciary. *See* Lindgren & Marshall, *supra*, at 287-88, 294-95. *Cf.* Dan Eggen, *Ashcroft Decries Court Rulings: 'Second-Guessing' Bush on Security Raises Risk, He Says*, Wash. Post, Nov. 13, 2004, at A6.

Certiorari before judgment has been granted to the prevailing party in the district court a number of times. For example, in *Nixon,* 418 U.S. at 686-87, 690, the Court granted certiorari before judgment, on the petition of the prevailing party in the district court, in a case involving the reach of the Executive power because of the "public importance of the issues presented and the need for their prompt resolution…" *See also United States* v. *United Mine Workers,* 330 U.S. 258, 269 (1947); *United States* v. *Bankers Trust Co.,* 294 U.S. 240, 294-295 (1935); Brief of the United States for Certiorari Before Judgment, *New York v. Microsoft*, No. 00-261 4 n.3 ("The Court's power to grant certiorari before judgment extends to petitions filed by the party that prevailed in the district court.") (providing citations); Stern & Grossman, *supra*, at 78 ("The Court has given literal effect to the words 'any party' [in the Expediting Act, 28 U.S.C. § 1254] in holding that if the losing party in a federal district court appeals to a court of appeals, and the record is docketed therein, the successful party can, prior to judgment in the court of appeals, petition the Supreme Court to hear the case in lieu of the court of appeals").

The Court also granted certiorari before judgment when called to do so by the prevailing party in *Youngstown*, 343 U.S. at 579, a case where the President seized the nation's steel mills, claiming that the country's war-making needs demanded it. After the district court found that the President had overstepped his bounds and enjoined the seizure, both parties filed petitions for certiorari in this Court, asserting that the "interests of the Nation [require that] the vital questions here presented should be resolved at the earliest possible moment by this Court." Pet. for Writ of Certiorari Before Judgment, on Behalf of Petitioner, 6 (adding that although the District Court had "necessarily and correctly decided the fundamental constitutional questions involved," the Nation required that the Court "authoritatively confirm" that decision). The Court accepted certiorari and promptly struck down the President's use of power. *Youngstown*, 343 U.S. at 588-89.

B. Review of the District Court's Decision Regarding the Legality of Military Commissions Is Warranted Because of the Importance of Military Commissions and Because the Ruling Below Has Tremendous Significance for Other Cases

1. In its motion to expedite this case in the Court of Appeals, the United States has outlined a set of claims that would support certiorari before judgment. U.S. Mot. To Expedite, App. 48-54.

- The Government argues for expedition because it says the district court's opinion "derailed the ongoing military commission proceedings" and reached "legally erroneous rulings with potentially very broad and dangerous ramifications." The Government states that these rulings "represent an unprecedented judicial intrusion into the prerogatives of the President and warrant expedited review by this Court." App. 49-50.
- The Government contends that the district court's ruling on the Geneva Convention "has substantial implications beyond this case." In particular, it states that the ruling below "opens a veritable Pandora's box where the Executive attempting to protect this nation through the use of military force would become entangled in a morass of litigation," and would "indisputably encumber the President's authority as Commander in Chief." App. 50. It further asserts that the decision below conflicts with *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004). App. 50.
- The Government claims that the district court "effectively overrules the President's determinations" about al Qaeda and that "[t]hese determinations

were fundamental exercises of the President's authority as Commander in Chief" and the court's order "is in itself a substantial injury to the President's authority." App. 51.

- The Government concludes by stressing the need for expedited resolution to re-start the military commission process and "to minimize the unwarranted delay caused by the district court's order in the conduct of these important military commission proceedings." App. 52.

2. Petitioner has waited three years to have a fair trial. Throughout this time, he has languished in detention, deprived of his liberty and access to his wife and children. App. 60-61. Prompt resolution of the legal issues by this Court will provide authoritative guidance that no other court is able to offer – to the Executive Branch, to Congress, to the bench and bar, and the world community as to the rights, powers, and obligations of the several arms of the United States Government in this momentous period. If military commissions are worth conducting, they are worth conducting lawfully and being *perceived* as so conducted. Their deployment in jurisdictionally dubious contexts or in legally clouded conditions can only work a disservice to their potential utility when confined to proper circumstances and conducted under legally appropriate ground rules. Only this Court's prompt and decisive resolution of the questions presented by the use of military commissions in the circumstances of this case can dispel those clouds swiftly and with the certitude that those conditions require.

3. Unlike typical cases, in which an issue may "percolate" through various Courts of Appeal and be tested by numerous Circuits, the issues here can *only* be heard in the Court of Appeals for the District of Columbia. *See Padilla*, 124 S. Ct. at 2725 n.16. The benefits of percolation are therefore reduced here as compared to the typical case. In addition, the vast outpouring of scholarly and *amici* interest in the case over the past three years has created a vibrant and mature debate that may inform this Court's resolution of the

Questions Presented.[5] The case has been fully briefed in the District Court – and the issues will inevitably reach this

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[5]In the district court in this case, for example, briefs were filed on behalf of (1) Arthur Miller; (2) 271 United Kingdom and European Parliamentarians; (3) International Law Professors; (4) 16 Professors of Constitutional Law; (5) General David M. Brahms, Admiral Lee F. Gunn, Admiral John D. Hutson and General Richard O'Meara; (6) Louise Doswald-Beck, Guy S. Goodwin-Gill, Frits Kalshoven, Marco Sassoli and The Center for International Human Rights of Northwestern University School of Law; and (7) the Washington Legal Foundation.

Academic literature debating the legality and constitutionality of military commissions is plentiful. *See, e.g.,* Jordan J. Paust, *Post-9/11 Overreaction And Fallacies Regarding War And Defense, Guantanamo, The Status Of Persons, Treatment, Judicial Review Of Detention, And Due Process In Military Commissions*, 79 NOTRE DAME L. REV. 1335 (2004); Melissa J. Epstein and Richard Baker, *The Customary Origins And Elements Of Select Conduct Of Hostilities Charges Before The International Criminal Tribunal For The Former Yugoslavia: A Potential Model For Use By Military Commissions*, 179 MIL. L. REV. 68 (2004); Kevin J. Barry, *Military Commissions: Trying American Justice*, Army Lawyer, Nov. 2003, at 1; Carl Tobias, *Detentions, Military Commissions, Terrorism, and Domestic Case Precedent,* 76 S. CAL. L. REV. 1371 (2003); David Stoelting, *Military Commissions and Terrorism*, 31 DENV. J. INT'L L. & POL'Y 427 (2003); Eugene R. Fidell, *Military Commissions and Administrative Law*, 6 GREEN BAG 2d 379 (2003); Robert John Araujo, *A Judicial Response to Terrorism: The Status of Military Commissions under Domestic and International Law*, 11 TUL. J. INT'L & COMP. L. 117 (2003); John M. Bickers, *Military Commissions Are Constitutionally Sound: A Response To Professors Katyal And Tribe*, 34 TEX. TECH L. REV. 899 (2003); Laura A. Dickinson, *Using Legal Process To Fight Terrorism: Detentions, Military Commissions, International Tribunals, And The Rule Of Law*, 75 S. CAL. L. REV. 1407 (2002); Juan R. Torruella, *On The Slippery Slopes Of Afghanistan: Military Commissions And The Exercise Of Presidential Power*, 4 U. PA. J. CONST. L. 648 (2002); Kenneth Anderson, *What To Do With Bin Laden And Al Qaeda Terrorists?: A Qualified Defense Of Military Commissions And United States Policy On Detainees At Guantanamo Bay Naval Base,* 25 HARV. J.L. & PUB. POL'Y 591 (2002); Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity Of Military Commissions*, 5 GREEN BAG 2d 249 (2002); Harold Hongju Koh, *The Case Against Military Commissions,* 96 AM. J. INT'L L. 337 (2002); Michael O. Lacey, *Military Commissions: A Historical Survey*, Army Lawyer March, 2002, at 41; David Golove, *Military Tribunals, International Law, And The Constitution: A Franckian-Madisonian Approach,* 35 N.Y.U. J. INT'L L. & POL. 363 (2003); George Rutherglen, *Structural Uncertainty Over*

Court; any decision by the Circuit Court thus would "have no effect on the basic posture of the constitutional questions presented . . . ." Pet. for Writ of Certiorari in *Youngstown Sheet & Tube*, at 7-8; *Youngstown*, 343 U.S. 937 (1952) (granting certiorari before judgment).[6]

C. This Case Squarely Presents the Issues On Which this Court's Guidance is Needed

This is the first case to challenge the constitutionality of a military commission since the aftermath of World War II. Since the Court's landmark decisions in *Ex Parte Quirin* and *Johnson v. Eisentrager*, 337 U.S. 763 (1950), remarkable changes have altered the legal landscape. The United States has ratified the Geneva Conventions. The Government has extended its law extraterritorially. And the Uniform Code of Military Justice has been enacted and has completely revolutionized the predecessor Articles of War. These significant developments necessitate the involvement of this Court in answering the questions presented, which ask whether the present day military commissions are consistent with the current law and treaties of the nation.

The facts of this case raise each of the questions presented. Petitioner did not receive an Article 5 hearing under the Geneva Convention or under Sec. 190-8 of the Army Regulations; he is being prosecuted in the name of the laws of war and the President has invoked, as the basis of his authority, 10 U.S.C. §§ 821 and 836. Petitioner receives different protections and rights than all others who face courts-martial under the UCMJ.

Habeas Corpus & The Jurisdiction Of Military Tribunals, 5 GREEN BAG 2d 397 (2002); Daniel A. Rezneck and Jonathan F. Potter, *Military Tribunals, The Constitution, and the UCMJ,* 2002 FED. CTS. L. REV. 3; Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying The Military Tribunals*, 111 YALE L.J. 1259 (2002).

[6] In *Youngstown*, the Court ignored the protests of two justices who preferred to wait for Circuit Court resolution, 343 U.S. at 937 (Burton & Frankfurter, J.J., dissenting from grant of certiorari), instead "[d]eeming it best that the issues raised be promptly decided by this Court." *Youngstown*, 343 U.S. at 584.

D. The Military Commission Being Used to Try Petitioner Is Unlawful and Implicates Separation of Powers Concerns That Require This Court's Immediate Consideration

This case challenges an unprecedented and dangerous expansion of Executive Branch authority cloaked in the exercise of the President's war powers. Far from the battlefield – however broadly defined – and remote from any zone of military occupation, the President has unilaterally created a military commission, justified not as ancillary to his invasion of Iraq to topple the regime of Sadam Hussein, not as ancillary to the post-invasion occupation of Iraq or the current military hostilities there, but rather by the far broader and more amorphous rubric of the "war" on international terrorism. That "war" manifestly is not a war in any sense of that term against any nation state or indeed against any well-defined enemy, nor is it a war with any defined or definable geographic arena of conflict, nor a war in which one can pinpoint a date when hostilities began, or a means of determining when hostilities are at an end, and it most assuredly is not a war that was ever declared by Congress. In an undeclared war, unbounded by time, place or the identity of the enemy, Respondents have relied on legal precedents set during previous conventional wars in order to designate Petitioner Hamdan an enemy combatant and to prefer war crimes charges.

The applications of concepts of conventional war to a war on terrorism obviously raise profound legal issues with which this Court will in due course need to grapple. Most of these issues, thankfully, are not presented here. This case challenges only the creation and use of a military commission created without Congressional authorization, in a place far removed from any military hostilities, to try an offense unknown to the laws of war and not authorized to be tried by commission, under procedures that flout basic tenets of military justice against a civilian who contests that he is an unlawful belligerent.

Respondents have argued that although the UCMJ is authority for creating the military commission, its protections and procedures are not applicable in this case. The plain language of the UCMJ and its legislative history establish

that it does apply. Indeed, the very UCMJ provision upon which Respondents rely for authority to create the military commission itself unmistakably states that the procedures, rules, and principles of law followed by a military commission "may not be contrary to or inconsistent with" the UCMJ. 10 U.S.C. § 836. Furthermore, the UCMJ broke from the predecessor Articles of War by extending the protections of the Code to all leased territories, like Guantanamo Bay, that are under the control of the Secretary of the Defense. *Compare Yamashita v. Styer*, 327 U.S. 1, 20 (1946) (stating that Congress "did not thereby make subject to the Articles of War persons other than those defined by Article 2 as being subject to the Articles, nor did it confer the benefits of the Articles upon such persons" and that General Yamashita was "not a person made subject to the Articles of War by Article 2") *with* 10 U.S.C. § 802(12) (expanding the list of persons "subject to this chapter" to include "persons within an area leased by" the United States and subject to the control of the Secretary of Defense).

Because the UCMJ applies, the confrontation rights of courts-martial must extend to military commissions. *See* 10 U.S.C. § 839 (providing rights of confrontation). This tracks the "general rule, that military commissions are constituted and composed, and their proceedings are conducted, similarly to general courts-martial." W. Winthrop, Military Law and Precedents, 835 n.81 (2d ed. 1920) (citations omitted); Act of July 2, 1864, 13 Stat. 356 (extending court-martial provisions to commissions). *See also Crawford v. Washington*, 124 S. Ct. 1354, 1363 (2004) (finding confrontation rule one of common law "founded on natural justice" (quoting *State v. Webb*, 2 N.C. 104 (1794)).

Respondents chiefly rely on *Quirin* and *Yamashita* to support the legitimacy of the military commission at issue in this case. However, as the district court noted, those cases identify the source of authority to create military commissions as Article I, § 8, cl. 10 of the Constitution, which confers on Congress the power "to define and punish…Offenses against the Law of Nations." *See, e.g.*, *Yamashita*, 327 U.S. at 7; App. 6. Indeed, in *Quirin*, the Court expressly found it unnecessary "to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress

has authorized trial of offenses against the law of war before such commissions." *Quirin*, 317 U.S. at 11. Article 15 of the Articles of War, which in *Quirin* and *Yamashita* was identified as the source of such Congressional authorization, is now set forth in the Uniform Code of Military Justice at 10 U.S.C. § 821.

Respondents invoke 10 U.S.C. § 821 as authorization for the military commission, but fail to acknowledge the limits on the jurisdiction of military commissions established by that statute. The statute authorizes trial by military commission only for "offenders and offenses that by statute or by the law of war may be tried by military commissions." *Id.* Respondents can point to no statute that identifies Petitioner as an "offender" or conspiracy as an "offense" triable by military commission. Accordingly, by invoking 10 U.S.C. § 821, Respondents necessarily rely on the *laws of war* as the source of authority for identifying one who may be tried by military commission.

The District Court, however, properly recognized that the law of war now includes the Third Geneva Convention ("GPW"). *See Hamdi v. Rumsfeld*, 124 S.Ct. 2633, at 2641 (2004) (plurality opinion) (citing numerous Articles of the GPW); App. 9-10. Under Article 5 of the GPW, if any doubt exists concerning whether an individual is entitled to the protections of the GPW, that person must be afforded all the protections of the Convention "until such time as their status has been determined by a competent tribunal." GPW, Art. 5; *see also* Army Regulation 190-8, § 1-6(a), "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees" (implementing the GPW, as recognized by Justice Souter in his separate opinion in *Hamdi*, 124 S. Ct. at 2658). There can be no reasonable dispute that Petitioner in this case has not been afforded an Article 5 hearing. Accordingly, he is entitled to the protections of the GPW, including those set forth in Article 102.

Article 102 of the GPW provides that a protected person "can be validly sentenced only if the sentence is pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power." The District Court properly held that the military commission in this case "is not such a court. Its procedures are not such procedures." App. 10.

The strained arguments advanced by Respondents to avoid this result are unavailing. First, Respondents assert that the GPW does not apply to Petitioner because he is a member of al Qaeda, the war against al Qaeda in Afghanistan was "separate" from the armed conflict against the Taliban (who controlled the state), and the GPW does not extend to armed conflicts against non-state entities. The District Court correctly rejected these arguments. App. 11. Not only is the factual premise in doubt, Respondents' interpretation is also refuted by the language and structure of the Convention itself. That language by its terms applies in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." GPW, Art. 2. Afghanistan and the United States are both High Contracting Parties to the GPW. App. 10. Respondents' interpretation also ignores the historical fact that the United States has consistently applied the GPW to both regular and irregular enemy forces in the numerous conflicts in which this country has been involved since ratifying the GPW in the mid-1950s.

Respondents go so far as to assert that the "separate" nature of the conflict against al Qaeda is a Presidential "finding" that is unreviewable by Article III courts. App. 51. Of course, this so-called "finding" – asserted in an effort to disqualify the judiciary from its constitutional obligation to interpret and give effect to a treaty of the United States – is a mere appellation that seeks to turn disputed facts into a political question. Moreover, Respondents are simply wrong in claiming that the Executive's interpretation of a treaty is conclusive and unreviewable. Under the Supremacy Clause, treaties are the supreme law of the land, and it is axiomatic that it is the province of the judiciary to interpret the law. In *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933), this Court stated that "the construction of a treaty by the political department of the government [is] not conclusive upon courts called upon to construe it" (internal citations omitted). In addition, the District Court's interpretation of the applicability of the GPW is fully consistent with the long-standing canon of construction that "a treaty should generally be construed…liberally to give effect to the purpose which animates it and…where a provision of a treaty fairly admits of two constructions, one restricting, and the other enlarging, rights which may be claimed under it, the more liberal

interpretation is to be preferred." *United States v. Stuart*, 489 U.S. 353, 368 (1989) (internal quotation marks and citation omitted).

Respondents also argue that Petitioner's rights under the GPW, if any, are not enforceable in an Article III court, raising the specter of "private rights of action" that they claim are implicitly asserted in this case. However, as the District Court noted, this case has nothing to do with "private rights of action" under the GPW. Rather, the GPW is simply the most complete current statement of the laws of wars with respect to POWs and others seized in the course of armed conflict. It is implicated in this case by operation of the very statute that Respondents invoke as the source of Congressional authority for their conduct, 10 U.S.C. 821. The Executive cannot lawfully ignore the instruction of Congress that any military commission operate in conformity with the laws of war. The District Court was therefore correct in dismissing Respondent's argument as nothing more than "[an] assertion that no federal court has the authority to determine whether the Third Geneva Convention has been violated, or, if it has, to grant relief from the violation." App. 15. The Court should reaffirm that, even in times of national emergency, the interpretation of the law is a judicial function, and no derogation from its prerogatives in the independent exercise of that function can be countenanced if the rule of law is to endure in this Republic.

Yet Respondents, even after the reminder that "a state of war is not a blank check for the President," *Hamdi*, 124 S. Ct. at 2650 (plurality op.), continue to press in the Court of Appeals the breathtaking claim of Presidential power unconstrained by law. *See* U.S. Mot. To Expedite, App. 52. ("The appeal also presents the critical issue of whether the President has inherent authority to create military commissions to try enemy combatants."). If any judicial body is to become the first to accept so sweeping a concept of unbounded and untethered power supposedly inhering in the Office of President, that body can only be (although Petitioner trusts it will not be) this Court. Therefore, it must be said that the government's submission is directed to the wrong building. And whatever inherent power may exist by virtue of the "war" on global terrorism surely cannot include the power to detach an exceptional and specialized institution from its historical underpinnings, and deploy it in completely

different circumstances, whether for reasons of political expediency or even for reasons of military convenience.

Such efforts in the past have been decisively rejected, as, for example, in this Court's landmark opinion in *Ex parte Milligan,* 71 U.S. (4 Wall.) 2 (1866). In that Civil War case, the Court struck down as unconstitutional the conviction of a civilian before a military commission. "Martial rule can never exist where courts are open, and in the proper and unobstructed exercise of their jurisdiction," said the Court, for "[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." *Id*. at 120-21, 127. Today, the President's unilateral creation of the military commission, his solitary definition of the offenses and persons subject to its jurisdiction, and his single-handed promulgation of the rules for adjudication of cases before it combine to violate the separation of powers built into the plan of our Constitution.

Respondents have also argued that, in promulgating the Authorization for the Use of Military Force (AUMF) shortly after the September 11 attacks, Congress also implicitly authorized the President to create commissions for the trial of alleged war criminals. The AUMF is conspicuously silent on the subject. While the authority to use military force implies the power to detain those captured in battle, it does not reasonably imply a power to set up a judicial tribunal far removed from zones of combat or military occupation. As the Court noted in another context, "[s]uch a latitudinarian interpretation…would be at war with the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority." *Reid*, 354 U.S. at 30 (plurality opinion).

In making their argument, Respondents have relied extensively on *Hamdi*, 124 S. Ct. 2633 (plurality opinion). But the Court expressly declined to rule on the scope of the President's authority in that case: "The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not

reach the question whether Article II provides such authority, however, because we agree…that Congress has in fact authorized Hamdi's detention, through the AUMF." *Id*. at 2639. Significantly, the plurality went on to emphasize that the AUMF only purported to authorize continuing detention of individuals who were confirmed enemy combatants, whose status it held had to be determined "in a proceeding that comports with due process." *Id.* at 2643. Indeed, the *Hamdi* plurality repeatedly looked to the GPW to outline the powers of the Government. *See id.* at 2641 (citing Art. 118 and article mentioning Arts. 85, 99, 119, 129); *id.* (stating that "our understanding is based on longstanding law-of-war principles").

This case raises the question of the reach of *Hamdi*, which on its own terms dealt only with the question of detention, and not adjudication of war crimes. Respondents have overread the plurality's descriptive statement: "The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.' *Ex parte Quirin,* 317 U.S. at 28." *Hamdi*, 1245 S. Ct. at 2640. This description of past history is not in dispute. Indeed, that description does not even answer the question of *what body* must try unlawful combatants. *See also id.* (referring to "mere detention"); *id.* at 2643 (stating that *Quirin* is "the most apposite precedent that we have on the question of whether citizens may be *detained* in such circumstances") (emphasis added).[7] While the law on detention has changed somewhat since World War II, the law with respect to military trial has changed dramatically, with the enactment of

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[7] It is also significant that Justice Thomas' opinion in *Hamdi*, which Respondents relied upon in the district court to suggest a fifth vote for the lawfulness of military commissions, was carefully confined to detention, mentioning the term (or derivations of the term such as "detain") at least forty-six times in his opinion. *See Hamdi*, 124 S. Ct. at 2674, 2677-85. Justice Thomas acknowledged that *punishment* stands on entirely different footing than detention, specifically isolating the *Milligan* case: "More importantly, the Court referred frequently and pervasively to the criminal nature of the proceedings instituted against Milligan…the punishment-nonpunishment distinction harmonizes all of the precedent." *Id.* at 2682 (citations omitted).

the UCMJ, the ratification of the Geneva Conventions, and the constitutional and statutory changes to courts-martial.

E. Expedited Consideration by the Court of Appeals Is Not Enough

Petitioner's case requires a prompt resolution that intermediate appellate review cannot provide – particularly because that resolution will necessarily be purely tentative until this Court will have spoken on the matter. And, even in the difficult to imagine circumstance that the D.C. Circuit has the last word for the time being on the profound questions necessarily presented by this case, only this Court is capable of pronouncing with final authority on these questions – questions whose resolution may well affect a wide range of other activities the President has ordered in conjunction with the war on terror – the other trials by military commission, the Combatant Status Review Tribunals, and the treatment of the other Guantanamo Bay prisoners. *See* U.S. Mot. To Expedite, App. 56-57. Even the expedited briefing schedule in the D.C. Circuit will leave Petitioner languishing, and the Government without judicially sanctioned direction, for a far longer period than is necessary to resolve this case or is justified by its circumstances. When the whole world is watching and waiting, only a resolution by the Supreme Court of the United States can allow justice to exhale.

Petitioner does not dispute the need for speed but submits that the best way to accommodate that need is for review by this Court at this time. The number and complexity of the issues suggest that one longer briefing schedule in this Court will produce papers better calibrated to the gravity of the issues presented. As the leading article on the subject describes it:

> Expedited appeal, however, raises problems of its own. A rushed schedule in two appellate courts may not produce a more considered opinion than a somewhat longer deliberation in one court.

Lindgren & Marshall, *supra*, at 282. This concern is at its height here, for the briefing schedule set by the Court of Appeals does not permit oral argument until the middle of January, 2005, at the earliest. Even were that court to issue an

opinion quickly, it would be quite difficult for this Court to schedule the case during the 2004 Term at that date. For that reason, the possibility exists that a legal cloud could hang over the military commission for more than a year from the filing date of this motion. Certiorari before judgment would avoid that circumstance, and provide guidance to both the government and those who are currently locked up at Guantanamo to face military commissions.

The need for resolution by this Court is even more pressing because all of the relevant precedents are ones of this Court, and not those of the D.C. Circuit. This case is governed by the meaning of *Milligan, Quirin, Youngstown*, and *Reid*, and, to some extent, *Hamdi* and *Rasul*. One need not go as far as Justice Frankfurter did in another case to underscore the special value of certiorari before judgment here:

> These are not questions on which, with all due respect, a lower court can be of effective assistance to this Court. They do not involve the valuation of evidence or the application of rules of local law or special familiarity and experience with the materials and the underlying considerations on which judgment must be based. On the contrary, the constitutional history and the cases upon which the decision ultimately must turn are the special concern of this Court."

Lurk v. United States, 366 U.S. 712, 712-13 (1961) (Frankfurter, J., dissenting, joined by Harlan and Stewart, JJ.). *See also* Pet. for Cert., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (stating that an intermediate appellate decision is not needed because "[a]ll essential questions of jurisdiction and procedure were fully explored in the tribunal of first instance"). Unlike *United States v. Clinton*, 524 U.S. 912 (1998) (denying petition for writ of certiorari before judgment), neither the District of Columbia Circuit nor any other circuit has any particular body of expertise in evaluating military commissions. Br. for Respondent The White House in Opposition to Petition for Writ of Certiorari, *United States v. Clinton*, No. 97-1924, at 12 (The D.C. Circuit "has developed over the years a body of decisional

law that is specially focused on the issues arising out of the governmental attorney-client privilege . . . ."). Here, the issues will come down to the meaning of a series of Supreme Court decisions, from *Milligan* and *Quirin* to *Hamdi* and *Rasul*.

Mr. Hamdan, as well as the entire government of the United States, those affected by the government's actions, the lower courts, and the world community stand to benefit from clear guidance as to how the United States may wage the legal war on terror in the future. Similarly, our country has a pressing need to know that those implicated in that war are being treated in the way the Constitution, our statutes, and the laws of war demand.

CONCLUSION

The petition for a writ of certiorari before judgment should be granted.

RESPECTFULLY
SUBMITTED,

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November 22, 2004

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 04-1519 (JR)

SALIM AHMED HAMDAN, PLAINTIFF

v.

DONALD H. RUMSFELD, DEFENDANT.

Nov. 8, 2004.

Before: ROBERTSON, District Judge.

MEMORANDUM OPINION

Salim Ahmed Hamdan petitions for a writ of habeas corpus, challenging the lawfulness of the Secretary of Defense's plan to try him for alleged war crimes before a military commission convened under special orders issued by the President of the United States, rather than before a court-martial convened under the Uniform Code of Military Justice. The government moves to dismiss. Because Hamdan has not been determined by a competent tribunal to be an offender triable under the law of war, 10 U.S.C. § 821, and because in any event the procedures established for the Military Commission by the President's order are "contrary to or inconsistent" with those applicable to courts-martial, 10 U.S.C. § 836, Hamdan's petition will be **granted** in part. The government's motion will be **denied**. The reasons for these rulings are set forth below.

BACKGROUND

Hamdan was captured in Afghanistan in late 2001, during a time of hostilities in that country that followed the terrorist attacks in the United States on September 11, 2001

mounted by al Qaeda, a terrorist group harbored in Afghanistan. He was detained by American military forces and transferred sometime in 2002 to the detention facility set up by the Defense Department at Guantanamo Bay Naval Base, Cuba. On July 3, 2003, acting pursuant to the Military Order he had issued on November 13, 2001,[8] and finding "that there is reason to believe that [Hamdan] was a member of al Qaida or was otherwise involved in terrorism directed against the United States," the President designated Hamdan for trial by military commission. Press Release, Dep't of Defense, President Determines Enemy Combatants Subject to His Military Order (July 3, 2003), http://www.defenselink.mil/releases/2003/nr20030703-0173.html. In December 2003, Hamdan was placed in a part of the Guantanamo Bay facility known as Camp Echo, where he was held in isolation. On December 18, 2003, military counsel was appointed for him. On February 12, 2004, Hamdan's counsel filed a demand for charges and speedy trial under Article 10 of the Uniform Code of Military Justice. On February 23, 2004, the legal advisor to the Appointing Authority[9] ruled that the UCMJ did not apply to Hamdan's detention. On April 6, 2004, in the United States District Court for the Western District of Washington, Hamdan's counsel filed the petition for mandamus or habeas corpus that is now before this court. On July 9, 2004, Hamdan was formally charged with conspiracy to commit the following offenses: "attacking civilians; attacking civilian

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[8] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 13, 2001).

[9] The Department of Defense has implemented the President's Military Order of November 3, 2001 with a series of Military Commission Orders, Instructions, and other documents. *See generally* Dep't of Defense, Military Commissions (providing extensive links to background materials on the Military Commissions), *at* http://www.defenselink.mil/news/commissions.html. The Secretary of Defense may designate an "Appointing Authority" to issue orders establishing and regulating military commissions. Military Commission Order No. 1 (March 21, 2002), C.F.R. § 9.2, http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf. Secretary Rumsfeld designated John D. Altenburg, Jr. as Appointing Authority. Press Release, Dep't of Defense, Appointing Authority Decision Made (December 30, 2003), http://www.defenselink.mil/releases/2003/nr20031230-0820.html.

objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism." Dep't of Defense, Military Commission List of Charges for Salim Ahmed Hamdan, http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf . Following the Supreme Court's decision on June 28, 2004, that federal district courts have jurisdiction of habeas petitions filed by Guantanamo Bay detainees, *Rasul v. Bush,* 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004), and the Ninth Circuit's decision on July 8, 2004, that all such cases should be heard in the District of the District of Columbia, *Gherebi v. Bush,* 374 F.3d 727 (9th Cir.2004), the case was transferred here, where it was docketed on September 2, 2004.[10] Oral argument was held on October 25, 2004.

Hamdan's petition is stated in eight counts. It alleges the denial of Hamdan's speedy trial rights in violation of Article 10 of the Uniform Code of Military Justice, 10 U.S.C. § 810 (count 1); challenges the nature and length of Hamdan's pretrial detention as a violation of the Third Geneva Convention (count 2) and of Common Article 3 of the Geneva Conventions (count 3); challenges the order establishing the Military Commission as a violation of the separation of powers doctrine (count 4) and as purporting to invest the Military Commission with authority that exceeds the law of war (count 7); challenges the creation of the Military Commission as a violation of the equal protection guarantees of the Fifth Amendment (count 5) and of 42 U.S.C. § 1981 (count 6); and argues that the Military Order does not, on its face, apply to Hamdan (count 8).

Although Judge Lasnik (W.D.Wash.) ordered the respondents to file a "return," Order Granting Motion to Hold Petition in Abeyance (W.D.Wash. No. 04-0777) (May 11, 2004), and although the motion to dismiss now before this court is styled a "consolidated return to petition and memorandum of law in support of cross-motion to dismiss," no formal show cause order has issued, nor have the respondents ever filed a factual response to Hamdan's

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[10] Hamdan's counsel, Charles Swift, initially filed the petition in this case in his own name as Hamdan's next friend. The government challenged Swift's standing to do so. At a conference on September 14, 2004, the petition was amended, by consent and *nunc pro tunc,* to be in Hamdan's name only.

allegations. An order issued October 4, 2004 [Dkt # 26] by Judge Joyce Hens Green, who is coordinating and managing all of the Guantanamo Bay cases in this court, provided that "[r]espondents are not required ... to file a response addressing enemy combatant status issues ... or a factual return providing the factual basis for petitioner's detention as an enemy combatant, pending further order of the Court."[11] The absence of a factual return is of no moment, however. The issues before me will be resolved as a matter of law. The only three facts that are necessary to my disposition of the petition for habeas corpus and of the cross-motion to dismiss are that Hamdan was captured in Afghanistan during hostilities after the 9/11 attacks, that he has asserted his entitlement to prisoner-of-war status under the Third Geneva Convention, and that the government has not convened a competent tribunal to determine whether Hamdan is entitled to such status. All of those propositions appear to be undisputed.

ANALYSIS

1. Abstention is neither required nor appropriate.

The well-established doctrine that federal courts will "normally not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted," *Schlesinger v. Councilman,* 420 U.S. 738 (1975), is not applicable here. *Councilman* involved a court-martial, not a military commission. Its holding is that, "when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention ...." *Id.* at 758. In reaching that conclusion, the Court found it necessary to distinguish its previous decisions in *United States ex rel. Toth v. Quarles,* 350 U.S. 11 (1955) (civilian ex-serviceman not triable by court-martial for offense committed while in service), *Reid v. Covert,* 354 U.S. 1 (1957) (civilian dependent not triable by court-martial for murder of service member husband overseas in peacetime), and *McElroy v. United States. ex rel.*

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[11] This order was issued only for the instant case, because briefing of these motions was nearly complete and the issues they raised did not require factual returns. Factual returns must be filed in all of the other Guantanamo detainee cases pending in this court.

Guagliardo, 361 U.S. 281 (1960) (civilian employees of armed forces overseas not subject to court-martial jurisdiction for noncapital offenses), none of which required exhaustion. The *Councilman* Court also repeated its observation in *Noyd v. Bond,* 395 U.S. 683, 696 n. 8 (1969), 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." A jurisdictional argument is just what Hamdan present here.

Controlling Circuit precedent is found in *New v. Cohen,* 129 F.3d 639, 644 (D.C.Cir.1997). In that case, following the Supreme Court's decision in *Parisi v. Davidson,* 405 U.S. 34 (1972), the Court of Appeals noted that, although the abstention rule is often "'framed in terms of 'exhaustion' it may more accurately be understood as based upon the appropriate demands of comity between two separate judicial systems.'" *Id.* at 642, (quoting *Parisi,* 405 U.S. at 40).

None of the policy factors identified by the Supreme Court as supporting the doctrine of comity is applicable here. *See Parisi,* 405 U.S. at 41, *discussed in New,* 129 F.3d at 643. 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 the 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. *Parisi,* 405 U.S. at 40.

The *New* case identifies an exception to the exhaustion rule that it characterizes as "quite simple: a person need not exhaust remedies in a military tribunal if the military court has no jurisdiction over him." *New,* 129 F.3d at 644. That rule, squarely based on the Supreme Court's opinions in *McElroy, Reed,* and *Toth, supra,* applies here. Even *Councilman* supports the proposition that a district court should at least determine whether the petitioner has "'raised substantial arguments denying the right of the military to try [him] at all.'" 420 U.S. at 763 (quoting *Noyd v. Bond,* 395 U.S. at 696 n. 8). Having done so, and having considered Hamdan's arguments that he is not triable by military commission at all, I conclude that abstention is neither

required nor appropriate as to the issues resolved by this opinion.

2. No proper determination has been made that Hamdan is an offender triable by military tribunal under the law of war.

a. The President may establish military commissions only for offenders or offenses triable by military tribunal under the law of war.

The major premise of the government's argument that the President has untrammeled power to establish military tribunals is that his authority emanates from Article II of the Constitution and is inherent in his role as commander-in-chief. None of the principal cases on which the government relies, *Ex parte Quirin,* 317 U.S. 1 (1942)*, Application of Yamashita,* 327 U.S. 1 (1946)*, and Madsen v. Kinsella,* 343 U.S. 341 (1952), has so held. In *Quirin* the Supreme Court located the power in Article I, § 8, emphasizing the President's *executive* power as commander-in-chief "to wage war which *Congress* has declared, and to carry into effect all laws passed by *Congress* for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war." *Quirin,* 317 U.S. at 10 (emphasis added). *Quirin* stands for the proposition that the authority to appoint military commissions is found, not in the inherent power of the presidency, but in the Articles of War (a predecessor of the Uniform Code of Military Justice) by which *Congress* provided rules for the government of the army. *Id.* Thus, Congress provided for the trial by courts-martial of members of the armed forces and specific classes of persons associated with or serving with the army, *id.,* and "the *Articles* [*of War*] also recognize the 'military commission' appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial." *Id.* The President's authority to prescribe procedures for military commissions was conferred by Articles 38 and 46 of the Articles of War. *Id.* The *Quirin* Court sustained the President's order creating a military commission, because "[b]y his Order creating the ... Commission [the President] has undertaken to exercise the authority conferred upon him by *Congress* ...." *Id.* at 11.

This sentence continues with the words "... and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war." *Id.* at 11. That dangling idea is not explained--in *Quirin* or in later cases. The Court expressly found it unnecessary in *Quirin* "to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions." *Id.*

In *Yamashita,* the Supreme Court noted that it had "had occasion [in *Quirin*] to consider at length the sources and nature of the authority to create military commissions for the trial of enemy combatants for offenses against the law of war," *Yamashita,* at 327 U.S. at 7, and noted:

> [W]e there pointed out that *Congress,* in the exercise of the power conferred upon it by Article I, § 8 Cl. 10 of the Constitution to 'define and punish ... Offenses against the Law of Nations ...,' of which the law of war is a part, had by the Articles of War [citation omitted] recognized the 'military commission' appointed by military command as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war.

Id. at 7 (emphasis added). Further on, the Court noted:

> We further pointed out that *Congress,* by sanctioning trial of enemy combatants for violations of the law of war by military commission, had not attempted to codify the law of war or to mark its precise boundaries. Instead, by Article 15 it had incorporated, by reference, as within the preexisting jurisdiction of military commissions created by appropriate military

> command, all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction. It thus adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention, to which the United States and the Axis powers were parties."

Id. at 7-8 (emphasis added). And again:

> *Congress,* in the exercise of its constitutional power to define and punish offenses against the law of nations, of which the law of war is a part, has recognized the 'military commission' appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war.

Id. at 16 (emphasis added). *Yamashita* concluded that, by giving "sanction ... to any use of the military commission contemplated by the common law of war," *Congress* "preserve[d] their traditional jurisdiction over enemy combatants unimpaired by the Articles [of War]...." *Id.* at 20.

What was then Article 15 of the Articles of War is now Article 21 of the Uniform Code of Military Justice, 10 U.S.C. § 821. It provides:

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

provost courts, or other military tribunals.

Quirin and *Yamashita* make it clear that Article 21 represents Congressional approval of the historical, traditional, non-statutory military commission. The language of that approval, however, does not extend past "offenders or offenses that by statute or by the law of war may be tried by military commissions ...." 10 U.S.C. § 821.

Any additional jurisdiction for military commissions would have to come from some inherent executive authority that *Quirin, Yamashita,* and *Madsen* neither define nor directly support. If the President does have inherent power in this area, it is quite limited. Congress has the power to amend those limits and could do so tomorrow. Were the President to act outside the limits now set for military commissions by Article 21, however, his actions would fall into the most restricted category of cases identified by Justice Jackson in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 637 (1952), in which "the President takes measures incompatible with the expressed or implied will of Congress," and in which the President's power is "at its lowest ebb."[12]

b. The law of war includes the Third Geneva Convention, which requires trial by court-martial as long as Hamdan's POW status is in doubt.

> "From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals."

This language is from *Quirin,* 317 U.S. at 27-28. The United States has ratified the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135 (the Third Geneva Convention). Afghanistan is a party to the Geneva

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[12] For further development of this argument, see Brief Amici Curiae of Sixteen Law Professors at 9-13.

Conventions.[13] The Third Geneva Convention is acknowledged to be part of the law of war, 10/25/04 Tr. at 55; Military Commission Instruction No. 2, § (5)(G) (Apr. 30, 2003); 32 C.F.R. § 11.5(g), http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf. It is applicable by its terms in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." Third Geneva Convention, art. 2. That language covers the hostilities in Afghanistan that were ongoing in late 2001, when Hamdan was captured there. If Hamdan is entitled to the protections accorded prisoners of war under the Third Geneva Convention, one need look no farther than Article 102 for the rule that requires his habeas petition to be granted:

> **A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.**[14]

The Military Commission is not such a court. Its procedures are not such procedures.

The government does not dispute the proposition that prisoners of war may not be tried by military tribunal. Its position is that Hamdan is not entitled to the protections of the Third Geneva Convention at all, and certainly not to prisoner-of-war status, and that in any event the protections of the Third Geneva Convention are not enforceable by way of habeas corpus.

(1) The government's first argument that the Third Geneva Convention does not protect Hamdan asserts that Hamdan was captured, not in the course of a conflict between the United States and Afghanistan, but in the course of a "separate" conflict with al Qaeda. That argument is rejected.

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[13] *See* International Committee of the Red Cross, Treaty Database, *at* http://www.icrc.org/ihl.

[14] *See* Brief Amici Curiae of Sixteen Law Professors at 28-30.

The government apparently bases the argument on a Presidential "finding" that it claims is "not reviewable." *See* Motion to Dismiss at 33, *Hicks v. Bush* (D.D.C. No. 02-00299) (October 14, 2004). The finding is set forth in Memorandum from the President, to the Vice President *et al.,* Humane Treatment of al Qaeda and Taliban Detainees (February 7, 2002), http://www.library.law.pace.edu/research/020207_bushmemo.pdf, stating that the Third Geneva Convention applies to the Taliban detainees, but not to the al Qaeda detainees captured in Afghanistan, because al Qaeda is not a state party to the Geneva Conventions. Notwithstanding the President's view that the United States was engaged in two separate conflicts in Afghanistan (the common public understanding is to the contrary, *see* Joan Fitzpatrick, Jurisdiction of Military Commissions and the Ambiguous War on Terrorism, 96 Am. J. Int'l. L. 345, 349 (2002) (conflict in Afghanistan was international armed conflict in which Taliban and al Qaeda joined forces against U.S. and its Afghan allies)), the government's attempt to separate the Taliban from al Qaeda for Geneva Convention purposes finds no support in the structure of the Conventions themselves, which are triggered by the place of the conflict, and not by what particular faction a fighter is associated with. *See* Amicus Brief of General David M. Brahms (ret.), Admiral Lee F. Gunn (ret.), Admiral John D. Hutson (ret.), General Richard O'Meara (ret.) (Generals and Admirals Amicus Brief) at 17 (citing Memorandum from William H. Taft IV, Legal Adviser, Dep't of State, to Counsel to the President ¶ 3 (Feb. 2, 2002), http://www.fas.org/sgp/othergov/taft.pdf). Thus at some level--whether as a prisoner-of-war entitled to the full panoply of Convention protections or only under the more limited protections afforded by Common Article 3, *see infra* note 13--the Third Geneva Convention applies to all persons detained in Afghanistan during the hostilities there.

(2) The government next argues that, even if the Third Geneva Convention might theoretically apply to anyone captured in the Afghanistan theater, members of al Qaeda such as Hamdan are not entitled to POW status because they do not satisfy the test established by Article 4(2) of the Third Geneva Convention--they do not carry arms openly and operate under the laws and customs of war. Gov't Resp. at 35. *See also* The White House, Statement by the Press Secretary

on the Geneva Convention (May 7, 2003), http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html. We know this, the government argues, because the President himself has determined that Hamdan was a member of al Qaeda or otherwise involved in terrorism against the United States. *Id.* Presidential determinations in this area, the government argues, are due "extraordinary deference." 10/25/04 Tr. at 38. Moreover (as the court was advised for the first time at oral argument on October 25, 2004) a Combatant Status Review Tribunal (CSRT) found, after a hearing on October 3, 2004, that Hamdan has the status of an enemy combatant "as either a member of or affiliated with Al Qaeda." 10/25/04 Tr. at 12.

Article 5 of the Third Geneva Convention provides:

> **Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.**

This provision has been implemented and confirmed by Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, http://www.army.mil/usapa/epubs/pdf/r190_8.pdf., Hamdan has asserted his entitlement to POW status, and the Army's regulations provide that whenever a detainee makes such a claim his status is "in doubt." Army Regulation 190-8, § 1-6(a); *Hamdi,* 124 S.Ct. at 2658 (Souter, J., concurring). The Army's regulation is in keeping with general international understandings of the meaning of Article 5. *See generally* Generals and Admirals Amicus Brief at 18-22.

Thus the government's position that no doubt has arisen as to Hamdan's status does not withstand scrutiny, and neither does the government's position that, if a hearing is required by Army regulations, "it was provided," 10/25/04 Tr. at 40. There is nothing in this record to suggest that a competent tribunal has determined that Hamdan is not a prisoner-of-war under the Geneva Conventions. Hamdan has

appeared before the Combatant Status Review Tribunal, but the CSRT was not established to address detainees' status under the Geneva Conventions. It was established to comply with the Supreme Court's mandate in *Hamdi, supra,* to decide "whether the detainee is properly detained as an enemy combatant" for purposes of continued detention. Memorandum From Deputy Secretary of Defense, to Secretary of the Navy, Order Establishing Combatant Status Review Tribunal 3 (July 7, 2003), http://www.defenselink.mil/news/Jul2004/d20040707review.pdf; *see also* Memorandum From Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba (July 29, 2004), http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

The government's legal position is that the CSRT determination that Hamdan was a member of or affiliated with al Qaeda is also determinative of Hamdan's prisoner-of-war status, since the President has already determined that detained al Qaeda members are not prisoners-of-war under the Geneva Conventions, *see* 10/25/04 Tr. at 37. The President is not a "tribunal," however. The government must convene a competent tribunal (or address a competent tribunal already convened) and seek a specific determination as to Hamdan's status under the Geneva Conventions. Until or unless such a tribunal decides otherwise, Hamdan has, and must be accorded, the full protections of a prisoner-of-war.

(3) The government's next argument, that Common Article 3 does not apply because it was meant to cover local and not international conflicts, is also rejected.[15] It is

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[15] Article 3 of the Third Geneva Convention is called "Common Article 3" because it is common to all four of the 1949 Geneva Conventions.

It provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be found to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause,

universally agreed, and is demonstrable in the Convention language itself, in the context in which it was adopted, and by the generally accepted law of nations, that Common Article 3 embodies "international human norms," *Mehinovic v. Vuckovic,* 198 F.Supp.2d 1322, 1351 (N.D.Ga.2002), and that it sets forth the "most fundamental requirements of the law of war." *Kadic v. Karadzic,* 70 F.3d at 232, 243 (2d Cir.1995). The International Court of Justice has stated it plainly: "There is no doubt that, in the event of international armed conflicts ... [the rules articulated in Common Article 3] ... constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the court in 1949 called 'elementary considerations of humanity'." *Nicaragua v. United States,* 1986 I.C.J. 14, 114 (Judgment of June 27). The court went on to say that, "[b]ecause the minimum rules applicable to international and non-international conflicts are identical, there is no need to address the question whether ... [the

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shall in all circumstances be sickness, wounds, detention, or any other cause, shall in all circumstances by treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be commected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

actions alleged to be violative of Common Article 3] must be looked at in the context of the rules which operate for one or the other category of conflict."[16] *Id.*

The government has asserted a position starkly different from the positions and behavior of the United States in previous conflicts, one that can only weaken the United States' own ability to demand application of the Geneva Conventions to Americans captured during armed conflicts abroad. *Amici* remind us of the capture of U.S. Warrant Officer Michael Durant in 1993 by forces loyal to a Somali warlord. The United States demanded assurances that Durant would be treated consistently with protections afforded by the Convention, even though, if the Convention were applied as narrowly as the government now seeks to apply it to Hamdan, "Durant's captors would not be bound to follow the convention because they were not a state." Neil McDonald & Scott Sullivan, Rational Interpretation in Irrational Times: The Third Geneva Convention and "War On Terror", 44 Harv. Int'l. L.J. 301, 310 (2003). Examples of the way other governments have already begun to cite the United States' Guantanamo policy to justify their own repressive policies are set forth in Lawyers Committee for Human Rights, Assessing the New Normal: Liberty and Security for the Post-September 11 United States, at 77-80 (2003).

(4) The government's putative trump card is that Hamdan's rights under the Geneva Conventions, if any, and whatever they are, are not enforceable by this Court--that, in effect, Hamdan has failed to state a claim upon which relief can be granted--because the Third Geneva Convention is not "self-executing" and does not give rise to a private cause of action.

As an initial matter, it should be noted Hamdan has not asserted a "private right of action" under the Third Geneva Convention. The Convention is implicated in this case by operation of the statute that limits trials by military tribunal to "offenders ... triable under the law of war." 10 U.S.C. § 821. The government's argument thus amounts to the assertion that no federal court has the authority to determine whether the Third Geneva Convention has been violated, or, if it has, to grant relief from the violation.

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[16] *See also* Brief Amici of Sixteen Law Professors at 33 n.32.

Treaties made under the authority of the United States are the supreme law of the land. U.S. Const. art. VI, cl. 2. United States courts are bound to give effect to international law and to international agreements of the United States unless such agreements are "non-self-executing." *The Paquete Habana,* 175 U.S. 677, 708 (1900)*;* Restatement (Third) of the Foreign Relations Law of the United States § 111. A treaty is "non-self-executing" if it manifests an intention that it not become effective as domestic law without enactment of implementing legislation; or if the Senate in consenting to the treaty requires implementing legislation; or if implementing legislation is constitutionally required. *Id.* at § 111(4). The controlling law in this Circuit on the subject of whether or not treaties are self-executing is *Diggs v. Richardson,* 555 F.2d 848 (D.C.Cir.1976), a suit to prohibit the importation of seal furs from Namibia, brought by a citizen plaintiff who sought to compel United States government compliance with a United Nations Security Council resolution calling on member states to have no dealings with South Africa. The decision in that case instructs a court interpreting a treaty to look to the intent of the signatory parties as manifested by the language of the treaty and, if the language is uncertain, then to look to the circumstances surrounding execution of the treaty. *Id.* at 851. *Diggs* relies on the *Head Money Cases,* 112 U.S. 580 (1884), which established the proposition that a "treaty is a law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined." *Id.* at 598. The Court in *Diggs* concluded that the provisions of the Security Council resolution were not addressed to the judicial branch of government, that they did not by their terms confer rights on individuals, and that instead the resolution clearly called upon governments to take action. *Diggs,* 555 F.2d at 851.

The Geneva Conventions, of course, are all about prescribing rules by which the rights of individuals may be determined. Moreover, as petitioner and several of the *amici* have pointed out, *see, e.g.,* Pet'r's Mem. Supp. of Pet. at 39 n.11, it is quite clear from the legislative history of the ratification of the Geneva Conventions that Congress carefully considered what further legislation, if any, was deemed "required to give effect to the provisions contained in the four conventions," S.Rep. No. 84-9, at 30 (1955), and

found that only four provisions required implementing legislation. Articles 5 and 102, which are dispositive of Hamdan's case, *supra,* were not among them. What did require implementing legislation were Articles 129 and 130, providing for additional criminal penalties to be imposed upon those who engaged in "grave" violations of the Conventions, such as torture, medical experiments, or "willful" denial of Convention protections, none of which is involved here. Third Geneva Convention, art. 130. Judge Bork must have had those provisions in mind, together with Congress' response in enacting the War Crimes Act, 18 U.S.C. § 2441, when he found that the Third Geneva Convention was not self-executing because it required "implementing legislation." *Tel-Oren v. Libyan Arab Republic, et al.,* 726 F.2d 774, 809 (D.C.Cir.1984) (Bork, J., concurring). That opinion is one of three written by a three-judge panel, none of which was joined by any other member of the panel. It is not Circuit precedent and it is, I respectfully suggest, erroneous. "Some provisions of an international agreement may be self-executing and others non-self-executing." Restatement (Third) of Foreign Relations Law of the United States § 111 cmt. h.[17]

* * *

Because the Geneva Conventions were written to protect individuals, because the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation, because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and because nothing in the Third Geneva Convention itself manifests the contracting parties' intention that it not become effective as domestic law without the enactment of implementing legislation, I conclude that, insofar as it is pertinent here, the Third Geneva Convention is

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[17] The observation in *Al-Odah v. United States*, 321 F.3d 1134, 1147 (D.C. Cir. 2003), that the Third Geneva Convention is not self-executing merely relies on the reasons stated by Judge Bork in *Tel-Oren*, 726 F.2d at 809. Since that observation was not essential to the outcome in *Al-Odah*, and since in any event *Al-Odah* was reversed by the Supreme Court, I am not bound by it.

a self-executing treaty.[18] I further conclude that it is at least a matter of some doubt as to whether or not Hamdan is entitled to the protections of the Third Geneva Convention as a prisoner of war and that accordingly he must be given those protections unless and until the "competent tribunal" referred to in Article 5 concludes otherwise. It follows from those conclusions that Hamdan may not be tried for the war crimes he is charged with except by a court-martial duly convened under the Uniform Code of Military Justice.

c. Abstention is appropriate with respect to Hamdan's rights under Common Article 3.

There is an argument that, even if Hamdan does not have prisoner-of-war status, Common Article 3 would be violated by trying him for his alleged war crimes in this Military Commission. Abstention is appropriate, and perhaps required, on that question, because, unlike Article 102, which unmistakably mandates trial of POW's only by general court-martial and thus implicates the jurisdiction of the Military Commission, the Common Article 3 requirement of trial before a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" has no fixed, term-of-art meaning. A substantial number of rights and procedures conferred by the UCMJ are missing from the Military Commission's rules. *See infra* note 12; Generals and Admirals Amicus Brief at 24. I am aware of no authority that defines the word "guarantees" in Common Article 3 to mean that all of these rights must be guaranteed in advance of trial. Only Hamdan's right to be present at every phase of his trial and to see all the evidence admitted against him is of immediate pretrial concern. That right is addressed in the next section of this opinion.

3. In at least one critical respect, the procedures of the Military Commission are fatally contrary to or inconsistent with those of the Uniform Code of Military Justice.

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[18] Hamdan is a citizen of Yemen. The government has refused permission for Yemeni diplomats to visit Hamdan at Guantanamo Bay. Decl. of Lieutenant Commander Charles Swift at 4 (May 3, 2004). It ill behooves the government to argue that enforcement of the Geneva Convention is only to be had through diplomatic channels.

In most respects, the procedures established for the Military Commission at Guantanamo under the President's order define a trial forum that looks appropriate and even reassuring when seen through the lens of American jurisprudence. The rules laid down by Military Commission Order No. 1, 32 C.F.R. § 9.3, provide that the defendant shall have appointed military counsel, that he may within reason choose to replace "detailed" counsel with another military officer who is a judge advocate if such officer is available, that he may retain a civilian attorney if he can afford it, that he must receive a copy of the charges in a language that he understands, that he will be presumed innocent until proven guilty, that proof of guilt must be beyond a reasonable doubt, that he must be provided with the evidence the prosecution intends to introduce at trial and with any exculpatory evidence known to the prosecution, with important exceptions discussed below, that he is not required to testify at trial and that the Commission may not draw an adverse inference from his silence, that he may obtain witnesses and documents for his defense to the extent necessary and reasonably available, that he may present evidence at trial and cross-examine prosecution witnesses, and that he may not be placed in jeopardy twice for any charge as to which a finding has become final. *Id.* at §§ 9.4 and 9.5.

The Military Commission is remarkably different from a court-martial, however, in two important respects. The first has to do with the structure of the reviewing authority after trial; the second, with the power of the appointing authority or the presiding officer to exclude the accused from hearings and deny him access to evidence presented against him.[19]

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[19] A great many other differences are identified and discussed in David Glazier, Kangaroo Court or Competent Tribunal? Judging the 21st Century Military Commission, 89 Va. L. Rev. 2005, 2015-2020 (2003). Differences include (not an exhaustive list):

Article 16 requires that every court-martial consist of a military judge and no less than five members, as opposed to the Military Commission rules that require only three members. Military Commission Order No. 1 (4)(A); Article 10 of the UCMJ provides a speedy trial right, while the Military Commission rules provide none. Article 13 states that pre-trial detention should not be more rigorous than required to ensure defendant's presence, while the Commission rules contain no such provision and, in fact, Hamdan was held in solitary confinement in Camp

Petitioner's challenge to the first difference is unsuccessful. It is true that the President has made himself, or the Secretary of Defense acting at his direction, the final reviewing authority, whereas under the Uniform Code of Military Justice there would be two levels of independent review by members of the Third Branch of government--an appeal to the Court of Appeals for the Armed Forces, whose active bench consists of five civilian judges, and possible review by the Supreme Court on writ of *certiorari*. The President has, however, 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

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Echo for over 10 months. Article 30 states that charges shall be signed by one with personal knowledge of them or who has investigated them. The Military Commission rules include no such requirement. Article 31 provides that the accused must be informed before interrogation of the nature of the accusation, his right not to make any statement, and that statements he makes may be used in proceedings against him, and further provides that statements taken from the accused in violation of these requirements may not be received in evidence at a military proceeding. The Military Commission rules provide that the accused may not be forced to testify at his own trial, but the rule does not "preclude admission of evidence of prior statements or conduct of the Accused." Military Commission Order No. 1(5)(F). Article 33 states that the accused will receive notice of the charges against him within eight days of being arrested or confined unless written reason is given why this is not practicable. The Military Commission rules include no such requirement, and in fact, Hamdan, after being moved to Camp Echo for pre-commission detainment, was not notified of the charges against him for over 6 months. Article 38 provides the accused with certain rights before charges brought against him may be "referred" for trial, which include the right to counsel and the right to present evidence on his behalf. The Military Commission rules provide for no pre-trial referral process at all. Article 41 gives each side one peremptory challenge, while the Military Commission rules provide for none. Article 42 requires all trial participants to take an oath to perform their duties faithfully. The Military Commission rules allow witnesses to testify without taking an oath. Military Commission Order No. 1(6)(D). Article 52 requires three-fourths concurrence to impose a life sentence. The Military Commission rules only require two-thirds concurrence of the members to impose such a sentence. Military Commission Order No. 1(6)(F). Article 26 provides that military judges do not vote on guilt or innocence. Under the Military Commission rules, the Presiding Officer is a voting member of the trial panel. Military Commission Order No. 1(4)(A).

appointed to that panel some of the most distinguished civilian lawyers in the country (who may receive temporary commissions to fulfill the requirement that they be "officers," *see* Military Commission Order No. 1(6)(H); 32 C.F.R. 9.6(h)).[20] And, as for the President's naming himself or the Secretary of Defense as the final reviewing authority, that, after all, is what a military commission is. If Hamdan is triable by any military tribunal, 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.

The second difference between the procedures adopted for the Military Commission and those applicable in a court-martial convened under the Uniform Code of Military Justice is far more troubling. That difference lies in the treatment of information that is classified; information that is otherwise "protected"; or information that might implicate the physical safety of participants, including witnesses, or the integrity of intelligence and law enforcement sources and methods, or "other national security interests." *See* Military Commission Order No. 1(6)(B)(3); 32 C.F.R. § 9.6(b). Under the Secretary of Defense's regulations, the Military Commission must "[h]old open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer." *Id.* Detailed military defense counsel may not be excluded from proceedings, nor may evidence be received that has not been presented to detailed defense counsel, Military Commission Order No. 1 (6)(B)(3), (6)(D)(5); 32 C.F.R. §§ 9.6(b)(3), (d)(5). *The accused himself may be excluded from proceedings,* however, and evidence may be adduced that he will never see (because his lawyer will be forbidden to disclose it to him). *See id.*

Thus, for example, testimony may be received from a confidential informant, and Hamdan will not be permitted to hear the testimony, see the witness's face, or learn his name.

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[20] Griffin B. Bell, a former United States Circuit Judge and Attorney General; William T. Coleman, Jr., a former Secretary of Transportation; Edward George Biester, Jr., a former Congressman, former Pennsylvania Attorney General, and current Pennsylvania Judge; and Frank J. Williams, Chief Justice of the Rhode Island Supreme Court. *See* Dep't of Defense, Military Commission Biographies, http://www.defenselink.mil/news/Aug2004/commissions_biographies.html.

If the government has information developed by interrogation of witnesses in Afghanistan or elsewhere, it can offer such evidence in transcript form, or even as summaries of transcripts. *See* Military Commission Order No. 1(6)(D); 32 C.F.R. § 9.6(d). The Presiding Officer or the Appointing Authority may receive it in evidence if it meets the "reasonably probative" standard but forbid it to be shown to Hamdan. *See id.* As counsel for Hamdan put it at oral argument, portions of Mr. Hamdan's trial can be conducted "outside his presence. He can be excluded, not for his conduct, [but] because the government doesn't want him to know what's in it. They make a great big deal out of I can be there, but anybody who's practiced trial law, especially criminal law, knows that where you get your cross examination questions from is turning to your client and saying, 'Did that really happen? Is that what happened?' I'm not permitted to do that." 10/25/04 Tr. at 97.

It is obvious beyond the need for citation that such a dramatic deviation from the confrontation clause could not be countenanced in any American court, particularly after Justice Scalia's extensive opinion in his decision this year in *Crawford v. Washington,* 124 S.Ct. 1354 (2004). It is also apparent that the right to trial "in one's presence" is established as a matter of international humanitarian and human rights law.[21] But it is unnecessary to consider whether Hamdan can rely on any American constitutional notions of fairness, or whether the nature of these proceedings really is, as counsel asserts, akin to the Star Chamber, 10/25/04 Tr. at 97 (and violative of Common Article 3), because--at least in this critical respect--the rules of the Military Commission are fatally "contrary to or

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[21] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, art. 14(d)(3); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, art. 75.4(e). "This includes, at a minimum, all hearings in which the prosecutor participates. *E.g.,* Eur.Ct.H.Rts., *Belziuk v. Poland,* App. No. 00023103/93, Judgment of 25 March 1998, para. 39." Brief Amici Curiae of Louise Doswald-Beck *et al.* at 32-33 n.137. In this country, as Justice Scalia noted in *Crawford v. Washington,* 124 S. Ct. at 1363, the right to be present was held three years after the adoption of the Sixth Amendment to be a rule of common law "founded on natural justice" (quoting from *State v. Webb,* 2 N.C. 104 (1794)).

inconsistent with" the statutory requirements for courts-martial convened under the Uniform Code of Military Justice, and thus unlawful.

In a general court-martial conducted under the UCMJ, the accused has the right to be present during sessions of the court:

> **When the members of a court-martial deliberate or vote, only the members may be present. *All other proceedings,* including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and *shall be in the presence of the accused,* the defense counsel, the trial counsel, and, in cases in which a military judge has been detailed to the court, the military judge.**

UCMJ Article 39(b), 10 U.S.C. § 839(b) (emphasis added).

Article 36 of the Uniform Code of Military Justice, 10 U.S.C. § 836(a), provides:

> **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. (Emphasis added.)**

The government argues for procedural "flexibility" in military commission proceedings, asserting

> that construing Article 36 rigidly to mean that there can be no deviation from the UCMJ ... would have resulted

> in having virtually all of the UCMJ provisions apply to the military commissions, which would clearly be in conflict with historical practice, as recognized by the Supreme Court, in both *Yamashita* and *Madsen,* and also inconsistent with Congress' intent, as reflected in Articles 21 and 36, and other provisions of the UCMJ that specifically mention commissions when a particular rule applies to them.

10/25/04 Tr. 26-27. But the language of Article 36 does not require rigid adherence to all of the UCMJ's rules for courts-martial. It proscribes only procedures and modes of proof that are "contrary to or inconsistent with" the UCMJ.[22]

As for the government's reliance on *Yamashita* and *Madsen: Yamashita* offers support for the government's position only if developments between 1946 and 2004 are ignored. In 1946, the Supreme Court held that Article 38 of the Articles of War (the predecessor of Article 36 of the UCMJ) did not provide to enemy combatants in military tribunals the procedural protections (in that case, restrictions on the use of depositions) available in courts-martial under the Articles of War. *Yamashita,* 327 U.S. at 18-20. The Court's holding depended upon the fact that General Yamashita, an enemy combatant, was not subject to trial by courts-martial under then Article 2 of the Articles of War (the predecessor to Article 2 of the UCMJ), which conferred courts-martial jurisdiction only over U.S. military personnel and those affiliated with them. *Id.* at 19-20. The Court held that Congress intended to grant court-martial protections within tribunals only to those persons who could be tried under the laws of war in either courts-martial or tribunals. *See id.* The UCMJ and the 1949 Geneva Conventions had not come into effect in 1946. Article 2 of the UCMJ is now

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[22] In *Kangaroo Court or Competent Tribunal?, supra* note 14 at 2020-22, the author suggests that one possible reading of this provision would require consistency only with those nine UCMJ articles (of 158 total) that expressly refer to or recite their applicability to military commissions. A review of the articles that contain such references or recitals, however, *see id.* at 2014 n. 23, demonstrates the implausibility of such a reading.

broader than Article 2 of the Articles of War. *See generally* Library of Congress, Index and Legislative History of the UCMJ (1950), http://www.loc.gov/rr/frd/Military_Law/index_legHistory.html. It has been expanded to include as persons subject to court-martial, both prisoners of war, 10 U.S.C. § 802(a)(9), and "persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands." *Id.* § 802(a)(12). One or both of those new categories undoubtedly applies to petitioner. For this reason, *Yamashita*'s holding now arguably gives more support to petitioner's case than to the government's.[23]

Madsen follows *Yamashita* in its general characterization of military commissions as "our common law war courts" and states that "[n]either their procedure nor their jurisdiction has been prescribed by statute." *Madsen,* 343 U.S. at 346-47. It does not appear that any procedural issue was actually raised in *Madsen,* however, nor were the Geneva Conventions addressed in any way in that case. Madsen was an American citizen, the dependent wife of an Armed Forces member, charged with murdering her husband in the American Zone of Occupied Germany in 1947 and tried there by the United States Court of the Allied High Commission for Germany. Her argument, which the Court rejected, was simply that the jurisdiction of military commissions over civilian offenders and non-military offenses was automatically ended by amendments to the Articles of War enacted in 1916 that extended the jurisdiction of courts-martial to persons accompanying United States forces outside the territorial jurisdiction of the United States. *Id.* at 351-52.

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[23] *Yamashita* has been undercut by history in another important respect. The Supreme Court found the guarantee of trial by court-martial for prisoners of war in the 1929 Geneva Convention inapplicable to General Yamashita because it construed that provision as applicable only to prosecutions for acts committed while in the status of prisoner of war. The Third Geneva Convention, adopted after and in light of *Yamashita,* made it clear that the court-martial trial provision applies as well to offenses committed by combatants while combatants. Third Geneva Convention, art. 85. *See also,* Glazier, *supra* note 12 at 2079-80.

Even though *Madsen* presented no procedural issue, the Supreme Court did generally review the procedures applicable to Madsen's trial. A comparison between those procedures and the rules of the Guantanamo Military Commission is not favorable to the government's position here. In *Madsen,* United States Military Government Ordinance No. 2 (the analogue of the Military Commission Order in this case) provided, under "rights of accused":

> Every person accused before a military government court shall be entitled ... to be present at his trial, to give evidence and to examine or cross-examine any witness; but the court may proceed in the absence of the accused if the accused has applied for and been granted permission to be absent, or if the accused is believed to be a fugitive from justice.

Id. at 358 n. 24. There was no provision for the exclusion of the accused if classified information was to be introduced.

The government's best argument, drawing on language found in both *Yamashita* and *Madsen,* is that a "common law war court" has been "adapted in each instance to the need that called it forth," 343 U.S. at 347-48 (citing *Yamashita,* 327 U.S. at 18-23). Neither 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. Presumably the problems of dealing with classified or "protected" information underlie the President's blanket finding that using the regular rules is "not practicable." The military has not found it impracticable to deal with classified material in courts-martial, however. An extensive and elaborate process for dealing with classified material has evolved in the Military Rules of Evidence. Mil. R. Evid. 505; *see* 10/25/04 Tr. 131-32. Alternatives to full disclosure are provided, Mil. R. Evid. 505(i)(4)(D). Ultimately, to be sure, the government has a choice to make, if the presiding military judge determines that alternatives may not be used and the government objects to disclosure of information. At that point, the conflict between the government's need to protect

classified information and the defendant's right to be present becomes irreconcilable, and the only available options are to strike or preclude the testimony of a witness, or declare a mistrial, or find against the government on any issue as to which the evidence is relevant and material to the defense, or dismiss the charges (with or without prejudice), Mil. R. Evid. 505(i)(4)(E). The point is that the rules of the Military Commission resolve that conflict, not in favor of the defendant, but in favor of the government.

Unlike the other procedural problems with the Commission's rules that are discussed elsewhere in this opinion, this one is neither remote nor speculative: Counsel made the unrefuted assertion at oral argument that Hamdan has already been excluded from the *voir dire* process and that "the government's already indicated that for two days of his trial, he won't be there. And they'll put on the evidence at that point." 10/25/04 Tr. 132. Counsel's appropriate concern is not only for the established right of his client to be present at his trial, but also for the adequacy of the defense he can provide to his client. The relationship between the right to be present and the adequacy of defense is recognized by military courts, which have interpreted Article 39 of the UCMJ in the light of Confrontation Clause jurisprudence. The leading Supreme Court case is *Maryland v. Craig,* 497 U.S. 836 (1990) (one-way television viewing of witness in child abuse case permissible under rule of necessity), which noted that the "central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact" and that the "elements of confrontation"--"physical presence, oath, cross-examination, and observation of demeanor by the trier of fact," serve among other things to enhance the accuracy of fact-finding by "reducing the risk that a witness will wrongfully implicate an innocent person." *Id.* at 846 (internal citations omitted).

Following *Craig* in a military case involving child abuse, the Court of Appeals for the Armed Forces found that a military judge had misapplied the Supreme Court's holding when he excluded the defendant from the courtroom during a general court-martial:

> There [in *Craig*], the witness was outside the courtroom and the defendant was present. Here, the

> witness was in the courtroom and appellant was excluded. While appellant could observe J's testimony, he could not observe the reactions of the court members or the military judge, and they could not observe his demeanor. He could not communicate with his counsel except through the bailiff, who was not a member of the defense team. We hold that this procedure violated the Sixth Amendment, Article 39, and RCM 804. While *Craig* and [*United States v. Williams,* 37 M.J. 289 (C.M .A.1993)] permit restricting an accused's face-to-face confrontation of a witness, they do not authorize expelling an accused from the courtroom.

United States. v. Daulton, 45 M.J. 212, 219 (C.A.A.F.1996); *see also United States v. Longstreath,* 45 M.J. 366 (C.A.A.F.1996) (defendant separated from witness by television but present in courtroom).[24]

A tribunal set up to try, possibly convict, and punish a person accused of crime that is configured in advance to permit the introduction of evidence and the testimony of witnesses out of the presence of the accused is indeed substantively different from a regularly convened court-martial. If such a tribunal is not a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," it is violative of Common Article 3. That is a question on which I have determined to abstain. In the meantime, however, I cannot stretch the meaning of the Military Commission's rule enough to find it consistent with the UCMJ's right to be

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[24] The statute Congress enacted after and in light of the *Craig* opinion, 18 U.S.C. § 3509, carefully protects the rights of child victims and witnesses in abuse cases but preserves the right of the accused to be present. Even if a child witness is permitted to testify by videotaped deposition, the accused must be "present" via two-way television, and the defendant must be "provided with a means of private, contemporaneous communication with the defendant's attorney during the deposition." 18 U.S.C. § 3509(b)(2)(B)(iv).

present. 10 U.S.C. § 839. A provision that permits the exclusion of the accused from his trial for reasons other than his disruptive behavior or his voluntary absence is indeed directly contrary to the UCMJ's right to be present. I must accordingly find on the basis of the statute that, so long as it operates under such a rule, the Military Commission cannot try Hamdan.

4. Hamdan's detention claim appears to be moot, and his speedy trial and equal protection claims need not be ruled upon at this time.

Until a few days before the oral argument on Hamdan's petition, his most urgent and striking claim was that he had been unlawfully and inhumanely held in isolation since December 2003 and that such treatment was affecting his mental and psychological health as well as his ability to assist in the preparation of his defense. Late on the Friday afternoon before the oral argument held on Monday, October 25, 2004, the government filed its "notice of a change in circumstances," advising the court that Hamdan had been moved back to Camp Delta--a separate wing of Camp Delta, to be sure, but nevertheless an open-air part of Camp Delta where pre-commission detainees can communicate with each other, exercise, and practice their religion. 10/25/04 Tr. at 11-12. That change in status may not exactly moot Hamdan's claim about his confinement in isolation, which the government is capable of repeating and which has evaded review. The treatment Hamdan may or may not be afforded in the future, however, is not susceptible to review on a writ of habeas corpus.

The second most urgent and most important claim in Hamdan's original petition was his claim of entitlement to the protection of the Uniform Code of Military Justice's speedy trial rule and his assertion that he had been detained more than the maximum 90 days permitted by Article 103 of the Third Geneva Convention. These concerns were more urgent before Hamdan 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.[25] The UCMJ's speedy trial requirements establish no specific number of days that will require dismissal of a suit. 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. The record 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). It is well established in any event that the critical element of prejudice is best evaluated post-trial. *U.S. v. MacDonald,* 435 U.S. 850, 858-9 (1978).

It is also unnecessary for me to decide whether, by virtue of his detention at Guantanamo Bay, Hamdan has any rights at all under the United States Constitution or under 42 U.S.C. § 1981.[26]

CONCLUSION

It is now clear, by virtue of the Supreme Court's decision in *Hamdi,* that the detentions of enemy combatants at Guantanamo Bay are not unlawful per se. The granting (in part) of Hamdan's petition for habeas corpus accordingly brings only limited relief. The order that accompanies this opinion provides: (1) that, unless and until a competent tribunal determines that Hamdan is not entitled to POW status, he may be tried for the offenses with which he is charged only by court-martial under the Uniform Code of Military Justice; (2) that, unless and until the Military Commission's rule permitting Hamdan's exclusion from commission sessions and the withholding of evidence from him is amended so that it is consistent with and not contrary to UCMJ Article 39, Hamdan's trial before the Military Commission would be unlawful; and (3) that Hamdan must be released from the pre-Commission detention wing of Camp Delta and returned to the general population of detainees, unless some reason other than the pending charges

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[25] Hamdan does not currently challenge his detention as an enemy combatant in proceedings before this Court.

[26] The Supreme Court's recent decision in *Rasul* does little to clarify the Constitutional status of Guantanamo Bay but may contain some hint that non-citizens held at Guantanamo Bay have some Constitutional protection. *See Rasul,* 124 S.Ct. at 2698 n. 15.

against him requires different treatment. Hamdan's remaining claims are in abeyance.

ORDER

For the reasons set forth in the accompanying memorandum opinion it is

ORDERED that the petition of Salim Ahmed Hamdan for habeas corpus [1-1] is granted in part. It is

FURTHER ORDERED that the cross-motion to dismiss of Donald H. Rumsfeld [1-84] is denied. It is

FURTHER ORDERED that, unless and until a competent tribunal determines that petitioner is not entitled to the protections afforded prisoners-of-war under Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, he may not be tried by Military Commission for the offenses with which he is charged. It is

FURTHER ORDERED that, unless and until the rules for Military Commissions (Department of Defense Military Commission Order No. 1) are amended so that they are consistent with and not contrary to Uniform Code of Military Justice Article 39, 10 U.S.C. § 839, petitioner may not be tried by Military Commission for the offenses with which he is charged. It is

FURTHER ORDERED that petitioner be released from the pre-Commission detention wing of Camp Delta and returned to the general population of Guantanamo detainees, unless some reason other than the pending charges against him requires different treatment. And it is

FURTHER ORDERED that petitioner's remaining claims are in abeyance, the Court having abstained from deciding them.

APPENDIX B

U.S. Const. Art. I, Section 8 states in part:

The Congress shall have power…to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

U.S. Const. Art. VI states in part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Amend. 14 states in part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

10 U.S.C. Section 802 states in part:

(a) The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it…

(7) Persons in custody of the armed forces serving a sentence imposed by a court-martial….

(9) Prisoners of war in custody of the armed forces.

(10) In time of war, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of

international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

10 U.S.C. Section 810 states:

Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, he shall not ordinarily be placed in confinement. When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

10 U.S.C. Section 821 states:

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

10 U.S.C. Section 836 states:

(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.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

10 U.S.C. Section 839 states:

(a) At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to section 835 of this title (article 35), call the court into

session without the presence of the members for the purpose of--

(1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

(2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court;

(3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused; and

(4) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 836 of this title (article 36) and which does not require the presence of the members of the court.

These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record. These proceedings may be conducted notwithstanding the number of members of the court and without regard to section 829 of this title (article 29).

(b) When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and, in cases in which a military judge has been detailed to the court, the military judge.

10 U.S.C. Section 3037 states:

(a) The President, by and with the advice and consent of the Senate, shall appoint the Judge Advocate General, the Assistant Judge Advocate General, and general officers of the Judge Advocate General's Corps, from officers of the Judge Advocate General's Corps who are recommended by the Secretary of the Army. An officer appointed as the Judge Advocate General or Assistant Judge Advocate General normally holds office for four years. However, the President may terminate or extend the appointment at any time. If an

officer who is so appointed holds a lower regular grade, he shall be appointed in the regular grade of major general.

(b) The Judge Advocate General shall be appointed from those officers who at the time of appointment are members of the bar of a Federal court or the highest court of a State or Territory, and who have had at least eight years of experience in legal duties as commissioned officers.

(c) The Judge Advocate General, in addition to other duties prescribed by law--

(1) is the legal adviser of the Secretary of the Army and of all officers and agencies of the Department of the Army;

(2) shall direct the members of the Judge Advocate General's Corps in the performance of their duties; and

(3) shall receive, revise, and have recorded the proceedings of courts of inquiry and military commissions.

(d) Under regulations prescribed by the Secretary of Defense, the Secretary of the Army, in selecting an officer for recommendation to the President under subsection (a) for appointment as the Judge Advocate General or Assistant Judge Advocate General, shall ensure that the officer selected is recommended by a board of officers that, insofar as practicable, is subject to the procedures applicable to selection boards convened under chapter 36 of this title.

Third Geneva Convention, relative to the Treatment of Prisoners of War

Article 2

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Article 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Article 4

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) That of being commanded by a person responsible for his subordinates;

(b) That of having a fixed distinctive sign recognizable at a distance;

(c) That of carrying arms openly;

(d) That of conducting their operations in accordance with the laws and customs of war.

3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

5. Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

1. Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

2. The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

Article 5

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Article 102

A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed

forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

APPENDIX C

FOR OFFICIAL USE ONLY
No. 040004

UNITED STATES

v.

SALIM AHMED HAMDAN
a/k/a Salim Ahmad Hamdan
a/k/a Salem Ahmed Salem Hamdan
a/ka/ Saqr al Jadawy
a/k/a Saqr al Jaddawi
a/k/a Khalid bin Abdallah
a/k/a Khalid wl'd Abdallah

Approval of Charges And Referral

July 13, 2004

The charge against Salim Ahmed Hamdan (a/k/a Salim Ahmad Hamdan, a/k/a Salem Ahmed Salem Hamdan, a/ka/ Saqr al Jadawy, a/k/a Saqr al Jaddawi, a/k/a Khalid bin Abdallah, a/k/a Khalid wl'd Abdallah) is approved and referred to the Military Commission identified at Encl 1. The Presiding Officer will notify me not later than July, 26, 2004, of the initial trial schedule, including dates for submission and argument of motions, and a convening date.

s/John D. Altenburg, Jr.
John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN
a/k/a Salim Ahmad Hamdan
a/k/a Salem Ahmed Salem Hamdan
a/ka/ Saqr al Jadawy
a/k/a Saqr al Jaddawi
a/k/a Khalid bin Abdallah
a/k/a Khalid wl'd Abdallah

CHARGE: CONSPIRACY

Salim Ahmed Hamdan (a/k/a Salim Ahmad Hamdan, a/k/a Salem Ahmed Salem Hamdan, a/ka/ Saqr al Jadawy, a/k/a Saqr al Jaddawi, a/k/a Khalid bin Abdallah, a/k/a Khalid wl'd Abdallah) is a person subject to trial by Military Commission. At all times material to the charge:

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 3, 2003 that Salim Ahmed Hamdan (a/k/a Salim Ahmad Hamdan, a/k/a Salem Ahmed Salem Hamdan, a/ka/ Saqr al Jadawy, a/k/a Saqr al Jaddawi, a/k/a Khalid bin Abdallah, a/k/a Khalid wl'd Abdallah) is subject to his Military Order of November 13, 2001.
2. Hamdan's charged conduct is triable by a military commission.

GENERAL ALLEGATIONS

3. Al Qaida ("the Base"), was founded by Usama bin Laden and others around 1989 for the purpose of opposing certain governments and officials with force and violence.

4. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.
5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.
6. Al Qaida operations and activities are directed by a *shura* (consultation) counsel composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.
7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan and other countries for the purpose of supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.
8. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian Peninsula.
9. In February of 1998, Usama bin Laden, Ayman al Zawahari and others under the banner of "International Islamic Front for Jihad on the Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere the can be found and to "plunder their money."
10. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."
11. Since 1989, members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS

COLE in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE: CONSPIRACY

12. Salim Ahmed Hamdan (a/k/a Salim Ahmad Hamdan, a/k/a Salem Ahmed Salem Hamdan, a/ka/ Saqr al Jadawy, a/k/a Saqr al Jaddawi, a/k/a Khalid bin Abdallah, a/k/a Khalid wl'd Abdallah, hereinafter "Hamdan") in Afghanistan, Pakistan, Yemen and other countries, from on or about February 1996 to on or about November 24, 2001, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden, Saif al Adel, Dr. Ayman al Zawahari (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism.

13. In furtherance of this enterprise and conspiracy, Hamdan and other members or associates of al Qaida committed the following overt acts:

    a. In 1996, Hamdan met with Usama bin Laden in Qandahar, Afghanistan and ultimately became a bodyguard and personal driver for Usama bin Laden. Hamdan served in this capacity until his capture in November of 2001. Based on his contact with Usama bin Laden and members or associates of al Qaida during this period, Hamdan believed that Usama bin Laden and his associates were involved in the attacks on the U.S. Embassies in Kenya and Tanzania in August 1998, the attack on the USS COLE in October 2000, and the attacks on the United States on September 11, 2001.

b. From 1996 through 2001, Hamdan: (1) delivered weapons, ammunition or other supplies to al Qaida members and associates; (2) picked up weapons at Taliban warehouses for al Qaida use and delivered them directly to Saif al Adel, the head of al Qaida's security committee, in Qandahar, Afghanistan; (3) purchased or ensured that Toyota Hi Lux trucks were available for use by the Usama bin Ladan bodyguard unit tasked with protecting and providing physical security for Usama bin Laden; and (4) served as a driver for Usama bin Laden and other high ranking al Qaida members and associates. At the time of the al Qaida sponsored attacks on the U.S. Embassies in Tanzania and Kenya in August of 1998, and the attacks on the United States on September 11, 2001, Hamdan served as a driver in a convoy of three to nine vehicles in which Usama bin Laden and others were transported to various areas in Afghanistan. Such convoys were utilized to ensure the safety of Usama bin Laden and the others. Bodyguards in these convoys were armed with Kalishnikov rifles, rocket propelled grenades, hand-held radios and handguns.

c. On divers [sic] occasions between 1996 and November of 2001, Hamdan drove or accompanied Usama bin Laden to various al Qaida-sponsored training camps, press conferences, or lectures. During these trips, Usama bin Laden would give speeches in which he would encourage others to conduct "martyr missions" (meaning an attack wherein one would kill himself as well as the targets of the attack) against the

Americans, to engage in war against the Americans, and to drive the "infidels" out of the Arabian Peninsula.

d. Between 1996 and November of 2001, Hamdan, on divers [sic] occasions received training on rifles, handguns and machine guns at the al Qaida-sponsored al Farouq camp in Afghanistan.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 04-1519 (JR)

SALIM AHMED HAMDAN, Petitioner

v.

DONALD H. RUMSFELD, ET AL., Respondents.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that respondents/defendants in this case, George W. Bush, President of the United States; Donald H. Rumsfeld, United States Secretary of Defense; John D. Altenburg, Jr., Appointing Authority for Military Commissions, Department of Defense; Brigadier General Thomas L. Hemmingway, Legal Advisor to the Appointing Authority for Military Commissions; and Brigadier General Jay Hood, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from this Court's Order entered and filed November 8, 2004, and all earlier rulings and interlocutory orders that gave rise to and/or produced that order.

Dated: November 12, 2004 [Filed November 16, 2004]

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

BRIAN D. BOYLE
Principal Deputy Associate Attorney General

DOUGLAS N. LETTER
Terrorism Litigation Counsel

ROBERT D. OKUN
Assistant United States Attorney Chief, Special Proceedings Section

JONATHAN L. MARCUS
DAVID B. SALMONS
Assistants to the Solicitor General

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s/Nicholas J. Patterson
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20 Massachusetts Ave., N.W.
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APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5392
[Civ. Action No. 04-1519 (JR)]

SALIM AHMED HAMDAN, Petitioner-Appellee

v.

DONALD H. RUMSFELD, ET AL., Respondents-Appellants.

MOTION FOR EXPEDITION OF APPEAL

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 27, respondents-appellants, Donald H. Rumsfeld, United States Secretary of Defense, et al., hereby move to expedite the above-captioned appeal.

1. On November 8, 2004, the district court in the above-captioned case, granted in part the habeas corpus petition of Salim Ahmed Hamdan. Hamdan is a trained al Qaeda member/affiliate. After joining forces with Osama bin Laden in 1996, Hamdan served as the personal driver for Osama bin Laden and other high ranking al Qaeda members and associates. He delivered weapons, ammunition or other supplies to al Qaeda members and associates. Hamdan was trained to use rifles, handguns and machine guns at an al Qaeda camp in Afghanistan. *See* Respondents' Cross-Motion to Dismiss, Ex. A (Indictment).

Hamdan was captured as part of the U.S. military operation in Afghanistan in late 2001. In 2002, Hamdan was transferred to the detention facility at the U.S. Naval Base at Guantanamo Bay, Cuba. On July 3, 2003, the President issued a finding that "that there is reason to believe that [Hamdan] was a member of al Qa[e]da or was otherwise involved in terrorism directed against the United States," and

designated Hamdan for trial by military commission. Slip op. 2-3.

Hamdan's counsel filed the petition for mandamus or habeas corpus in federal district court challenging the commission proceedings. Slip op. 4.

2. On November 8, 2004, the district court granted the petition in part. In so ruling, the court overruled the Commander in Chiefs determination that al Qaeda members and affiliates are not covered by the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (hereafter the "Geneva Convention"). The court also effectively overruled the President's determination that al Qaeda was a separate party to the conflict in Afghanistan. Notwithstanding statements of this Court to the contrary, and the Supreme Court's holding that the prior version of the treaty was not self-executing, the district court here proceeded to hold that the Convention was self-executing, and granted Hamdan rights enforceable in federal court. Based on its construction of the Convention and U.S. Army regulations, the court found that Hamdan has the right to be treated as a prisoner of war (until determined otherwise by "a competent authority") and that he could not be tried by the currently constituted military commission for his war crimes. The court went further and held that, even if Hamdan is determined not to be a POW, he can only be tried by a military commission that affords him the full rights a U.S. service member would receive under the Uniform Code of Military Justice. In so holding, the court found that the President lacked the constitutional authority to create the commissions currently in place. Based on this series of erroneous legal rulings, the court enjoined the ongoing military commission proceedings against Hamdan and ordered him released to the general detention population at the Guantanamo Bay Naval Base.

3. On November 12, 2004, respondents filed a notice of appeal from the district court's November 8 order.

4. An expedited appeal is warranted not only because the district court's order has derailed the ongoing military commission proceedings against a prominent aide to al Qaeda leader Osama bin Laden, but also because, in reaching that result, the court has rendered several legally erroneous rulings with potentially very broad and dangerous

ramifications. These rulings, granting judicially enforceable rights under the Geneva Convention to al Qaeda enemy combatants, and contradicting the important military determinations of the Commander-in-Chief during a time of active armed conflict, represent an unprecedented judicial intrusion into the prerogatives of the President and warrant expedited review by this Court.

a. The district court's ruling that the Geneva Convention provisions at issue are self-executing is both wrong as a matter of law and has substantial implications beyond this case. Finding that those captured during armed conflict have judicially enforceable rights under the Convention opens a veritable Pandora's box where the Executive attempting to protect this nation through the use of military force would become entangled in a morass of litigation, brought by enemy detainees and POWs, about the implementation of the Convention. Such a result would indisputably encumber the President's authority as Commander in Chief. Indeed, it is nearly unimaginable to consider the implications of having permitted the more than 2 million POWs held during WWII the right to enforce Geneva Convention provisions through legal actions filed in the United States.

The district court's primary rationale for finding the Convention to be self-executing is that the treaty protects the rights of individuals (*i.e.*, persons captured or otherwise detained during an armed conflict). That rationale, however, conflicts with the Supreme Court's recent decision in *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004), which refused to find the International Covenant on Civil and Political Rights ("ICCPR") – which protects individual civil rights -- to be self-executing (*i.e.*, to provide judicially enforceable rights). *Sosa*, 124 S.Ct. at 2767. Other major civil rights and human rights conventions are also not self-executing -- *e.g.*, the International Convention on the Elimination of All Forms of Racial Discrimination, the Torture Convention, and the Genocide Convention. See 140 Cong. Rec. 14,326 (1994); 136 Cong. Rec. 36,198 (1990); 132 Cong. Rec. 2350 (1986).

Moreover, the Supreme Court has held that the precursor to the Geneva Convention was not self-executing. *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950). *See also Holmes v. Laud*, 459 F.2d 1211, 1222 (D.C. Cir. 1972) (noting that "corrective machinery specified in the treaty itself is nonjudicial"). When the President signed and the Senate

ratified the current version of the Convention in 1955, there was no indication that they changed the essential character of the treaty to permit, without any implementing legislation, alleged violations to be enforced by captured enemy forces through the captor's judicial system. To the contrary, the terms of the Convention show that vindication of rights under the Treaty is a matter of State-to-State relations, not domestic court resolution. *See Hamdi v. Rumsfeld*, 316 F.3d 450, 468-469 (4th Cir. 2003), *overruled on other grounds*, 124 S. Ct. 2633 (2004).

Thus, it is no accident that over the last fifty years no court of appeals has ever found the Convention to be "self-executing." *See Hamdi*, 316 at 468-469. *See also Al Odah v. United States*, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randoph, J., concurring), *overruled on other grounds*, 124 S. Ct. 2686 (2004); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-810 (D.C. Cir. 1984) (Bork, J., concurring).

b. The district court's order also effectively overrules the President's determinations that al Qaeda was a separate party to the conflict in Afghanistan and that al Qaeda members/affiliates do not qualify for protection under the Geneva Convention. The district court appears to have decided that, in respect to the military conflict in Afghanistan, al Qaeda and Taliban forces cannot properly be treated as separate entities. The President, however, expressly determined just the opposite: that al Qaeda is a distinct party to the conflict. That decision, made as part of the President's broad authority as Commander in Chief, as well as pursuant to his powers over foreign affairs, is not subject to contradiction by the district court or any other court. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition is exclusively a function of the Executive.").

These determinations were fundamental exercises of the President's authority as Commander in Chief. The district court's decision to treat those determinations as legal nullities and to grant Convention rights to al Qaeda members/affiliates is in itself a substantial injury to the President's authority.

c. This appeal also presents an important question of when a district court must abstain until military commission proceedings have reached a point of finality. The district court refused to abstain here, even though, in general, it is

well established that a federal court must abstain from hearing a challenge to a military commission proceeding until the completion of the proceedings. *See Schlesinger v. Councilman*, 420 U.S. 738 (1975); *New v. Cohen*, 129 F.3d 639 (D.C. Cir. 1997). Although it is true that there are some cases in which courts have not required exhaustion of military remedies before considering challenges to the jurisdiction of military courts, those cases involved *U.S. citizens* who were indisputably civilians and were charged with offenses unrelated to any armed conflict. *See, e.g., Reid v. Covert*, 354 U.S. 1 (1957); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

The military commission proceedings against Hamdan were ongoing with motions pending and a trial scheduled. The district court's order disrupting these important proceedings against an al Qaeda enemy combatant charged with war crimes is directly contrary to the Supreme Court's admonition in *Councilman* that the judiciary should not generally interfere with ongoing military tribunal proceedings. As in *Councilman*, the ultimate ruling of the military commission process here will "remain subject in proper cases to collateral impeachment," 420 U.S. at 738, and there is no irreparable harm to Hamdan requiring court intervention at this juncture.

Thus, there was no proper basis for the district court to intervene and to prevent the President from exercising his constitutional authority to capture and try war criminals during this country's war against terrorism. Expedited review by this Court is critical in order to minimize the unwarranted delay caused by the district court's order in the conduct of these important military commission proceedings.

d. The appeal also presents the critical issue of whether the President has inherent authority to create-military commissions to try enemy combatants. The district court erred not only in concluding that 10 U.S.C. 821 does not reflect congressional approval of the exercise of the President's war powers here, but also erred in concluding that the Constitution does not confer authority upon the President to establish military tribunals. *See* Slip Op. 8-13. Under Article II, the President is vested with broad authority as "Commander in Chief' to carry out military operations. The Commander-in-Chief power is the "[f]irst of the enumerated powers of the President * * * * [a]nd includes all that is

necessary and proper for carrying [it] into execution." *Eisentrager*, 339 U.S. at 788. An essential "incident to the conduct of war is the adoption of measures by the military commander * * * to seize and subject to disciplinary measures those enemies who * * * have violated the law of war." *Yamashita v. Styer*, 327 U.S. 1, 11 (1946)

The district court's order rejecting this basic and necessary Executive power as Commander in Chief is plainly erroneous and warrants swift appellate review.

5. Given these serious legal errors and the significant harms that the district court's ruling could potentially cause, expedition of this appeal is clearly warranted.[1]

The Government proposes an expedited schedule under which appellants' brief would be due 21 days after this Court's order granting this motion, appellee's brief be due 21 days thereafter, and appellants' reply 10 days after that. The Government further requests that this Court schedule oral argument as soon as possible after the close of the briefing.

6. Government Counsel has consulted with counsel for Hamdan, and they have refused to consent to this motion and they reserve the right to oppose it.

CONCLUSION

For the foregoing reasons, this Court should expedite the consideration of this appeal.

PETER KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

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[1] The considerations we advance in support of expedition could well support a stay of the district court's order pending appeal. Although we are not seeking a stay in this motion, the Government may need to seek that additional relief, especially given the uncertain implications of the district court's POW analysis. Regardless of whether a stay is sought or ordered, expedition of the appeal is warranted for the reasons set forth herein.

GREGORY G. KATSAS
Deputy Assistant Attorney
General

s/Douglas N. Letter
DOUGLAS N. LETTER

s/Robert M. Loeb
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November 16, 2004

APPENDIX F

FROM COL. PETER E. BROWNBACK, NOVEMBER 8, 2004

The Commission has carefully considered the order of the district court for the District of Columbia. Proceedings in the case of US v. Hamdan are abated until further notice.

FOR THE COMMISSION

s/ Peter E. Brownback
Peter E. Brownback III
COL, JA, USA
Presiding Officer

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5393
[Civ. Action No. CIV.A.04-1519]

Salim Ahmed Hamdan**,** Appellee

v.

Donald H. Rumsfeld, United States Secretary of Defense, et al., Appellants.

BEFORE: Edwards, Randolph, and Tatel, Circuit Judges

ORDER

Upon consideration of the motion for expedition of appeal, it is

ORDERED that the motion be granted. The following briefing schedule applies:

Brief and Appendix for Appellants	December 8, 2004
Brief for Appellee	December 29, 2004
Reply Brief for Appellants	January 10, 2005

Any amici curiae must file their briefs on the same date as the party they support.

FILED ON: November 17, 2004

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

s/Scott H. Atchue
Scott H. Atchue
Deputy Clerk / LD

APPENDIX H

UNITED STATES NAVAL STATION:
GUANTANAMO BAY, CUBA:

AFFIDAVIT

I, Salim Ahmed Salim Hamdan, having been duly sworn, states and deposes as follows:

My name is Salim Ahmed Salim Hamdan and I am a Yemeni citizen. I have been known by the name Saqr. I was born in the village of Khoreiba in the governate of Hadhramout in approximately 1969. In 1980, I moved to Makula, where I lived with relatives and worked odd jobs in the city from age 10 until the age of about 20. From the age of 20 I moved to the capital of Yemen, Sa'ana, where I continued to work and seek better employment opportunities, I was unable to find permanent employment, but continued to work odd jobs. In 1996, I was approached by Ali Al-Yafi who was seeking men to aid Muslims struggling against the communists in Tajikistan. After several meetings I agreed to go with him to Tajikistan to aid my fellow Muslims in their struggle. I traveled to Pakistan and then to Afghanistan where I met with other Muslims who were going to Tajikistan. We traveled by plane then by car and then by foot until we got to Badashaw, the forces at Tajikistan wouldn't allow us to go further, and the weather in the mountains was bad, we turned around and left for Kabul. In Kabul, I told Muhammad, that I wanted to return to Yemen. He asked me why. He said there was no work in Yemen and I should stay here, because he has a job for me. He told me he knew of a job as a driver for me. He took me to a farm in Jalalabad, where I met Osama Bin Laden. Osama Bin Laden offered me a job as a driver on a farm he owned, bringing Afghanis workers from the local village to work and back again. After about seven (7) months Osama Bin Laden began to have me drive him to various places. During the period that I worked for Osama Bin Laden, I traveled back to Yemen twice, the first time in 1998 was to get married, then in August 2000, I went back to Yemen to attend my brother-in-law's wedding and to attend the pilgrimage to the Hajj. In February 2001, I returned to Afghanistan with my wife to continue work as a driver. I was still working as a driver in October 2001, when the Northern

Alliance with American support began its offensive. The last time I was with Bin Laden was in Kabul. I heard that the Northern Alliance was attacking Kandahar where my wife and daughter were living and I feared for my wife. I decided to return to them and I asked him [Bin Laden] if I could go to Kandahar but regardless of his response, affirmative or negative, I was going to my wife. I was worried about their safety and I decided to take them to Pakistan. I decided to borrow a car to drive my family to Pakistan. After I had taken my family to Pakistan, I tried to return to Afghanistan to return the car to its owner and to return to my house to sell my belongings to get money in order to return with my family to Yemen. But while trying to return, I was stopped by soldiers loyal to the former king Zahir Shah of Afghanistan, who were looking for Arabs to sell to American forces. When they stopped me they had already taken another Arab who they shot and killed. I tried to flee, but I failed and they captured me again. They tied my hands and feet behind me like an animal with electrical wire and they tied me so tight that the wire cut me. They took me to a house. After a day, I was taken to another house for seven (7) days where I was questioned by a man in a military uniform, who spoke Arabic and said he was an American. The Afghan soldiers told me they had gotten $5,000.00 from the Americans for me, one of the guards who was at the house wanted to see dollars. When the guard showed the money, I saw it too.

While in Afghanistan, I helped and cooperated with the Americans in every way. Despite the fact that I cooperated with the Americans, I was physically abused. I have a bad back from work in Yemen. I told my investigators of this condition but was transported in positions that caused me physical agony in my back. I was dressed in only bright blue overalls in sub-freezing temperatures and was very cold. I was made to sit motionless on benches with other prisoners for days. When I did not know the answers to the investigators questions, the soldiers would strike me with their fists and kick me with their feet, after the investigator left, before they took me back with the other prisoners. When I took them places I had driven Osama Bin Laden, they would threaten me with death, torture or prison when I did not know the answers to their questions. One of their methods to threaten was to put a pistol on the table in front of me and show me the gun and asked, "What do you think?" I

went with them to places that Bin Laden lived and where he traveled.

In June 2002, I was flown to Guantanamo Bay, Cuba. In Guantanamo Bay, Cuba, I was put in a large prison with many other men. I was held in a single cell in a cellblock of 48 men. These cells were open to the air and I could talk to the other men. I was given 15 minutes a week of exercise in a 8 meter by 7 meter fenced in area. A Muslim cleric would come and talk to people and I talked with and I could hear the calls to prayer. At Camp Delta, I was questioned by many people from the FBI and Arab police forces. They showed me pictures and asked me to identify the people. On two (2) occasions they allowed me to call my wife on a portable telephone and speak with her and to calm her. I had not heard from her since I left her in Pakistan and I was worried about her. Men from the FBI and investigators from the camp told me that he did not think I had committed any crime and that I am not guilty, but that he wanted me to be a witness against others. He said that if I was willing to be a witness, I could leave Guantanamo Bay and become an American citizen. He let me call my wife again to discuss it. The FBI agent had a written agreement he wanted me to sign. I decided not to because I did not have a lawyer to guarantee that the agreement would be honored. After that I was questioned many times by the FBI and other people.

In December 2003, I was moved from Camp Delta, and put in a new cell, this cell was enclosed in a house, and from that time I have not been permitted to see the sun or hear other people outside the house or talk with other people. I am alone except for the guard in the house. They allow me to exercise three times per week but only at night and not in the day. They gave me the Quran only but not other books. When I asked why I had been moved to this place no one told me anything until I asked for a translator because I do not speak English and the guard does not speak Arabic. The translator is supposed to come twice a week but the translator did not come except when I demanded urgently. He told me that I will have a military trial and will be given a lawyer and I complained that I have medical problems and I asked for a doctor to come check me but he did not come. I have pains in my back and leg and I itch from lack of sunshine. The soldier told me to inform my lawyer when he comes that you asked for a doctor and he did not come. I asked for books from the

library, but was told it was closed. I am alone and I do not talk with anyone in my cell because there is no one else to talk to.

On January 30th, I met LCDR Charles Swift, who told me that he had been assigned to defend me before a military commission. I asked my lawyer what the charges against me were. LCDR Swift told me that no charges against me, but the government sent him a letter that the charges contemplated were conspiracy to commit terrorism. I asked my lawyer why the government had not prepared the charges and when my trial would be.

LCDR Swift told me that the government letter demanded to know whether I would plead guilty to unspecified charges in exchange for a guaranteed sentence. LCDR Swift also told me that in addition to pleading guilty, that I would have to be a witness for the United States as part of the agreement. I do not believe I should plea guilty, because I do not believe I have committed any crime.

Being held in the cell where I am now is very hard, much harder than Camp Delta. One month is like a year here, and I have considered pleading guilty in order to get out of here. I believe that I am a civilian, I have never been a member of Al-Qaeda and I am not a terrorist and I believe I should have a civilian trial, but any trial is better than what I have now. I have asked LCDR Swift to seek a trial as fast as possible and authorized him to act as my next friend in the civilian court, because I have no relatives in the United States. I understand that Professor Neal Kaytal will also represent me. My translator, Mr. Charles Schmitz, prepared this statement in Arabic, which I have read and understand to be the truth. My translator, Mr. Schmitz has prepared an English version of my Arabic hand-written statement and based on his review, I have signed and swear to its authenticity.

Further your affiant sayeth not.

_____

Salim Ahmed Salim Hamdan

Subscribed and sworn before
Me this 9th day of February 2004

JASON E. KREINHOP
Legalman First Class, United States Navy
Notary Public and counsel for the United States
10 U.S.C. 1044a