Judge Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Lieutenant Commander CHARLES SWIFT, as next friend for SALIM AHMED HAMDAN, Military Commission Detainee, Camp Echo, Guantanamo Bay Naval Base, Guantanamo, Cuba,

Petitioner,

v.

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,

Respondents.

NO. C04-0777RSL

NOTICE OF MOTION AND RESPONDENTS' CROSS-MOTION TO DISMISS; CONSOLIDATED RETURN TO PETITION AND MEMORANDUM OF LAW IN SUPPORT OF CROSS-MOTION TO DISMISS

(Note on Motion Calendar for: September 3, 2004)

Respondents respectfully request, pursuant to Rule 12(b)(1) and (b)(6), of the Federal Rules of Civil Procedure, that this Court deny the petition for writ of mandamus or, in the alternative, writ of habeas corpus ("petition"), grant respondents' cross-motion to dismiss, and enter a judgment of dismissal in favor of respondents This cross-motion is made and based on the accompanying memorandum, the pleadings and papers filed herein, and such oral

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argument as the Court may entertain.

DATED this 6th day of August, 2004.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Respondents, through undersigned counsel, oppose and hereby move to dismiss the petition for writ of mandamus or habeas corpus ("petition") filed in this case.

The petition raises statutory, constitutional, and treaty-based challenges to the President's authority to subject Salim Ahmed Hamdan to trial by military commission and to confine him in connection with the commission proceedings. The petition also challenges the President's authority to detain Hamdan as an enemy combatant and seeks Hamdan's release.

As explained in our Motion to Dismiss or Transfer dated July 16, 2004, this Court lacks jurisdiction over the petition for two separate reasons. First, the petitioner, Charles Swift, does not have standing to bring this action as a next friend to Hamdan, because Swift has failed to show that Hamdan was unable to bring the action in his own name. Second, this Court lacks jurisdiction under the habeas statute, because none of the respondents resides in this District. Although petitioner has styled his petition as a request for a writ of mandamus or, in the alternative, habeas corpus, his petition – which challenges the legality of his custody pursuant to the military commission proceedings and the legality of his detention as an enemy combatant – is the exclusive province of habeas corpus. Even if mandamus were an appropriate vehicle in these circumstances, this Court would remain an improper forum, because neither Hamdan, the real party in interest, nor Swift, the nominal party, resides in this District.

In the event this Court declines to dismiss the petition for lack of jurisdiction or to transfer the case to the District of Columbia, the Court should not consider the petition at this time, because the military commission proceedings against Hamdan are ongoing. Indeed, both the government and Hamdan have proposed that the trial begin in December. The law is clear that the federal courts will not intercede in military process, but rather, will wait until such process is complete before considering challenges to the jurisdiction of the Military Commission.

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Petitioner's claims lack merit in any event. Military commissions have a long historical pedigree, and the Supreme Court has repeatedly approved their use for wartime trials of enemy combatants such as Hamdan. See Ex parte Quirin, 317 U.S. 1 (1942); Yamashita v. Styer, 327 U.S. 1 (1946). Petitioner's claims – regardless of how they are styled[1] – must therefore be dismissed.

STATEMENT OF FACTS

1. On September 11, 2001, the United States endured a foreign enemy attack more savage, deadly, and destructive than any sustained by the Nation on any one day in its history. That morning, agents of the al Qaida terrorist network hijacked four commercial airliners loaded with passengers and jet fuel and flew the planes as missiles towards targets in the Nation's financial center and its seat of government. Two of the planes struck the World Trade Center office towers in New York City just as the business day began, and a third hit the headquarters of the Department of Defense at the Pentagon. The fourth was brought down in Pennsylvania by its passengers before it could reach its target, presumed to be the United States Capitol or the White House. The September 11 attacks killed approximately 3,000 persons, exceeding the loss of life inflicted at Pearl Harbor. The attacks also caused injury to thousands more persons, destroyed hundreds of millions of dollars in property, and exacted a heavy toll on the Nation's infrastructure and economy.

The President, acting as Commander in Chief, took immediate action to defend the country and prevent additional attacks. Congress swiftly enacted its support of the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on

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[1] "Mandamus relief is only available to compel an officer of the United States to perform a duty if (1) the plaintiff's claim is clear and certain; (2) the duty of the officer is ministerial and so plainly prescribed as to be free from doubt * * * ; and (3) no other adequate remedy is available." Fallini v. Hodel, 783 F.2d 1343, 1345 (9th Cir. 1986)." As we demonstrate below, none of petitioner's legal claims has any merit, so respondents have no duty to release Hamdan from custody pursuant to the military commission proceedings or from his confinement as an enemy combatant. Hamdan likewise is not entitled to a writ of habeas corpus, because he is not in custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3).

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September 11, 2001." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF). Congress emphasized that the forces responsible for the September 11 attacks "continue to pose an unusual and extraordinary threat to the national security," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Ibid.

The President ordered the armed forces of the United States to Afghanistan to subdue the al Qaida terrorist network and the Taliban regime that supported it. In the course of those ongoing operations, United States and coalition forces have removed the Taliban from power, have eliminated the "primary source of support to the terrorists who viciously attacked our Nation on September 11, 2001," and have "seriously degraded" al Qaida's training capabilities. Office of the White House Press Secretary, Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Sept. 19, 2003) (< www.whitehouse.gov/news/releases/2003/09/20030919-1.html>). Al Qaida and the Taliban nonetheless remain a significant threat to United States and coalition forces. Moreover, Usama bin Laden has continued his call to al Qaida and its supporters to maintain their war against the United States, and the United States and other nations have been subject to attacks throughout the world. See, e.g., Tape urges Muslim fight against U.S. (Feb. 2, 2003) (< www.cnn.com/2003/ ALLPOLITICS/02/11/powell.binladen/index.html>). See also Qaeda Tapes Taunt U.S., France (Feb. 24, 2004) (< www.cbsnews.com/stories/2004/01/04/terror/main591217.shtml).

2. In the context of both the removal of the Taliban from power and in the broader efforts to dismantle the al Qaida terrorist network and its supporters, the United States, consistent with the Nation's settled historical practice in times of war, has seized and detained numerous persons fighting for and associated with the enemy during the course of the ongoing military campaign. Individuals taken into U.S. control in connection with the ongoing hostilities undergo a multi-step screening process to determine if their detention is necessary. Only a small fraction of those captured in connection with the current conflict and subjected to

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the screening process have been designated for detention at Guantanamo. Upon their arrival at Guantanamo, detainees are subject to an additional assessment by military commanders regarding the need for their detention. The military is currently detaining approximately 600 aliens at Guantanamo.

3. Equally consistent with historical practice, the President has ordered the establishment of military commissions to try a subset of those detainees for violations of the laws of war and other applicable laws. In doing so, the President expressly relied on "the authority vested in me * * * as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the [AUMF] and sections 821[2] and 836[3] of title 10, United States Code." Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001) (hereinafter "Military Order").

The President made several findings that undergird the Military Order. He found, inter alia, that "[i]nternational terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens

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[2] That section provides:

Art. 21. Jurisdiction of courts-martial not exclusive

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

[3] That section provides, in relevant part:

Art. 36. President may prescribe rules

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

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

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and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces," §1(a); that such terrorists "possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government," § 1(c); that, in order "to protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to" the Military Order to "be detained, and, when tried, * * * be tried for violations of the laws of war and other applicable laws by military tribunals," § 1(e); and that "[g]iven the danger to the safety of the United States and the nature of international terrorism * * * it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts," § 1(f).

The Military Order applies to "any individual who is not a United States citizen with respect to whom" the President makes two determinations "in writing": first, that there is "reason to believe that such individual" "(i) is or was a member of the organization known as al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harbored one or more individuals described in" either of the other two categories; and second, "it is in the interest of the United States that such individual be subject to this order." Military Order § 2(a). The Order further provides that any individual subject to the order "shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death." Id. § 4(a).

The Order authorizes the Secretary of Defense to issue orders and regulations

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

The Secretary of Defense, acting pursuant to the Military Order, established the Appointing Authority for Military Commissions.[4] See Department of Defense Directive No. 5105.70, Feb. 10, 2004. The Appointing Authority has many responsibilities, including to appoint military commissions to try individuals subject to the Military Order; designate a judge advocate of any United States Armed Force to serve as a Presiding Officer over each military commission; approve and refer charges against such individuals; approve plea agreements; decide interlocutory questions certified by the Presiding Officer; ensure military commission proceedings are open to the maximum extent practicable; and order that investigative or other resources be made available to Defense Counsel and the Accused to the extent necessary for a full and fair trial. Id. § 4.

The military commissions that the Appointing Authority establishes have jurisdiction over individuals subject to the Military Order who are "alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority." Military Commission Order No. 1, 32 C.F.R. § 9.3(a) (2003). That charge must allege "violations of the laws of war" or "other offenses triable by military commission." Id. § 9.3(b). An individual so charged (the "Accused") is assigned defense counsel (one or more military officers who are judge advocates of any United States armed force) to conduct his defense

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

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before the Commission. Id. § 9.4(c)(2). The Accused may choose to replace the detailed defense counsel with another military officer who is a judge advocate, provided that such officer is available. Id. § 9.4(c)(2)(iii)(A). The Accused may also retain a civilian attorney of choice at no expense to the United States government, ibid., provided that such attorney meets certain criteria, id. § 9.4(c)(2)(iii)(B).

Under the procedures the Secretary established for the commissions, the Accused must, inter alia, (1) receive a copy of the charges in English and, if appropriate, in another language that the Accused understands, "sufficiently in advance of trial to prepare a defense"; (2) be presumed innocent until proven guilty; and (3) be found not guilty unless the offense is proved beyond a reasonable doubt. Id. §§ 9.5(a), (b),(c). The prosecution must provide the defense "with access to evidence [it] intends to introduce at trial" and to "evidence known to the prosecution that tends to exculpate the Accused." Id. § 9.5(e). The Accused is permitted but not required to testify at trial, and the Commission may not draw an adverse inference from a decision not to testify. Id. § 9.5(f). The Accused also "may obtain witnesses and documents for [his] defense, to the extent necessary and reasonably available as determined by the Presiding Officer," id. § 9.5(h), and may present evidence at trial and cross-examine prosecution witnesses, id. § 9.5(i). In addition, once a Commission's finding on a charge becomes final, "the Accused shall not again by tried" for that charge. Id. § 9.5(p).

The Secretary of Defense has directed the commissions to provide for a "full and fair trial"; to "[p]roceed impartially and expeditiously"; and to "[h]old open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer[.]" Id. §§ 9.6(b)(1),(2),(3). Proceedings may be closed in order to (1) protect classified information; (2) prevent unauthorized disclosure of protected information; (3) protect the physical safety of participants, including witnesses; and (4) protect intelligence and law enforcement sources and methods. Id. § 9.6(b)(3). In no circumstance, however, may the detailed defense counsel be excluded from a proceeding, ibid., and in no circumstance may the Commission admit into evidence information not presented to detailed defense counsel, id. § 9.6(d)(5)(ii)(C).

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Once a trial is completed (including sentencing in the event of a guilty verdict), the Presiding Officer must "transmit the authenticated record of trial to the Appointing Authority," id. at § 9.6(h)(1), which "shall promptly perform an administrative review of the record of trial," id. § 9.6(h)(3). If the Appointing Authority determines that the commission proceedings are "administratively complete," the Appointing Authority must transmit the record of trial to the Review Panel, which consists of three military officers,[5] at least one of whom has experience as a judge. Id. 9.6(h)(4). The Review Panel must return the case to the Appointing Authority for further proceedings when a majority of that panel "has formed a definite and firm conviction that a material error of law occurred." Military Commission Instruction No. 9, § 4(C)(1)(a). On the other hand, if a majority of the panel finds no such error, it must forward the case to the Secretary with a written opinion recommending that (1) each finding of guilt "be approved, disapproved, or changed to a finding of Guilty to a lesser-included offense" and (2) the sentence imposed "be approved, mitigated, commuted, deferred, or suspended." Id. § 4(C)(1)(b). "An authenticated finding of Not Guilty," however, "shall not be changed to a finding of Guilty." 32 C.F.R. § 9.6(h)(2).

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

4. Pursuant to the Military Order, on July 3, 2003, the President designated Salim Ahmed Hamdan, a Guantanamo detainee on whose behalf this petition has been filed, for trial by military commission, upon determining that there is reason to believe that Hamdan was a member of al Qaida or otherwise involved in terrorism against the United States. July

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

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3, 2003 Background Briefing on Military Commissions (Ex. A to 4/5/04 Swift Decl.), at 1. As a result of this designation, on December 18, 2003, the Department of Defense (DOD) assigned Lieutenant Commander Charles Swift, the named petitioner, to meet with and defend Hamdan before a military commission. Dec. 18, 2003 Memorandum Detailing Defense Counsel (Ex. H to 4/5/04 Swift Decl.). That same month, Hamdan, who had been housed with other enemy combatants at Guantanamo, was moved to a different facility at Guantanamo, Camp Echo, where he has his own cell in which he may have private discussions with his lawyers. Feb. 13, 2004 Briefing on Detainee Operations at Guantanamo Bay (Ex. C to 4/5/04 Swift Decl.), at 10.

5. On April 6, 2004, Swift filed this petition as an alleged next-friend of Hamdan challenging Hamdan's pre-trial confinement, prospective trial, and continued detention on multiple statutory, constitutional, and treaty-based grounds. Pet. 15-23 (Claims For Relief). The petition requests, among other things, an order mandating Hamdan's release from confinement in Camp Echo, enjoining respondents from enforcing the Military Order of November 13, 2001, compelling respondents to justify Hamdan's continued detention as an enemy combatant, and mandating Hamdan's release from U.S. custody in the absence of adequate justification. Pet. 24-25 (Prayer For Relief).

6. On July 9, 2004, the prosecutor charged Hamdan with conspiring with Usama Bin Laden, Dr. Ayman al Zawahari (a/k/a "the Doctor"), and others members and associates of al Qaida from on or about February 1996 to on or about November 24, 2001, to commit offenses triable by military commission – namely, attacking civilians, attacking civilian objects, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent, and terrorism. Charge ¶ 12 (attached as Exhibit A); see 32 C.F.R. §§ 11.6(a)(2), (a)(3), (b)(2), (b)(3), (b)(4). The charge alleges that "[b]etween 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." Id. ¶ 7. It also alleges

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that "[i]n February of 1998, Usama Bin Laden, Ayman al Zawahiri and others under the banner of the '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 they can be found and to 'plunder their money.'" Id. ¶ 9. It further alleges that "[s]ince 1989, members and associates of al Qaida * * * have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001." Id. ¶ 11.

As for Hamdan's role in the conspiracy, the charge asserts that "[i]n 1996, Hamdan met with Usama bin Laden in Qandahar, Afghanistan, and ultimately became a bodyguard and personal driver for Usama bin Laden," serving in that capacity "until his capture in November of 2001." Id. ¶ 13(a). The charge further alleges that, in furtherance of al Qaida's objectives, Hamdan from 1996 through 2001 "delivered weapons, ammunition or other supplies to al Qaida members and associates," id. ¶ 13(a); "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," id. ¶ 13(b)(1); "purchased or ensured that Toyota Hi Lux trucks were available for use by the Usama bin Laden bodyguard unit tasked with protecting and providing physical security" for bin Laden, id. ¶ 13(b)(2); "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" at the time of the 1998 embassy attacks and the September 11 attacks, id. ¶ 13(b)(4); "drove or accompanied Usama bin Laden to various al Qaida-sponsored training camps, press conferences, or lectures," id. ¶ 13(c); and "received training on rifles, handguns and machine guns at the al Qaida-sponsored al Farouq camp in Afghanistan," id. ¶ 13(d).

The Appointing Authority approved and referred the charge to a Military Commission on July 13, 2004. See Exhibit B. The charge is noncapital, so Hamdan faces a maximum sentence of life imprisonment. Both the government and Hamdan have proposed that his

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Commission trial begin in December. Hamdan is scheduled to appear before the Commission on August 23, 2004, for preliminary matters.[6]

ARGUMENT

Since the founding of this nation, the military has used military commissions during wartime to try violations against the laws of war. Nearly ninety years ago, Congress recognized this historic practice and approved its continuing use. And nearly sixty years ago, the Supreme Court upheld the use of military commissions during World War II against a series of challenges, including cases involving a presumed American citizen, captured in the United States, Ex parte Quirin, 317 U.S. 1 (1942); the Japanese military governor of the Phillippines, Yamashita v. Styer, 327 U.S. 1 (1946); German nationals who alleged that they worked for civilian agencies of the German government in China, Johnson v. Eisentrager, 339 U.S. 763 (1950); and the spouse of a serviceman posted in occupied Germany, Madsen v. Kinsella, 343 U.S. 341 (1952). Despite the fact that both Congress and the Judiciary have blessed the Executive's use of military commissions during wartime, despite the fact that the statutory framework today is identical in all material respects to that which existed during the prior legal challenges, and despite the fact that the President has inherent power as Commander in Chief to establish military commissions in the war against al Qaida and the Taliban, petitioner contends that Hamdan's detention pursuant to the Military Order violates federal statutes, the Constitution, and the Geneva Conventions. As discussed in more detail below, these claims cannot be heard at this time and lack merit in any event.[7]

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[6] Before his trial, Hamdan will have the opportunity to challenge his status as an enemy combatant before a Combatant Status Review Tribunal. See July 7, 2004 Order Establishing Combatant Status Review Tribunal, available at www.defenselink.mil/news/Jul/2004/d20040707review.pdf. That Tribunal will only confirm whether Hamdan is properly classified as an enemy combatant, not whether he committed the offense approved and referred for trial by the Military Commission.

[7] These claims cannot be heard for the additional reasons that petitioner lacks standing to serve as Hamdan's next-friend or as a third party, this Court lacks habeas jurisdiction, a mandamus petition is not appropriate given the nature of petitioner's claims, and this Court is not a proper venue even if mandamus were a proper vehicle. See Respondents' Motion to Dismiss or Transfer dated July 16, 2004.

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I. THIS COURT SHOULD ABSTAIN UNTIL THE MILITARY PROCEEDINGS ARE COMPLETED AND HAMDAN HAS EXHAUSTED HIS MILITARY REMEDIES

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

The leading case governing the role of the federal courts in addressing challenges to military process is Schlesinger v. Councilman, 420 U.S. 738 (1975). There, the Supreme Court rejected an Army captain's attempt to enjoin his impending court-martial on charges that he wrongfully possessed, transferred, and sold marijuana. Councilman contended that the military court lacked jurisdiction because the charges were not "service connected," but the Court held that such a contention did not constitute a sufficient basis to intervene in the military proceedings.

At the outset, the Court recognized that "'military law * * * is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.'" Id. at 746 (quoting Burns v. Wilson, 346 U.S. 137, 140 (1953)). In determining the proper role for federal courts presented with challenges to military proceedings, the Court found instructive the federal approach to ongoing state court proceedings. The Court observed that "considerations of comity [and] the necessity of respect for coordinate judicial systems have led this Court to preclude equitable intervention in pending state criminal proceedings unless the harm sought to be averted is both great and immediate, of a kind that cannot be eliminated by * * * defense against a single criminal prosecution." Id. at 756 (internal quotation marks omitted). The Court further observed that this abstention doctrine is "similar" to "the

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requirement of the exhaustion of administrative remedies," which is predicated on "the special competence of agencies * * * to develop the facts, to apply the law in which they are peculiarly expert, and to correct their own errors." Ibid. "These considerations[,]" the Court concluded, "apply in equal measure to the balance governing the propriety of equitable intervention in pending court-martial proceedings." Id. at 757.

The Court further explained that principles of abstention and exhaustion have special salience in the military context: As the Court observed, "there is here something more that, in our view, counsels strongly against the exercise of equity power even where, under the administrative exhaustion rule, intervention might be appropriate." Ibid (emphasis added). The Court identified that "something" as "the unique military exigencies" that set the military apart from civilian society and that relate to its "primary business * * * to fight or be ready to fight wars should the occasion arise." Ibid. Based on these "strong considerations," id. at 761, the Court held that "when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise." Id. at 758.

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

The principles that led the Councilman Court to reject federal court intervention in ongoing military proceedings apply with even greater force here, where the President in his

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capacity as Commander in Chief, and with the approval of Congress,[8] established the military commissions challenged herein upon finding that they are "necessary" for "the effective conduct of military operations and prevention of terrorist attacks." Military Order § 1(e). Given that the Military Order applies to enemy combatants who are captured during the ongoing war with al Qaida and its supporters, the traditional deference courts pay the military justice system is at the pinnacle. The Executive Branch, not this court, bears the responsibility for protecting the nation from foreign attack and is in the best position to determine appropriate procedures for trying enemy combatants charged with violations of the laws of war consistent with national security and the need to provide a full and fair trial. See id. §§ 1(f); 4(c)(2). The Executive Branch has exercised that authority in this war by establishing military commissions and an elaborate set of procedures governing their use, including multiple levels of review. See Statement of Facts Part 3, supra. In these circumstances, this Court should await the outcome of Hamdan's military prosecution before considering his legal challenges.[9]

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[8] As discussed in greater detail below, the Supreme Court has repeatedly held that one of the provisions that President Bush expressly invoked in establishing the military commissions, 10 U.S.C. § 821, constitutes congressional authorization for the President to convene military commissions during wartime to try violations of the laws of war. And the Supreme Court recently made clear in Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) (plurality opinion); id. at 2679 (Thomas, J., dissenting), that the AUMF triggered the exercise of the President's traditional war powers, including, under 10 U.S.C. § 821, the power to convene military commissions.

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

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

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Petitioner claims (Mem. 18-19) that Hamdan has already exhausted his military remedies, at least with respect to his speedy trial claim under 10 U.S.C. § 810, because the Appointing Authority has rejected that claim.[10] That argument lacks merit. To begin with, the Appointing Authority is not the final decision-maker under the military commission regime established pursuant to the Military Order. Hamdan is free to raise the issue before his Military Commission and, even if the Military Commission were to consider itself bound by the Appointing Authority's prior determination, the claim would still be subject to consideration by the Review Panel, the Secretary of Defense, and the President. Hamdan therefore has not exhausted his speedy trial claim.

Moreover, even assuming that he had, the Councilman rule still calls for abstaining until the military process runs its course. 420 U.S. at 757. Indeed, federal courts have rejected the contention that alleged speedy trial violations cause irreparable harm that justifies pre-trial intervention by a reviewing court. In Carden v. Montana, 626 F.2d 82 (9th Cir. 1980), for example, the Ninth Circuit held that an alleged speedy trial violation in state court did not constitute "the type of 'special circumstances' which warrant federal intervention" on habeas. Id. at 84. The court noted that the Supreme Court has identified the limited circumstances in which departure from the abstention doctrine is appropriate, namely, "in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances were irreparable injury can be shown." Ibid. (quoting Perez v. Ledesma, 401 U.S. 82, 85 (1971)). The Ninth Circuit went on to rule that the petitioners had not shown irreparable injury, because their right to a speedy trial could be vindicated after the trial, via dismissal of the charges. Ibid.

The Supreme Court's holding in United States v. MacDonald, 435 U.S. 850 (1978),

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[10] Petitioner states (Mem. 19) that "many of the issues presented here have already been decided by the Appointing Authority," but the record shows that the only claim he has presented to the Appointing Authority is Count One of this petition (denial of speedy trial under 10 U.S.C. § 810).

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makes clear that a speedy trial claim does not generally afford a reviewing court a basis to take the extraordinary step of disrupting or precluding a trial. There, the Court ruled that a criminal defendant may not appeal before trial an order denying his motion to dismiss on speedy trial grounds. The Court explained that "the Speedy Trial Clause does not * * * encompass a 'right not to be tried" which must be upheld prior to trial if it is to be enjoyed at all[,]" id. at 861. Rather, "[i]t is the delay before trial, not the trial itself, that offends against the constitutional guarantee," and whether that delay prejudiced the defendant's ability to obtain a fair trial cannot generally be determined until "after the relevant facts have been developed at trial." Id. at 858.

It follows that the one claim for which Hamdan has sought initial review in the military system – a violation of his alleged right to a speedy trial under 10 U.S.C. § 810 – provides no basis for this Court to depart from the Councilman rule. Even assuming Section 810 applied to him, but see Part II(A), below, whatever right Hamdan would have under that provision could be fully vindicated under MacDonald through post-trial review of the impact on Hamdan's defense of the allegedly unlawful delay. Because Hamdan has shown "no harm other than that attendant to resolution of his case in the military court system," this Court "must refrain from intervention, by way of injunction or otherwise." Councilman, 420 U.S. at 758.

As for the remaining claims in the petition, Hamdan has raised none in the military system. He offers several reasons why this Court should create an exception to the Councilman abstention and exhaustion rule in this case, none of which has merit. First, Hamdan cites Reid v. Covert, 354 U.S. 1 (1957) (plurality opinion), and United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955), for the proposition that the Supreme Court has not always required exhaustion of military remedies before considering challenges to the jurisdiction of military courts to proceed against particular persons. Hamdan's reliance on these cases, however, is misplaced because those cases involved challenges by U.S.-citizens who were undisputedly civilians and were charged with offenses unrelated to warfare. See

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United States v. Verdugo-Urquidez, 494 U.S. 259, 270 (1990) ("Since respondent is not a United States citizen, he can derive no comfort from the Reid holding."). The Court was concerned in those cases about "the disruption caused to petitioners' civilian lives" by the "deprivation of liberty." Councilman, 420 U.S. at 759.

Here, by contrast, the President has determined that there is reason to believe Hamdan is a member of al Qaida or was otherwise involved in terrorism against the United States. Following that determination, Hamdan was charged with conspiring with Usama bin Laden and other top leaders of al Qaida to commit offenses triable by military commission, namely, attacking civilians, attacking civilian objects, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent, and terrorism. See Charge (Exhibit A). Hamdan's military prosecution thus presents military exigencies related to the conduct of war and the national security of the United States that were simply non-existent in Reid and Toth.

Petitioner cannot point to any authority for the proposition that the federal courts must determine the correctness of the military's determination that captured individuals are enemy fighters before the military courts can exercise jurisdiction over those persons. In fact, in Eisentrager, the Court observed that "the 'power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others charged with violating the laws of war,'" is "'well-established.'" 339 U.S. at 786 (quoting Duncan v. Kahanamoku, 327 U.S. 304, 312-314 (1946) (emphasis added)); ibid. ("[T]he Military Commission is a lawful tribunal to adjudge enemy offenses against the laws of war."). And on the related question regarding the exercise of jurisdiction over a detained enemy combatant for the duration of the armed conflict, five members of the Supreme Court recently indicated that the military can make that jurisdictional

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determination, even when that detainee is a United States citizen.[11] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2648 (2004) (plurality opinion) ("[A] citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.") (emphasis added); id. at 2651 (standards "could be met by an appropriately authorized and properly constituted military tribunal"); id. at 2674 (Thomas, J., dissenting) (courts cannot second-guess President's decision to detain enemy combatant). It follows that Hamdan – an alien with no ties to the United States who will have a full and fair opportunity to press his defenses before the Military Commission – has no right to obtain a pre-trial ruling from this Court on the propriety of the commission's exercise of jurisdiction.[12]

In any event, there is no doubt that the Military Commission has jurisdiction over Hamdan's person. Military Commission Order No. 1 provides that the military commissions "shall have jurisdiction over only an individual * * * (1) subject to the President's Military Order and (2) alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority. 32 C.F.R. § 9.3(a). Because the President has determined that Hamdan is subject to the Order, and because Hamdan is alleged to have committed an offense in a charge that has been referred to (and approved by) the Appointing Authority, petitioner's claim (Mem. 69-71) that the Military Commission lacks jurisdiction

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[11] Hamdi makes clear that petitioner's analogy (Pet.'s Mem. 70) to the alien enemy doctrine is inapt. Regardless of the respective competence of the courts and the military in determining whether an individual is a citizen, the question whether an individual captured during wartime is an enemy combatant is a quintessentially military judgment. Indeed, while courts have reviewed the "jurisdictional fact" of whether the petitioner is in fact the citizen of a hostile power and therefore subject to the President's authority under the Alien Enemy Act, see, e.g., United States ex rel. Schwarzkopf v. Uhl, 137 F.2d 898, 900 (2d Cir. 1943), they will not review the President's determination that the alien is dangerous and should be removed. See Ludecke v. Watkins, 335 U.S. 160, 164, 170 (1948). The determination whether an individual is an enemy combatant is much more akin to the latter determination than the former.

[12] As mentioned in note 6, above, Hamdan will have an additional opportunity before the Combatant Status Review Tribunal – under procedures equivalent to what the Hamdi plurality suggested would be sufficient for citizens – to show that he is not an enemy combatant.

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over Hamdan is meritless.

Petitioner argues nevertheless (Mem. 21 n.5) that there is an even greater justification for federal court intervention here than in Reid and Toth, because the military courts there "had jurisdiction pursuant to acts of Congress," whereas the military commissions here were "established by a brief Executive Order." This argument lacks merit because its premise – that Congress has not authorized the Military Commission to which Hamdan is subject – has been rejected by the Supreme Court numerous times. See Ex parte Quirin, 317 U.S. 1 (1942); Yamashita v. Styer, 327 U.S. 1 (1946) (discussed in Part V, infra).

Councilman's abstention and exhaustion rule applies with particular force to challenges such as this one to a wartime prosecution before a military commission, where separation-of-powers principles call for special restraint on the part of the judiciary.[13] While petitioner claims that federal courts have more expertise when it comes to resolving the claims he has raised, the Supreme Court has never held that the expertise of the federal courts is a sufficient reason standing alone to justify departure from the abstention and exhaustion rule. Indeed, the Councilman Court specifically distinguished Reid and Toth on the basis of the petitioners' undisputed status as civilians who raised "substantial arguments" regarding "the right of the military to try them at all." Because Hamdan is an alien captured during an ongoing armed conflict and determined by the military to be an enemy combatant, he, unlike the U.S. citizen-spouses of servicemen in Reid and the ex-serviceman in Toth, does not have a "substantial argument" that the military lacks jurisdiction over him. Indeed, the Hamdi Court rejected any notion that the President is disabled from exercising Commander-in-Chief authority over a person detained as an enemy combatant merely because the detainee disputes his status as

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[13] Petitioner contends that military commissions are less entitled than courts-martial to the assumption that they will "'vindicate' defendants' 'constitutional rights." Pet.'s Mem. 21 n.5 (quoting Councilman, 420 U.S. at 758). As a nonresident alien with no voluntary contacts with the United States, however, Hamdan does not have any constitutional rights. See Part IV(A), infra. Second, whatever role the federal courts are to play in reviewing petitioner's legal claims, they will be in a much better position to consider the argument that the military commission's procedures deprived Hamdan of any constitutional or statutory rights he may have after the trial has taken place. See MacDonald, supra.

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such. 124 S. Ct. at 2642-2643 (plurality opinion); id. at 2674 (Thomas, J. dissenting). The Court ruled that the President has the power to detain an enemy combatant when "it is sufficiently clear that the individual is, in fact, an enemy combatant; whether that is established by concession or by some other process that verifies this fact with sufficient certainty seems beside the point." Id. at 2643.

Finally, petitioner contends (Mem. 22) that this Court should intervene because the Military Commission and the Appointing Authority are "highly unlikely" to find that Hamdan's claims have merit. Petitioner relies on Parisi v. Davidson, 405 U.S. 34 (1972), where the Court permitted a habeas claim to proceed while court martial proceedings were pending. That case, however, did "not concern a federal district court's direct intervention in a case arising in the military court system." Id. at 41. Instead, "[t]he petitioner's application for an administrative discharge – upon which the habeas corpus petition was based – antedated and was independent of the military criminal proceedings." Ibid. Moreover, "[t]he procedures and corrective opportunities of the military administrative apparatus had * * * been wholly utilized at the time" of the habeas proceedings, id. at 38-39, and the administrative discharge the petitioner sought was not available as a remedy in the pending court-martial, id. at 43. Here, by contrast, petitioner's claims arise out of Hamdan's designation for trial before the Military Commission and are a direct attack on the authority of that Military Commission to proceed against him; as such they are not independent of the military proceedings, and the military authorities do have the power to order the relief petitioner seeks. Furthermore, petitioner has not exhausted his remedies, and he points to no authority permitting relief from the exhaustion requirement solely based on a litigant's prediction that the forum in which his claims must initially be brought will conclude that they lack merit.

In sum, because military proceedings against Hamdan are ongoing, it would be improper for this Court to take up his claims now. If this Court nevertheless chooses to do so, it should still dismiss the petition, because each and every claim petitioner advances lacks merit.

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

Petitioner argues (Pet.'s Mem. 31-33) that Hamdan's present confinement at Camp Echo violates his alleged right to a speedy trial under Article 10 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 810. Petitioner's claim lacks merit for at least three reasons. First, the President has designated Hamdan for trial by a military commission for violation of the laws of war, so provisions of the UCMJ governing courts-martial do not apply to him. See Ex. E to 4/5/04 Swift Decl (2/23/04 Memorandum from the Appointing Authority Legal Advisor to Charles Swift re: Application of Article 10, UCMJ). Second, as an enemy combatant who is subject to detention for the duration of the ongoing armed conflict, see Hamdi, 124 S. Ct. at 2641-2642 (plurality opinion); id. at 2681-2682 (Thomas, J., dissenting), Hamdan has no legal basis on which to raise a speedy trial claim related to the nature or length of his detention. That is because he has no legal entitlement to a particular form of detention (e.g., to stay at Camp Delta) even assuming he were not subject to trial. Third, even if Article 10 were applicable to him, Hamdan would not be entitled to any relief, because he has failed to show that the military did not act with "reasonable diligence" in bringing and approving charges against him, much less that he has been prejudiced by the alleged delay.

A. The Provisions Of The UCMJ Applicable To Courts-Martial Do Not Apply To Hamdan, Whom The President Has Designated For Trial Before A Military Commission.

Petitioner argues (Mem. 29-31) that because the UCMJ extends courts-martial jurisdiction over "persons within an area leased by * * * the United States," 10 U.S.C. § 802(a)(12), it follows that all of the substantive and procedural rules set out in the UCMJ, including Article 10, are automatically applicable to him. There is a crucial flaw in his logic. The rules set out in the UCMJ apply to courts-martial, not commissions. Pursuant to the Military Order, the President designated Hamdan as eligible for trial before a military commission. See Order § 2(b). While the UCMJ recognizes the jurisdiction of military commissions to try violations of the laws of war, see Article 21 ("The provisions of this

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chapter conferring jurisdiction upon courts-martial do not deprive military commissions * * * of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions"), it does not purport to subject such commissions to its comprehensive set of rules governing courts-martial. Indeed, the Supreme Court has repeatedly recognized that while Congress has prescribed in detailed fashion the jurisdiction and procedures governing courts-martial, it has taken a hands-off approach with respect to wartime military commissions, by recognizing and approving their use but not regulating their procedures.

In Yamashita v. Styer, 327 U.S. 1 (1946), the Supreme Court expressly rejected the contention that a military commission convened to try General Yamashita, an enemy combatant, was subject to the procedures in the Articles of War (the precursor to the UCMJ) governing courts-martial. The Court explained that, by Article 15 of the Articles of War (now Article 21 of the UCMJ), Congress "recogniz[ed] military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles," and "gave sanction * * * to any use of the military commission contemplated by the common law of war." Id. at 19. Although the Court relied in part on the fact that General Yamashita did not fall within the categories of persons made subject to the jurisdiction of courts-martial by the Articles of War, the Court also based its holding on the fact that "the military commission before which he was tried, though sanctioned, and its jurisdiction saved, by Article 15, was not convened by virtue of the Articles of War, but pursuant to the common law of war," Ibid. (emphasis added). Moreover, the Court in Madsen v. Kinsella, 343 U.S. 341 (1952), subsequently rejected any suggestion that the Articles of War would apply to the trial by commission of a person subject to court-martial, upholding the trial by military commission of a U.S. citizen subject to the jurisdiction of courts-martial, notwithstanding that the commission trial was not conducted in strict accordance with the specific Articles of War governing

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courts-martial.[14]

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

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

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

When the President established military commissions to try unlawful combatants in the ongoing armed conflict with al Qaida and the Taliban and set out the procedures that will govern them, he exercised the very discretion that the Madsen Court held was implicit in his powers as Commander in Chief and was left unrestricted by Congress. See 32 C.F.R. Parts 9-17 (2004). Because, as Madsen explained, Congress did not purport to apply the numerous

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

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UCMJ provisions regulating courts-martial to the common law military commissions, Article 10 of the UCMJ, which sets out a speedy trial standard for courts-martial, is inapplicable to Hamdan.

Petitioner contends nevertheless (Mem. 31) that because the President expressly invoked the UCMJ in establishing the military commissions, he must afford Hamdan all of the procedural protections set forth in the UCMJ. The latter proposition does not follow from the former. The President invoked the provisions of the UCMJ that recognize his authority to use military commissions to try violations of the laws of war, Article 21, and to create a set of procedures to govern them, Article 36. Reliance on that authority, which the Supreme Court has construed to set military commissions apart from courts-martial and the UCMJ rules that govern them, could not logically trigger application of the entire UCMJ. Indeed, that is essentially the argument the Court rejected in Yamashita and Madsen. In any event, that enemy combatants facing military commissions do not receive the protection of Article 10 is not "contrary to or inconsistent with" the UCMJ, 10 U.S.C. § 836(a), because, as Congress recognized in taking a hands-off approach, military commissions convened during wartime to try violations of the laws of war must deal with military exigencies in administering justice. Because of the unique context in which the commissions operate, and the need for flexibility that context presents, it is not "contrary to or inconsistent with" the UCMJ for the commissions to try enemy combatants for violations of the laws of war without adhering to the speedy trial rules that apply to courts-martial.[15]

[15] Even assuming that Article 10 does apply to the military commissions, Hamdan cannot claim its protection, at least insofar as he seeks release from his present confinement. That is because the military has determined that Hamdan is an enemy combatant. As such, he may be detained for the duration of hostilities. Hamdi, 124 S. Ct. at 2641 (plurality opinion); id. at 2679 (Thomas, J. dissenting) (suggesting enemy combatant can be detained past cessation of formal hostilities). In light of his combatant status, Hamdan has no legal right to seek release from a particular form of confinement based on the length of time he has been held without a trial, even assuming that the speedy trial standards applied and that the military was not complying with them.

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B. Even Assuming Hamdan Has Standing To Assert A Violation Of Article 10, His Claim Fails As A Matter Of Law.

Even assuming speedy trial concepts under Article 10 applied to Hamdan's confinement, petitioner has not established any violation. In order to prevail on an Article 10 claim, petitioner must establish that the government has failed to proceed against Hamdan with "reasonable diligence." United States v. Cooper, 58 M.J. 54, 58 (C.A.A.F. 2003). All that petitioner states on this score is that "the Government did not need over two years to gather evidence." Pet.'s Mem. 32. That conclusory statement is patently insufficient. To begin with, to the extent there is any relevant time period for an individual lawfully detained as an enemy combatant, the Article 10 clock would not begin to run until the detainee is "ordered into arrest or confinement" pursuant to a charge. 10 U.S.C. § 810; see Cooper, 58 M.J. at 58 (Article 10 triggered "when a servicemember is placed in pretrial confinement"). Thus, any speedy trial clock here would not have begun to run until December 2003, when Hamdan was placed in Camp Echo to facilitate his ability to meet with counsel in connection with the impending charges.

Moreover, the amount of time that has elapsed, standing alone, does not suggest, much less establish, the absence of reasonable diligence. As the military courts have made clear, "[t]here is no 'magic number' of days in pretrial confinement which would give rise to a presumption of an Article 10, UCMJ, speedy trial violation." United States v. Goode, 54 M.J. 836 (N-M Ct. Crim. App. 2001); United States v. Kossman, 38 M.J. 258 (C.M.A. 1993) ("Pointedly, however, the drafters of Article 10 made no provision as to hours or days in which a case must be prosecuted because there are perfectly reasonable exigencies that arise in individual cases which just do not fit under a set time limit.") (internal quotation marks omitted). In the Goode case, the court held that a defendant who spent 337 days in pretrial confinement failed to make out an Article 10 or constitutional speedy trial violation. Id. at 838-840. Here, the government has charged Hamdan with participating in a foreign-based, far-reaching conspiracy spanning five and a half years. See Charge ¶¶ 12-13 (Exhibit A). The

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breadth and complexity of the charge as well as the fact that it was brought during the ongoing war against al Qaida and its supporters refutes petitioner's unsupported assertion that the government is engaged in "foot dragging." Mem. 32. See Barker v. Wingo, 407 U.S. 514, 531 (1972) ("[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.").

Petitioner's claim also founders on his failure to show prejudice from the alleged delay. See Barker, 407 U.S. at 533-534 (identifying four factors relevant to constitutional speedy trial claim, including prejudice to the defendant, and holding that defendant was minimally prejudiced by delay of more than five years); MacDonald, 435 U.S. at 858 (constitutional speedy trial right protects against three types of injury, but "the most serious" is impairment of the defense caused by delay); Cooper, 58 M.J. at 61 (directing military courts to consider Barker factors in evaluating Article 10 claim). Petitioner's contention that his defense will be based on testimony "that grows more stale with each passing day" falls well short of the mark. Such "[g]eneralized assertions of the loss of memory, witnesses, or evidence are insufficient to establish actual prejudice." United States v. Manning, 56 F.3d 1188, 1194 (9th Cir. 1995). Likewise, petitioner's assertion (Pet.'s Mem. 33) that Hamdan's present confinement "creates a genuine risk of psychological injury," that could impair his ability to assist in his own defense is precisely the kind of speculative claim that cannot form the basis for a finding of prejudice.[16] See ibid. (rejecting prejudice claim that embraces "pure conjecture"). Petitioner's speedy trial claim must therefore be dismissed.

III. HAMDAN'S CONFINEMENT PRIOR TO TRIAL DOES NOT VIOLATE THE GENEVA CONVENTIONS

Petitioner contends (Mem. 33-41) that Hamdan's confinement in Camp Echo prior to his trial violates Article 103 of the Geneva Convention Relative to the Treatment of Prisoners

[16] The vague and generalized nature of petitioner's claims only serve to highlight the premature status of this proceeding. See Part I (Argument), supra. Because "resolution of a speedy trial claim necessitates a careful assessment of the particular facts of the case," the claim – if it can be considered in federal court at all – is "best considered only after the relevant facts have been developed at trial." MacDonald, 435 U.S. at 858.

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of War (GPW), 6 U.S.T. 3316 (1955),[17] and Common Article 3[18] of the same treaty. Because the Geneva Conventions (1) are not self-executing, (2) do not apply to this conflict, and (3) do not afford a basis for relief even if they were self-executing and applied to this conflict, petitioner's claim lacks merit.

A. The Geneva Conventions Are Not Self-Executing.

Petitioner's reliance on provisions of the 1949 Geneva Conventions fails at the outset, because, as the Conventions' text and legislative history conclusively show, and as a solid majority of courts have held, those Conventions are not self-executing. Indeed, the GPW contains many provisions that, when considered together, demonstrate that the contracting parties understood that violations of the treaty would be enforced through diplomatic means. As the Fourth Circuit recently explained:

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[17] That Article provides, in relevant part:

> Judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offense, or if it is essential to do so in the interests of national security. In no circumstances shall this confinement exceed three months.

GPW art. 103.

[18] That Article provides, in relevant part:

> 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:
>
> (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.

GPW art. 3.

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> [W]hat discussion there is [in the text of the GPW] of enforcement focuses entirely on the vindication by diplomatic means of treaty rights inhering in sovereign nations. If two warring parties disagree about what the Convention requires of them, Article 11 instructs them to arrange a "meeting of their representatives" with the aid of diplomats from other countries, "with a view to settling the disagreement." Geneva Convention, at art. 11. Similarly, Article 132 states that "any alleged violation of the Convention" is to be resolved by a joint transnational effort "in a manner to be decided between the interested Parties." Id. at art. 132; cf. id. at arts. 129-30 (instructing signatories to enact legislation providing for criminal sanction for "persons committing * * * grave breaches of the present Convention"). We therefore agree with other courts of appeals that the language in the Geneva Convention is not "self-executing" and does not "create private rights of action in the domestic courts of the signatory countries." Huynh Thi Anh v. Levi, 586 F.2d 625, 629 (6th Cir. 1978) (applying identical enforcement provisions from the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Feb. 2, 1956, 6 U.S.T. 3516); see also Holmes v. Laird, 459 F.2d 1211, 1222 (D.C. Cir. 1972) (noting that "corrective machinery specified in the treaty itself is nonjudicial").

Hamdi v. Rumsfeld, 316 F.3d 450, 468-469 (4th Cir. 2003), vacated on other grounds, 124 S. Ct. 2686 (2004); see also Al Odah v. United States, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J., concurring), overruled on other grounds, Rasul v. Bush, 124 S. Ct. 2686 (2004); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808-810 (D.C. Cir. 1984) (Bork, J., concurring); Handel v. Artukovic, 601 F. Supp. 1421, 1424-1426 (C.D. Cal. 1985).[19]

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[19] Article 11 provides in full:

> In cases where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.
>
> For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for prisoners of war, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval by the Parties to the conflict a person belonging to a neutral Power, or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting.

Article 132 provides in full:

> At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention. If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed. Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

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The Fourth Circuit alluded to the fact that there was one area in which the contracting parties sought to go beyond diplomacy to enforce violations of the treaty: "grave breaches," which the parties pledged to punish themselves by enacting domestic criminal legislation. See Article 129 (GPW) ("The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in [Article 130]."); Article 130 ("Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against person or property protected by the Convention: * * * wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.").[20] Congress responded by enacting the War Crimes Act of 1996, 18 U.S.C. § 2441. That Act provides a means for remedying grave breaches, but obviously does not create any privately enforceable rights. The Executive Branch, through its ability to bring prosecutions, remains responsible for ensuring adherence to the treaty. In light of this clear textual framework for enforcing the treaty, there is no sound basis on which to conclude that the treaty provided prisoners of war, let alone unlawful combatants such as Hamdan, with private rights of action.

Contrary to petitioner's claim (Mem. 39-40), the legislative history does not suggest otherwise. In fact, the Senate Report on which petitioner relies makes clear that the GPW is not self-executing. In a section titled "Provisions Relating To Execution Of The Conventions," the Report states that "[t]he parties agree, moreover, to enact legislation necessary to provide effective penal sanctions for persons committing violations of the

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[20] The other Articles of the GPW governing execution of the Convention reinforce the conclusion that the treaty is not self-executing. They call for the contracting parties to permit representatives of the Protecting Powers (neutral nations) and the International Committee of the Red Cross to visit prisoners of war (Art. 126); to inculcate the principles of the Convention in their countries' populace (Art. 127); and to communicate with one another "through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof," (Art. 128) (emphasis added). See also Art. 8 ("The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers [neutral nations] whose duty it is to safeguard the interests of the Parties to the conflict.").

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contentions enumerated as grave breaches[.]" S. Exec. Rep. No. 84-9 (1955), at 7. The Report celebrates this provision as "an advance over the 1929 [Geneva] instruments which contained no corresponding provisions." Ibid.

Significantly, the Supreme Court interpreted the 1929 Geneva Convention in Johnson v. Eisentrager, 339 U.S. 763 (1950), and held that it was not self-executing. The Court ruled there that the German prisoners of war who were challenging the jurisdiction of the military commission which convicted them "could not" invoke the Geneva Convention because

> It is * * * the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.

Id. at 789 & n. 14. The Senate that ratified the 1949 GPW was operating against the backdrop of Eisentrager, yet in discussing the "advance[s]" over the 1929 treaty, it never so much as suggested that alleged violations of the updated GPW could be enforced through private actions. To the contrary, the one "advance" contemplated and remarked upon was the enactment of criminal legislation to address "grave breaches." S. Exec. Rep. No. 84-9 (1955), at 7, 27 ("the grave breaches provisions cannot be regarded as self-executing"). Moreover, in addressing how future compliance with the treaty would be achieved, the Senate Report did not mention legal claims or judicial machinery, but instead observed that "the weight of world opinion," would "exercise a salutary restraint on otherwise unbridled actions." Id at 32.

Given that it is apparent on the face of the treaty and from the legislative history that the parties contemplated the need for enacting legislation, the Fourth Circuit's conclusion in Hamdi that the GPW is not self-executing is undoubtedly correct. Petitioner's claim (Mem. 37) that this Court is "bound" by the Ninth Circuit's decision in In re Territo, 156

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F.2d 142 (9th Cir. 1946), is wrong on several counts.[21] First, that case, which involved an American citizen's challenge to his confinement as a prisoner of war, did not involve the GPW, but rather, its 1929 precursor. Second, the Territo court did not hold that the 1929 treaty was self-executing, nor did it have occasion to decide the question, because the prisoner did not claim on appeal that his detention violated the Geneva Convention; he claimed the treaty was not applicable. Id. at 145. Finally, even if the Territo court had held the 1929 Convention self-executing, Eisentrager expressly rejected that notion four years later. 339 U.S. at 789 n.14.

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

The Geneva Conventions do not apply to every conceivable armed conflict. Article 2 of the GPW provides for only three circumstances in which the Geneva Conventions "apply": (a) in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties," art. 2(1); (b) in 'all cases of partial or total occupation of the territory of a High Contracting Party," art.2(2); or (c) when a non-signatory "Power[] in conflict" "accepts and applies the provisions [of GC]," art.2(3). Because the armed conflict between the United States and al Qaida satisfies none of these situations, the

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[21] Petitioner's reliance on United States v. Noriega, 808 F. Supp. 791 (S.D. Fla. 1992), United States v. Lindh, 212 F. Supp.2d 541 (E.D. Va. 2002), and Padilla ex rel. Newman v. Bush, 233 F. Supp.2d 564 (S.D.N.Y. 2002), rev'd in part, 352 F.3d 695 (2d Cir. 2003), rev'd sub nom. Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004), is likewise misplaced. Padilla did not address whether the GPW authorizes private rights of action, see id. at 590. Lindh permitted the assertion of the GPW "as a defense to criminal prosecution"; however, the Fourth Circuit in Hamdi subsequently held the GPW to be non-self-executing. Hamdi, 316 F.3d at 468. As for Noriega, the district court discussed the GPW in an advisory opinion. 808 F. Supp. at 793, 799 (acknowledging that issue was not presented "in the context of a live controversy"). Moreover, Noriega's discussion does not apply to GPW Articles 3 and 103, the two provisions on which petitioner relies. That is because the court viewed the GPW Articles at issue as self-executing on the theory that the "grave breaches" cited in the GPW and expressly requiring implementing legislation did not refer to those Articles. Id. at 797 n.8. In contrast, violations of Articles 3 and 103, if proven, would constitute grave breaches of the GPW, see Art. 130 (willful deprivation of POW's right to fair trial), which under the plain terms of the treaty cannot be enforced without implementing legislation, and which, as contemplated by the Treaty, are to be remedied by the possibility of criminal sanction, not private rights of action.

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Geneva Conventions do not apply to al Qaida fighters such as Hamdan.

The President has found that the armed conflict between the United States and al Qaida does not come within Article 2 of the GPW. See Memorandum for the Vice President, et al. From President, Re: Humane Treatment of al Qaeda and Taliban Detainees at 1 (Feb. 7, 2002), available at www.library.law.pace.edu/government/detainee_memos.html. The President's determination is undoubtedly correct as a matter of law. The U.S.-al Qaida armed conflict is not one "between two or more of the High Contracting Parties" within the meaning of article 2(1). Al Qaida has not signed or ratified the GPW. Nor could it. Al Qaida is not a State. Rather, it is a terrorist organization composed of members from many nations, with ongoing military operations in many nations. As a non-State entity, it cannot be a "High Contracting Party" to the Convention. In addition, the U.S.-al Qaida armed conflict has not resulted in the "occupation of the territory of a High Contracting Party" within the meaning of article 2(2). As a non-State actor, al Qaida has no territory that could be occupied within the meaning of article 2(2). Nor is it a "Power in conflict" that can "accept[] and appl[y]" the Convention within the meaning of article 2(3). See, e.g., G.I.A.D. Draper, The Red Cross Conventions 16 (1958) (arguing that "in the context of Article 2, para. 3, 'Powers' means States capable then and there of becoming Contracting Parties to these Conventions either by ratification or by accession"); 2B Final Record of the Diplomatic Conference of Geneva of 1949, at 108 (explaining that article 2(3) would impose an "obligation to recognize that the Convention be applied to the non-Contracting adverse State, in so far as the latter accepted and applied the provisions thereof" (emphasis added) ("Final Record"); 4 Pictet, Commentary, at 23 (using "non-Contracting State" interchangeably with "non-Contracting Power" and "non-Contracting Party"). In any event, far from embracing the Convention or any other provision of the law of armed conflict, al Qaida has consistently acted in flagrant defiance of the law of armed conflict.

In sum, the Geneva Conventions are inapplicable to the United States' armed conflict with al Qaida, and for this reason as well Hamdan cannot claim their protections.

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C. GPW 103 And Common Article 3 Are Facially Inapplicable To Hamdan.

Even assuming Hamdan could claim protection under the Conventions, his claims would still fail as a matter of law.

1. GPW Article 103 does not apply to Hamdan. That Article provides, in relevant part:

> Judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as practicable. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. In no circumstances shall this confinement exceed three months.

GPW art. 103 (emphasis added). The problem for Hamdan is that he is not a "prisoner of war" eligible for Article 103's protection. GPW Article 4 makes clear that prisoners of war "carry[] arms openly" and "conduct[] their operations in accordance with the laws and customs of war." Those, like Hamdan, who fail to adhere to those conditions are not entitled to prisoner of war status and its attendant benefits when captured. See S. Exec. Rep. No. 84-9, at 5 ("extension of [the treaty's] protection to 'partisans' does not embrace that type of partisan who performs the role of farmer by day, guerilla by night"). The President has determined that Hamdan is subject to the Military Order. See Ex. A to 4/5/04 Swift Decl. As a member of al Qaida or otherwise involved in terrorism against the United States, Hamdan by definition does not observe the criteria necessary to qualify as a prisoner of war. See Padilla, 233 F. Supp.2d at 593 (citing the "obvious conclusion" that "when the President designated Padilla an 'enemy combatant,' he necessarily meant that Padilla was an unlawful combatant, acting as an associate of a terrorist organization whose operations do not meet the * * * criteria necessary to confer lawful combatant status on its members and adherents").

Petitioner nevertheless argues (Mem. 34) that Hamdan is entitled to Article 103's protection because doubt has arisen as to his status as an unlawful combatant and that, in the

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face of this doubt, GPW Article 5[22] and various United States military regulations require that he receive full prisoner of war protection until a competent tribunal has determined his status. Pet.'s Mem. 34 (citing GPW, 6 U.S.T. at 3324 (art. 5); Army Regulation 190-8 § 1-6(A) (1997), at 70; Dep't of the Navy, NWP 1-14M 11.7 (1995), at 77). But petitioner never explains why doubt has arisen as to his status. He acknowledges that he was closely affiliated with Usama bin Laden for a lengthy period of time, and he does not claim, much less present evidence, that he followed a responsible commander, bore a fixed, distinctive sign, carried arms openly, or observed the laws of war. See GPW art. 4(A)(2). Because both the President and a federal court, see Padilla, supra, have determined that al Qaida is not entitled to protection as prisoners of war, there can be no doubt about his unlawful combatant status.

2. Hamdan's Common Article 3 claim fares no better. Article 3, which prohibits "the passing of sentences and the carrying out of executions without previous judgment" applies only "[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." The United States' war against al Qaida, however, is a conflict of "an international character," and it is not limited to the territory of "one of the High Contracting Parties." (Emphasis added.) Al Qaida operates in many countries and our armed conflict with al Qaida terrorists extends not only to Afghanistan but to Pakistan, countries in Europe and southeast Asia, and the United States itself. See Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, Re: Application of Treaties and Laws to al Qaeda and Taliban detainees, at 5-9 (Jan. 22, 2002), available at

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[22] That provision provides in relevant part that

> 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.

GPW art. 5.

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www.library.law.pace.edu/government/detainee_memos.html. Thus, by its own terms, Article 3 does not apply to the conflict pursuant to which Hamdan remains confined.

Even if the protections in common Article 3 did apply, Hamdan's treatment would not violate that article. He has not been "sentenced * * * without previous judgment." To the contrary, the proceedings against Hamdan are in their preliminary stages. Hamdan was charged with an offense on July 9, 2004, and that charge was approved and referred by the Appointing Authority on July 13, 2004. The parties have proposed December dates for his trial by military commission. At his trial, Hamdan will enjoy, inter alia, the presumption of innocence, the assistance of counsel, and the opportunity to cross-examine prosecution witnesses, and the government will have to prove his guilt beyond a reasonable doubt. See Statement of Facts Part 3, supra. And any finding of guilt will be reviewed by a review panel, the Secretary of Defense, and the President, if the President does not designate the Secretary as the final decision-maker. This process is undoubtedly consistent with the protections set out in Common Article 3.

Moreover, Hamdan's confinement pending his military trial does not constitute the "passing of [a] sentence[] * * * without previous judgment." GPW Art. 3(1)(d). Hamdan is not being confined in Camp Echo as a punishment for the offense he is alleged to have committed. Rather, by virtue of being designated as eligible for trial before a military commission, Hamdan was assigned petitioner as his counsel to assist him with the legal proceedings. In order to facilitate contacts between the military commission designees and their counsel without jeopardizing security at Guantanamo, the military established a separate facility at Camp Echo to house Hamdan and the other designees. Confining Hamdan for substantial security reasons to facilitate his access to counsel pending his wartime trial does not constitute "punishment." To the contrary, it is well established that the wartime detention of an enemy combatant is a legitimate war measure, not punishment. Hamdi, 124 S. Ct. at 2640 ("The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.") (plurality opinion).

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IV. PETITIONER'S EQUAL PROTECTION CLAIMS ARE MERITLESS

Petitioner advances the novel argument (Mem. 61-68) that the Military Order violates the equal protection component of the Fifth Amendment and 42 U.S.C. § 1981, because it applies to non-citizens only. Like the other claims the petition raises, there are numerous reasons why it lacks merit. First, as the Supreme Court held in United States v. Verdugo Urquidez, 494 U.S. 259 (1990), and Johnson v. Eisentrager, 339 U.S. 763 (1950), Hamdan, as an alien with no voluntary connection to the United States, has no Fifth Amendment rights. Second, even apart from those decisions, Hamdan's equal protection claim would fail because Hamdan is not a member of a suspect class and, even if he were, courts have historically shown extraordinary deference to the federal government regarding its policies toward aliens, deference that reaches its apex when applied to decisions of the President during wartime that implicate national security and sensitive foreign policy matters. Third, and related to the first point, the military order does not discriminate against Hamdan in its allocation of fundamental rights, because Hamdan has no fundamental right to avoid trial by a military commission. Finally, Hamdan's statutory claim fails because the statute is facially inapplicable to federal action, and, in any event offers no greater protection than the Constitution.

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

As a non-resident alien with no voluntary contacts with the United States, Hamdan cannot invoke the Constitution of the United States. In fact, the Supreme Court has already expressly rejected the claim that the equal protection component of the Fifth Amendment applies to non-resident aliens such as Hamdan. In United States v. Verdugo-Urquidez, a nonresident alien whose Mexican residence was searched by federal agents, contended not only that the search violated his Fourth Amendment rights, but also that it violated the equal protection component of the Fifth Amendment by treating him differently from citizens with respect to the Fourth Amendment. 494 U.S. at 273. The Court flatly rejected this contention, explaining that "[n]ot only are history and case law against [Verdugo-Urquidez], but as

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pointed out in Johnson v. Eisentrager, 339 U.S. 763 * * * (1950), the result of accepting this claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries." Verdugo-Urquidez, 494 U.S. at 273. The Court also rejected Verdugo-Urquidez's reliance on a series of cases, including Plyler v. Doe, 457 U.S. 202 (1982), extending some constitutional protection to aliens. Verdugo-Urquidez, 494 U.S. at 271. The Court explained that those cases "establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." Ibid. Because Verdugo-Urquidez "is an alien who has had no previous significant voluntary connection with the United States," the Court held that those cases "avail him not." Ibid.

Petitioner's equal protection argument does not cite or discuss Verdugo-Urquidez or Eisentrager. But those decisions make clear that Hamdan, as a non-resident alien with no voluntary, substantial contacts with the United States, see ibid. ("lawful but involuntary" presence does not constitute "substantial connection"), cannot assert an equal protection claim. Verdugo-Urquidez reiterated Eisentrager's "emphatic" rejection of the extension of Fifth Amendment protections to nonresident aliens such as Hamdan. 494 U.S. at 269. The Eisentrager defendants, like Hamdan, challenged their trial before a military commission on Fifth Amendment grounds. The Fifth Amendment, the Court explained, does not "confer[] rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses[.]" Id. at 783. If it were otherwise "enemy elements * * * could require the American judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against 'unreasonable searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments." Id. at 784. Had the Bill of Rights been meant to apply so broadly, the Court explained, "it could scarcely have failed to excite contemporary comment," yet "[n]ot one word can be cited," and "[n]o decision of th[e] Court supports such a view." Id at 784-785; see Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (deeming it "well established" that due process

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protections "are unavailable to aliens outside of our geographic borders"); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens[.]").[23] Verdugo-Urquidez and Eisentrager thus bar petitioner's equal protection claim.[24]

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

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

> [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power,

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[23] See also Harbury v. Deutsch 233 F.3d 596, 602-604 (D.C. Cir. 2000) (Guatemalan citizen has no Fifth Amendment rights); Cuban American Bar Ass'n v. Christopher, 43 F.3d 1412, 1428 (11th Cir. 1995) (alien migrants at Guantanamo Bay have no constitutional rights); Kamrin v. United States, 725 F.2d 1225, 1228 (9th Cir. 1984) ("[I]t has long been settled that United States due process rights cannot be extended extraterritorially.").

[24] The Court's recent decision in Rasul v. Bush, 124 S. Ct. 2686 (2004), in no way affects Eisentrager's and Verdugo-Urquidez's rulings that non-resident aliens are not entitled to Fifth Amendment protections. Rasul only decided the question whether U.S. courts have statutory jurisdiction over petitions for writs of habeas corpus filed by aliens located outside U.S. territory. See 124 S. Ct. at 2695 ("Eisentrager plainly does not preclude the exercise of § 2241 jurisdiction over petitioners' claims."). Rasul said nothing about the possession of constitutional rights by non-resident aliens. Its footnote stating that "petitioners' allegations * * * unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States,'" id. at 2698 n.15, is dictum which cannot be construed to overrule prior holdings of the Court and which, in any event, does not specify that the allegations make out a constitutional violation, as opposed to some other form of violation. In any event, to the extent non-resident aliens held in Guantanamo enjoy any constitutional rights, they clearly would enjoy less rights than citizens detained under similar circumstances. Cf. The Insular Cases (discussed in Verdugo-Urquidez, 494 U.S. at 268).

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> and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Matthews v. Diaz, 426 U.S. 67, 81 n.17 (1976) (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588-589 (1952)). Petitioner offers no basis for disturbing the President's judgment here.

1. Heightened Scrutiny Applies Only to State Actions That Affect Resident Aliens.

Petitioner asserts (Mem. 62-63) that aliens are a suspect class, citing In re Griffiths, 413 U.S. 717, 721-722 (1973), and Graham v. Richardson, 403 U.S. 365, 372 (1971), for this proposition. Those cases, however, stand for a substantially narrower point: that lawful, resident aliens are a suspect class for equal protection purposes, and that policies that differentiate between that group and other similarly situated persons are subject to "close judicial scrutiny." Graham, 403 U.S. at 372. Nothing in either case suggests that the Supreme Court meant to include aliens differently situated from Griffiths and Richardson, who were lawfully admitted resident aliens. See, e.g., Griffiths, 413 U.S. at 722 (according protection to resident aliens on the premise that "like citizens, [they] pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society"); Verdugo-Urquidez, 494 U.S. at 273 (rejecting nonresident alien's reliance on Graham).

That the President's order applies to lawful, resident aliens as well as non-resident aliens makes no difference. As a nonresident alien, Hamdan has no standing to allege an equal protection violation on behalf of that distinct group. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) ("[T]he plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is * * * concrete and particularized."); see also Sabri v. United States, 124 S. Ct. 1941, 1948-1949 (2004) ("[W]e have recognized the validity of facial attacks alleging overbreadth * * * in relatively few settings, and generally, on the strength of specific reasons weighty enough to overcome our well-founded reticence."). As a representative of the broader unprotected class of aliens, Hamdan's challenge would be

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subject to rational basis review. See, e.g., Dandridge v. Williams, 397 U.S. 471, 485 (1970); United States v. Carolene Products, 304 U.S. 144, 152 (1938). Under that standard, the Military Order must be upheld as long as a court can identify any rational basis for it. Carolene Products, 304 U.S. at 152. Given that the "[e]xecutive power over enemy aliens * * * has been deemed throughout our history, essential to war-time security," Eisentrager, 339 U.S. at 774, it cannot seriously be argued that the President's action, taken in response to attacks executed by a foreign-based terrorist organization, lacks a rational basis.

Moreover, courts have only applied heightened scrutiny to policies regarding aliens that are promulgated by states, as opposed to the federal government. Griffiths and Graham, the two cases on which petitioner principally relies, dealt respectively with Connecticut's bar admission rules and Arizona and Pennsylvania's distribution of welfare benefits. In these and other cases involving state action, the Court has made it clear that federal policies regarding aliens are entitled to a much higher degree of deference. See, e.g., Graham, 413 U.S. at 379-80; Plyler, 457 U.S. at 225.

Indeed, cases considering federal policies that differentiate against aliens are marked by the Court's extreme deference towards the political branches. In Mathews v. Diaz, 426 U.S. 67 (1976), the Court expressly distinguished state and federal actions for purposes of equal protection doctrine relating to aliens, id. at 84-85, explaining that the relationship between the United States and aliens "has been committed to the political branches of the Federal Government," id. at 81. The Court went on to apply great deference in upholding a federal law that differentiated against aliens for purposes of determining eligibility for Medicare benefits. A host of other cases echo Mathews judicial deference toward federal policies governing aliens. See, e.g., Fiallo v. Bell, 430 U.S. 787, 792 (1977); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953); Harisiades v. Shaughnessy, 342 U.S. 580, 588-589 (1952). The concern motivating the Court's deference – that regulation of aliens is committed to the political branches of the federal government – is magnified in this case, where the President's Military Order not only regulates aliens, but does so in order to

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prosecute the war against international terrorism effectively. See, e.g., Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988) ("courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"). Accordingly, the heightened scrutiny that would apply to state actions differentiating against lawful resident aliens does not apply to the President's exercise of his war powers.

2. The Military Order Does Not Discriminate In The Allocation Of Fundamental Rights.

Petitioner's final equal protection argument (Mem. 64) is that the Military Order violates the Fifth Amendment because it discriminates in the allocation of fundamental rights. The Court's jurisprudence makes clear, however, that heightened scrutiny is applied only to the differential allocation of constitutionally guaranteed rights. See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 32-33 (1973). Because it is well established that enemy combatants– the only individuals subject to trial by military commission– possess no constitutional right to be tried for their war crimes in front of an Article III court, see Ex parte Quirin, 317 U.S. 1 (1942) (citizen and alien enemy combatants alike are subject to trial by military commission); Yamashita v. Styer, 327 U.S. 1 (1946) (alien enemy combatant), the line of cases on which petitioner relies, see Pet.'s Mem. at 65, is inapposite. Thus, while the Military Order would survive the most exacting scrutiny, it need only have a rational basis, as it undoubtedly does.

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

Petitioner's argument (Mem. 67-68) that the Military Order violates 42 U.S.C. § 1981 is equally meritless. Petitioner relies on a 1974 Ninth Circuit case holding that Section 1981 applied to federal action, Bowers v. Campbell, 505 F.2d 1155, but that case was decided before the law was amended in 1991. The 1991 amendment provides that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. § 1981(c) (emphasis added). This amendment renders Section 1981 facially inapplicable to federal action. For this reason,

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every federal court of appeals that has considered the issue since the law was amended has held that federal actions cannot give rise to claims under Section 1981. See Davis-Warren Auctioneers, J.V. v. F.D.I.C., 215 F.3d 1159, 1161 (10th Cir. 2000); Davis v. United States Dep't of Justice, 204 F.3d 723, 725-726 (7th Cir. 2000); Lee v. Hughes, 145 F.3d 1272, 1277 (11th Cir. 1998). Petitioner cites a single post-amendment district court case to the contrary, La Compania Ocho, Inc. v. United States Forest Serv., 874 F. Supp. 1242 (D. N.M. 1995), but that case was overruled by Davis-Warren.

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

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

When he issued the Military Order, the President invoked not only his authority as Commander in Chief, but also the authority granted him by Congress in the Authorization for Use of Military Force (AUMF) and the authority Congress recognized he had in Sections 821 and 836 of Title 10 of the United States Code. In Hamdi, the Court made clear that the AUMF authorizes the President to exercise "against individuals Congress sought to target in passing the AUMF" his traditional war powers, including "the capture, detention, and trial of enemy combatants." 124 S. Ct. at 2640 (plurality opinion) (citing Ex parte Quirin, 317 U.S. at 28); id. at 2679 (Thomas, J., dissenting) ("Congress has authorized the President" to "detain those arrayed against our troops"). As someone charged with, inter alia, delivering weapons, ammunition and other supplies to al Qaida members and associates, Hamdan, like Hamdi, falls squarely within the cross-hair of the AUMF.

Not only has Congress authorized the President generally to exercise his war powers

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against Hamdan, but it has specifically recognized and approved the President's exercise of his authority to convene military commissions to try persons such as Hamdan who are charged with committing offenses cognizable under the common law of war. Indeed, as the Supreme Court held in both Ex parte Quirin and Yamashita, Congress has done so through the very provisions of the Uniform Code of Military Justice that the President cited in the Military Order.

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

A. Hamdan Cannot Invoke Structural Protections Of Our Constitution.

Hamdan has no standing to claim a separation-of-powers violation. As a non-resident alien with no voluntary connections to the United States, Hamdan possesses no constitutional rights. See Part IV(A), supra. He thus may allege neither infringements of individual rights expressly recognized by the Constitution nor infringements of rights derived from the structural protections built into the Constitution.

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B. Congress Has Authorized The Military Commission Which Will Try Hamdan.

The whole premise of petitioner's separation-of-powers argument, that "the tribunals at issue here were created solely by virtue of an Executive order, without congressional authorization" (Pet.'s Mem. 43), is without foundation. When the President issued the Military Order establishing military commissions to try individuals such as Hamdan for violations of the laws of war and other offenses triable by military commission, he expressly relied not only on his powers as Commander in Chief,[25] but also on, inter alia, 10 U.S.C. § 821. That section, which is entitled "Jurisdiction of courts-martial not exclusive," states that "[t]he provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions * * * of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions." 10 U.S.C. § 821 (emphasis added). That language originated in Article 15 of the Articles of War, which was enacted in 1916. See Act of August 29, 1916, 39 Stat. 619, 653. At that time, Congress had decided to extend the jurisdiction of courts-martial to all offenses against the laws of war. The main proponent of Article 15 testified that, in light of the extension of courts-martial jurisdiction, it was important to make clear that the military commissions' "common law of war jurisdiction was not ousted." S. Rep. No. 63-229, at 53 (1914) (testimony of Judge Advocate General Crowder before the House Committee on Military Affairs); see also S. Rep. No. 64-130, at 40 (1916) (the military commission "is our common-law war court" that "has no statutory existence").

When the Supreme Court addressed challenges to the many military commissions convened during and after World War II, it agreed with General Crowder's view about the place military commissions occupied in our legal system, construing Article 15 as

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

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congressional recognition and approval of the common-law role military commissions play during wartime in punishing violations of the laws of war.[26] In Ex Parte Quirin, 317 U.S. 1 (1942), the Court expressly held that Article 15 – whose language is identical to today's Section 821 – "authorized trial of offenses against the laws of war before such commissions." Id. at 29 (emphasis added); id. at 28 ("By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military commissions shall have jurisdiction to try offenders or offenses against the law of war * * *). The Quirin Court held not only that Congress had authorized the President to use military commissions, but also that Congress did not purport to codify violations of the laws of war over which the commissions could exercise jurisdiction. Rather, "Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the laws of war." Id. at 30; id. at 35 (relying on the "long course of practical administrative construction by [the] military authorities"). Applying these principles, the Court approved the military commission's exercise of jurisdiction over the Nazi saboteurs for alleged offenses against the common law of war.

Recognizing that Quirin undoes his entire separation-of-powers argument, petitioner attempts to distinguish it on various grounds, none of which has any merit. Petitioner contends that Quirin is different because the charges there "were explicitly authorized by Congress," Pet.'s Mem. 48. That argument ignores the very holding of the decision and the Court's application of that holding to the first charge leveled against the saboteurs, which alleged "[v]iolation of the [common] law of war," 317 U.S. at 23, not an offense prescribed by Congress.[27] The Court explained that the whole point of Article 15 was congressional

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

[27] Petitioner emphasizes (Mem. 48-49) that charges 2 and 3 were explicitly authorized by Congress, but the Quirin Court upheld the military commission's authority to try petitioners based solely on charge 1. The fact that the Court limited its analysis to the charge that relied on the common law, rather than on the statutory charges, demonstrates the degree to which

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recognition and approval of the military's enforcement of a body of common law governing the rules of warfare that Congress did not purport to codify:

> Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war * * *, and which may constitutionally be included within that jurisdiction. Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.

Id. at 30 (citation omitted).

The Quirin Court went on to assess whether the saboteurs had been charged with "an offense against the law of war cognizable before a military tribunal." Id. at 29. In doing so, the Court did not look to federal statutes, but rather, to other cases tried before military commissions, id. at 31 nn.9 & 10 (discussing cases of confederate soldiers and officers convicted for hostile actions in civilian dress or other disguises, including attempts to derail a train and to set fire to New York City); contemporary secondary sources on military and international law, id. at 31; and the Rules of Land Warfare promulgated by the War Department for the guidance of the Army,[28] id. at 33-34. After canvassing these sources, the Court concluded that the Nazi saboteurs were properly charged with a violation of the law of war because, "[b]y a long course of practical administrative construction by its military authorities, our Government has likewise recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission." Id. at 35 (emphasis added). Contrary to petitioner's argument, the Court never implied, much less stated, that the alleged

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petitioner misreads Quirin.

[28] The Court cited provisions of the Rules of Land Warfare identifying persons subject to military trial for violations of the laws of war, including "'persons who take up arms and commit hostilities' without having the means of identification prescribed for belligerents." Id. at 34 (quoting Paragraph 348). The Court observed that "the specified violations [in the Rules] are intended to be only illustrative of the applicable principles of the common law of war, not "an exclusive enumeration." Ibid.

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violation of the law of war was cognizable because it was defined by Congress or because it resembled a statutory offense.

Given the total absence of evidence in Quirin that the Court approved the first charge based on explicit statutory authorization, petitioner looks outside Quirin to the statement in Madsen, that "'the military commission's conviction of saboteurs * * * was upheld on charges of violating the law of war as defined by statute'." Pet's Mem. 49 (emphasis in Mem.). A review of the pages in Quirin which Madsen cited indicates that what the Madsen Court meant was nothing more than what the Quirin Court held, namely, that Congress, via Article 15, acted to define the law of war as incorporating the body of common law applied by military commissions. See Quirin, 317 U.S. at 38 (the "Act of Congress [Article 15], by incorporating the law of war, punishes" violation of common law of war) (emphasis added); id. at 28 ("Congress * * * has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.") (emphasis added).

Respondents' reading of Quirin is confirmed by Yamashita v. Styer, 327 U.S. 1 (1946), which is not discussed in petitioner's separation-of-powers argument. In Yamashita, the Court characterized Quirin as holding that

> [Congress] 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.

327 U.S. at 11 (emphasis added). Petitioner's revisionist take on Quirin thus cannot be reconciled with the Yamashita Court's own interpretation and application of Quirin four years later.

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Under Quirin, there can be no doubt that Hamdan is charged with an offense that alleges a violation of the laws of war. He is charged with conspiring with an international terrorist organization that has carried out numerous attacks – including the September 11 attacks – that violate every precept of the laws of war.[29] Indeed, those attacks targeted civilians and were carried out by enemy forces disguised as civilians who did not carry arms openly. See id. at 34. And the particular offenses Hamdan is charged with conspiring to commit – attacking civilians, attacking civilian objects, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent, and terrorism – implicate the most basic protections of the laws of war. See 32 C.F.R. §§ 11.6(a)(2) and (a)(3); §§11.6(b)(2), (b)(3), and (b)(4); Yamashita, 327 U.S. at 17 ("Obviously charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment.").

Both the military's own field manual and the 1907 Hague Convention – two sources on which the Quirin Court heavily relied – confirm that the charge against Hamdan constitutes an offense against the customary laws of war. The Field Manual declares that "[c]ustomary international law prohibits the launching of attacks * * * against either the civilian population as such or individual civilians" and that "[t]he attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited." Dep't of the Army, Field Manual 27-10, The Law of Land Warfare ¶¶ 39-40; see also Hague Convention No. IV of October 18, 1907, 36 Stat. 2295, art. 23 (stating that "it is especially forbidden" both "[t]o kill or wound an enemy who [has] laid down his arms, or [has] no longer means of defense," and "[t]o destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."). The

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[29] The President, the Congress, and NATO have all recognized al Qaida's attacks as an act of war. See Military Order, § 1(a); AUMF, 115 Stat. 224; and Statement of NATO Secy. Gen. (Oct. 2, 2001) (available at http://usinfo.-state.gov.topical/pol/terror/01100205.htm). In any event, whether there exists a state of armed conflict to which the laws of war apply is a political question for the President, not the courts. See The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862); Eisentrager, 339 U.S. at 789; Ludecke v. Watkins, 335 U.S. 160, 170 (1948).

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manual further provides that individuals "who take up arms and commit hostile acts without having complied with the conditions prescribed by the laws of war for recognition as belligerents" are not entitled to combatant immunity for their hostile acts, but rather "may be tried and sentenced to execution or imprisonment." Id. ¶ 80. See also Yamashita, 327 U.S. at 14 (recognizing as violation of the law of war "deliberate plan and purpose to massacre and exterminate a large part of the civilian population * * * and to devastate and destroy public, private and religious property"); GPW art. 4 (extending POW protections only to lawful belligerents). Under these common law sources, the charge against Hamdan – implicating him in al Qaida's attacks on the United States – "plainly alleges violation of the law of war."[30] Quirin, 317 U.S. at 36.

Petitioner's attempt (Mem. 51-54) to distinguish Quirin on the basis of the declaration of war there is equally unavailing. Congress authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, * * * in order to prevent any future acts of international terrorism against the United States[.]" Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001).

[30] Petitioner (Pet.'s Mem. 43-47) misplaces reliance on Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866). To begin with, Milligan, which involved the military prosecution of an American citizen, was not a separation-of-powers case, for the Court held there that the government as a whole had no power to subject Milligan to military jurisdiction. Id. at 122. Moreover, Quirin "construe[d]" the "inapplicability of the law of war to Milligan's case as having particular reference to the facts," namely, that Milligan, as a person neither "a part of or associated with the armed forces of the enemy, was a non-belligerent." 317 U.S. at 19; see also Duncan v. Kahanamoku, 327 U.S. 304 (1946) (military tribunal cannot try persons for embezzling stock or brawling with soldiers). Finally, when addressing the application of the laws of war to the current armed conflict, a majority of the Supreme Court embraced Quirin, not Milligan, as the controlling precedent. Hamdi, 124 S. Ct. at 2643 (plurality opinion) ("Quirin was a unanimous opinion. It both postdates and clarifies Milligan[.]"); ibid. (rejecting a reading of Quirin that would limit application of its principles to cases where enemy combatant status is conceded); id. at 2682 (Thomas, J.) ("Quirin overruled Milligan to the extent those cases are inconsistent.").

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In Hamdi, a plurality of the Court ruled that this authorization triggered the exercise of the President's traditional war powers, in particular, the power to detain enemy combatants.[31] The Court explained that "detention of individuals [that Congress sought to target in passing the AUMF] * * *, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." 124 S. Ct. at 2640 (plurality opinion). That ruling applies with equal force to the President's power to punish war criminals. Indeed, the Hamdi Court justified its own conception of the President's war powers by expressly relying on Quirin for the proposition that "[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" Hamdi, 124 S. Ct. at 2640 (quoting Quirin, 317 U.S. at 28) (emphasis added). Because al Qaida is the central target of the AUMF, Congress has clearly authorized the President to exercise his war powers by subjecting to military trial individuals such as Hamdan who are charged with conspiring to achieve its goals.[32]

The absence of a formal declaration of war is likewise immaterial to application of the substantive prohibitions of the UCMJ. It is well settled that the UCMJ applies to armed conflicts that the United States has prosecuted without a formal declaration of war. See, e.g., United States v. Anderson, 38 C.M.R. 386, 386 (C.M.A. 1968) ("The current military involvement of the United States in Vietnam undoubtedly constitutes a 'time of war'

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

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

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in that area, within the meaning of Article 43"); United States v. Bancroft, 11 C.M.R. 3, 5 (C.M.A. 1953) ("a finding that this is a time of war, within the meaning of the language of the Code, is compelled by the very nature of the present conflict" in Korea). The cases that petitioner cites to the contrary, United States v. Averette, 41 C.M.R. 363, 365 (C.M.A. 1970), and Zamora v. Woodson, 42 C.M.R. 5 (C.M.A. 1970), hold that a formal declaration of war is necessary only before the UCMJ is applied to civilians, and are thus inapplicable to Hamdan, an alien captured in Afghanistan in the ongoing armed conflict and determined by the military to be an enemy combatant.

Finally, contrary to petitioner's contention, Quirin has not been eroded by subsequent legal developments. Hamdi reconfirms Quirin. 124 S. Ct. at 2643 (plurality opinion); id. at 2682 (Thomas, J., dissenting). Petitioner cites the codification of the UCMJ, but Congress expressly stated that the codification preserved the holding of Quirin. See S. Rep. No. 486, 81st Cong, 1st Sess. 13 (1949); H.R. Rep. No. 491, 81st Cong, 1st Sess. 17 (1949). As for the Geneva Conventions, as discussed above in Part III, they are not self-executing, do not apply, and, in any event, approve the military trial of unlawful combatants, see, e.g., S. Exec. Rep. No. 84-9, at 5 ("guerilla[s] * * * remain subject to trial and punishment as unlawful belligerents"). And the War Crimes Act of 1996 and Expanded War Crimes Act of 1997 were intended to supplement rather than replace the jurisdiction of military commissions over war crimes. Indeed, Congress could not have been clearer on this score. The War Crimes Act itself says nothing about altering the traditional jurisdiction of military commissions. That is not surprising, given that "[t]he enactment of H.R. 3680 [the War Crimes Act of 1996] is not intended to affect in any way the jurisdiction of any court-martial, military commission, or

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other military tribunal under any article of the Uniform Code of Military Justice or under the law of war or the law of nations." H. Rep. No. 698, 104th Cong. 2d Sess. 12 (1996).[33] Because Congress clearly did not intend to "occup[y] the field" (Pet.'s Mem. 72) previously occupied by military commissions, the subject matter jurisdiction of those commissions today is no narrower than it was during World War II. To the contrary, that jurisdiction remains broad enough to cover violations of the laws of armed conflict as defined by both historical and contemporary standards.[34]

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

Even if the legislative provisions the President expressly invoked did not constitute the congressional authorization that the Supreme Court has held they constitute, see Hamdi (construing AUMF), supra; Quirin (construing precursor to 10 U.S.C. § 821), the military commissions would still be constitutional. That is because the President's authority to create military commissions is inherent in his position as Commander-in-Chief. U.S. Const. Art. II § 2.

The Executive Branch's war power has always included the unilateral authority to create military commissions, because that authority is necessary to effectuate the war power. As the Court explained in Eisentrager, "[t]he first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And, of course, grant of war power includes all that is necessary and proper for carrying these powers

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[33] Military commissions may, of course, try persons for violations of the laws of war even if the underlying conduct could also be construed to violate criminal statutes. One of the Nazi saboteurs in Quirin was an American citizen who could have been charged with treason, but that fact did not negate his eligibility for trial by commission. 317 U.S. at 38. See also Colepaugh v. Looney, 235 F.2d 429, 432-433 (10th Cir. 1956) ("an accused has no constitutional right to choose the offense or the tribunal in which he will be tried").

[34] The Supreme Court has repeatedly held that the repeal by implication of an earlier statute is disfavored. See, e.g., Rodriguez v. United States, 480 U.S. 522, 524 (1987). Given that Congress made clear its intent not to repeal 10 U.S.C. § 821, the War Crimes Act cannot be read to displace the traditional jurisdiction of military commissions to try violations of the common law of war.

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into execution." 339 U.S. at 788 (citation omitted). That war power includes "the power * * * to punish those enemies who violated the law of war." Hirota, 338 U.S. at 208 (Douglas, J,. concurring) (citations omitted). And "punishment of war criminals" is an essential "part of the prosecution of the war," because it is "directed to a dilution of enemy power and [to] retribution for wrongs done." Id. at 208; see also Yamashita, 327 U.S. at 11 ("An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who * * * have violated the law of war."). Indeed, the laws of war exist to impose limits on belligerent conduct; as leader of the armed forces, the President must have the authority to enforce those limits to protect the nation.

The Executive Branch's unilateral authority to create military commissions not only necessarily inheres in the powers granted the President by the Constitution, but is also borne out by historical practice. In 1780, during the Revolutionary War, General Washington as Commander in Chief of the Continental Army appointed a "Board of General Officers" to try the British Major Andre as a spy, see Quirin, 317 U.S. at 31 n.9, when there was no court-martial authority to try him. See George B. Davis, A Treatise on the Military Law of the United States 308 n.1 (1913). General Andrew Jackson similarly convened military trials in 1818 to try two English subjects for inciting the Creek Indians to war with the United States. See William Winthrop, Military Law and Precedents 464, 832 (2d ed. 1920). In the Mexican American War, General Winfield Scott appointed tribunals called "council[s] of war" to try offenses under the laws of war and tribunals called "military commission[s]" to serve essentially as occupation courts administering justice for occupied territory. See id. at 832-33; Davis, supra at 308. And after the outbreak of the Civil War, military commissions were convened to try offenses against the laws of war, see Davis, supra, at 308 n.2; Winthrop, supra at 833.

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The Court has never called into question the validity of that historical practice. To the contrary, in Ex parte Vallindigham, 68 U.S. 243 (1863), the Court, in the course of concluding that it did not have jurisdiction to review the proceedings before a military commission, explained that military jurisdiction can be "derived from the common law of war." Id. at 249. And the three seminal military commission cases, Milligan, Quirin, and Yamashita, are all consistent with the position that the President does not require statutory authorization to establish military commissions to try violations of the laws of war. As mentioned above, Milligan is not a separation-of-powers case, and has been narrowly confined to its facts. In Quirin, the Court, in light of its reliance on congressional authorization, simply found it "unnecessary" to decide whether the President had unilateral authority. Finally, in Yamashita, although the same statutes that were dispositive in Quirin on the question of congressional authorization were still in force (as they are now), the Court strongly suggested that the President has inherent authority to convene military commissions. The Court observed that the Articles of War "recognized the 'military commission' appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war." Yamashita, 327 U.S. at 5 (emphasis added). The Court further explained that "'[a] military commission is our commonlaw war court. It has no statutory existence, though it is recognized by statute law.'" Id. at 20 n.7 (quoting General Crowder). The logical implication is that even without Article 15 or any other statute, the President can create commissions on the basis of his inherent authority as Commander-in-Chief. See also Madsen, 343 U.S. at 346-347 ("Since our nation's earliest days, [military] commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have taken many forms and borne many names. Neither their procedure nor their jurisdiction has been prescribed by statute.").

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CONCLUSION

For the reasons stated above, respondents respectfully request that the petition be denied, that their cross-motion to dismiss be granted, and that a judgment of dismissal be entered in favor of respondents.

DATED this 6th day of August, 2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington, and is a person of such age and discretion as to be competent to serve papers;

That on August 6, 2004, she electronically filed the Notice of Motion and Respondents' Cross-Motion to Dismiss; Consolidated Return to Petition and Memorandum of Law in Support of Cross-Motion to Dismiss with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participant(s):

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I further certify that on the same date, I caused to be mailed by United States Postal Service, the above document to the following non-CM/ECF participant(s):

Charles Davidson Swift
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Dated this 6th day of August, 2004.

s/ Laurie A. Gausta
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