No. 05-184

IN THE
Supreme Court of the United States

SALIM AHMED HAMDAN,
Petitioner,
v.
DONALD RUMSFELD, ET AL.,
Respondents.

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

BRIEF FOR PETITIONER SALIM AHMED HAMDAN

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QUESTIONS PRESENTED

1. Whether the military commission established by the President to try Petitioner and others similarly situated for alleged war crimes in the "war on terror" is duly authorized under Congress's Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224; the Uniform Code of Military Justice (UCMJ); or the inherent powers of the President?

2. Whether Petitioner and others similarly situated can obtain judicial enforcement from an Article III court of rights protected under the 1949 Geneva Convention in an action for a writ of habeas corpus challenging the legality of their detention by the Executive branch?

PARTIES TO THE PROCEEDING

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

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

The Respondents here and in the United States Court of Appeals for the District of Columbia are Donald H. Rumsfeld, United States Secretary of Defense; John D. Altenburg, Jr., Appointing Authority for Military Commissions, Department of Defense; Brigadier General Thomas L. Hemmingway, 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.

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OPINIONS BELOW

The Court of Appeals opinion (Pet. App. 1a) is reported at 415 F.3d 33 (D.C. Cir. 2005). The District Court opinion (Pet. App. 20a) is reported at 344 F. Supp. 2d 152 (D.D.C. 2004).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1254(1), as well as §§ 1651(a), 2241(a), and 2242, and Article III of the U.S. Constitution. On December 30, 2005, H.R. 2863, a Department of Defense Appropriations Act, was enacted. Petitioner has raised with the Solicitor General a proposed briefing schedule to address the effect, if any, of that Act on this Court's jurisdiction, and is awaiting his response.

CONSTITUTIONAL, STATUTORY AND INTERNATIONAL LAW PROVISIONS

The relevant provisions are reprinted in Appendix A, *infra*.

STATEMENT

1. This case involves the intersection of laws governing courts-martial, extraordinary military commissions, and the treaties and common law that compose the "law of war."

a. In 1950, Congress codified the jurisdiction and procedures of military courts in the Uniform Code of Military Justice (UCMJ). Chapter 47, Subchapter IV, establishes the jurisdiction of courts-martial, while other subchapters establish procedures and guarantee, among other things, the right to be present at trial and confront witnesses (§ 839) and the right to independent review of military court decisions (§§ 867, 867a).

UCMJ § 836(a) permits military courts to depart from some federal court procedures, but not the UCMJ itself:

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers

> practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

UCMJ § 821 addresses the jurisdiction of commissions:

> 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.

The UCMJ defines only two specific offenses as triable by commission, but neither applies to this case (§§ 904, 906).

b. Military commissions apply international law to prosecute individuals for violations of the "law of war." The law of war refers to a body of international law derived from treaties and customary international law. Among the most significant treaties codifying that law are the 1949 Geneva Conventions, ratified by the United States in 1955. In particular, the Third Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 (1949) (GPW), was the product of an intensive effort after World War II. "Experience acquired during 1939-45 amply demonstrated the necessity of…provid[ing] greater and more effective protection for the persons whom they were intended to benefit." S. Exec. Rep. No. 84-9, at 1 (1955) (Ratifying Report). "The function of the new texts is to provide better protection" than the predecessor 1929 Convention and to "tighten up the obligations of the parties." *Id.* at 2.

2. In the immediate wake of treacherous violence, Congress adopted a resolution authorizing the President to "use all necessary and appropriate force" against limited targets for specified purposes. 115 Stat. 224 (2001) (AUMF). Congress did not mention commissions or declare war. Under the AUMF, armed conflict in Afghanistan began.

On November 13, 2001, despite the circumscribed AUMF, the President issued a Military Order establishing the first commissions in over fifty years. Detention, Treatment, and

Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833. The commission's ever-shifting rules are starkly different from the protections mandated in the UCMJ. *See*, *e.g.*, Military Commission Order No. 1 (Aug. 31, 2005). For example, they allow the accused to be excluded from portions of his trial, *id*. § 6(B)(3); permit the admission of unsworn statements in lieu of testimony, *id*. § 6(D); and allow the Secretary of Defense to terminate the proceedings, *id*. § 6(H)(1)-(6). The rules state that the limited protections afforded to defendants, including the presumption of innocence, are not "right[s]" that are in any way "enforceable," *id.* § 10, and can be withdrawn at any time, *id*. § 11.

In March 2002, counsel for Respondent Rumsfeld stated that traditional "notice and comment" procedures could not be followed because "'the need to move decisively and expeditiously in the ongoing war against terrorism' left no time for the normal procedure for writing regulations." Jess Bravin, *Military-Tribunal Defendants Get Fewer Rights and Procedural Rules*, Wall St. J., Mar. 22, 2002, at A4. The Deputy Secretary of Defense testified that a "compelling reason" to deviate from established procedures for military justice was that "commissions would permit speedy" trials. *Military Commissions*, *Hearing Before the Senate Armed Services Cte.*, 107th Cong. (Dec. 12, 2001) (testimony of Paul Wolfowitz).

Not a single commission trial has taken place in the four years since the 2001 attacks.

3. Over four years ago, Petitioner was captured in Afghanistan by indigenous forces while attempting to return his family to Yemen. After being turned over to American forces in exchange for a bounty, he was taken in June 2002 to Guantanamo Bay, where he was placed with the general detainee population. Pet. App. 78a. In July 2003, the President found Petitioner eligible for trial by commission. As a result, he was placed in solitary confinement from December 2003 until late October 2004 (four days before this case was argued in the district court).

In December 2003, a month after certiorari was granted in *Rasul v. Bush*, 542 U.S. 466 (2004), and pursuant to a request by the Prosecutor that defense counsel be appointed for the limited purpose of negotiating a plea, military counsel was

appointed. Twelve days after counsel met Hamdan, he filed a demand for charges and a speedy trial under UCMJ Article 10. That demand was rejected in a legal opinion claiming that the UCMJ did not protect Hamdan. In July 2004, he was charged with a single count of conspiracy. Pet. App. 63a-67a. That charge does not allege that Hamdan committed offenses against the laws of war or that he engaged in any punishable conduct in the Afghan conflict.

4. That charge came three months *after* the Petition for Mandamus or, in the Alternative, Habeas Corpus, in this case was filed. On November 8, 2004, the district court (Robertson, J.) granted that petition in part and denied Respondents' motion to dismiss. The court rejected Respondents' demand to abstain until after the trial because Hamdan had "'raised substantial arguments denying the right of the military to try [him] at all.'" Pet. App. 24a (citing *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975)).

The district court then ruled that commissions may hear only offenses triable under the laws of war, including the Geneva Conventions; that the GPW is judicially enforceable; and that, as long as his prisoner-of-war (POW) status is in doubt, Petitioner must be tried by court-martial. Pet. App. 25a-37a. The court found it plain that the Military Order did not satisfy either the GPW or the UCMJ, particularly as it deprived Petitioner of the right to attend his trial and hear the evidence presented against him. *Id*. at 37a-47a. This placed the President in the zone where his power is at "its lowest ebb" under *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Pet. App. 28a.

5. On the government's appeal, the court of appeals reversed in a partially divided opinion written by Judge Randolph and joined by then-Judge Roberts (in full) and Judge Williams (in part). The panel first rejected abstention, finding that its rationales, comity and speed, "do not exist in Hamdan's case and we are thus left with nothing to detract from *Quirin*'s precedential value." *Id.* at 3a (citing *Ex parte Quirin*, 317 U.S. 1 (1942)). Under *Abney v. United States*, 431 U.S. 651, 662 (1977), abstention would be inappropriate because "setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not

to be tried by a tribunal that has no jurisdiction." *Id.* at 4a.

On the merits, the court held that the AUMF and UCMJ authorized commissions. *Id.* at 5a-7a. It also held that *Johnson v. Eisentrager*, 339 U.S. 763 (1950), precluded the GPW's judicial enforcement, although it acknowledged that *Eisentrager* involved the 1929 Convention and that it reached the question in an "alternative holding." *Id.* at 7a-10a.

With respect to Common Article 3 of the Convention, which requires "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable," the court found the conflict with al Qaeda exempt. *Id.* at 12a-13a. Judge Williams concurred, disagreeing with this holding because "the Convention's language and structure compel the view that Common Article 3 covers the conflict with al Qaeda." *Id.* at 18a.

6. On November 7, 2005, this Court granted certiorari.

SUMMARY OF ARGUMENT

This case involves a critical question regarding the allocation of power among Congress, the President and the federal courts in the ongoing "war on terror." The President has claimed the unilateral authority to try suspected terrorists wholly outside the traditional civilian and military judicial systems, for crimes defined by the President alone, under procedures lacking basic protections, before "judges" who are his chosen subordinates. He has further asserted the power to disregard treaty obligations that Congress has ratified and the federal courts repeatedly have enforced, obligations that protect not only Hamdan but also American servicemembers. Such assertions reach far beyond any war power ever conferred upon the Executive, even during declared wars. The court of appeals' limitless approval of this unprecedented arrogation of power must be reversed.

I. In this case, the President seeks not to revive, but to invent, a new form of military jurisdiction. While military commissions have served an important role in times of war, their use has been strictly limited in light of their inherent threat to liberty and the separation of powers. Accordingly, this Court has never before recognized the legitimacy of a

commission except to the extent it has been specifically authorized by Congress. And even in the few cases where this Court has found congressional authorization, this Court has always construed the commissions' jurisdiction as limited by the treaties and traditions constituting the law of war, absent express statutory provisions to the contrary.

In this case, the commissions established by the President transgress *both* boundaries. 10 U.S.C. 821 clearly provides that commissions at most may try "offenders or offenses that by statute or by the law of war may be tried by military commissions." Likewise, the AUMF only permits the use of "necessary and appropriate force." To construe that phrase as authorizing commissions that try offenses, much less offenses unrecognized by the law of war, in a forum far removed in time and distance from any battlefield, and without important procedural safeguards, would provide to the President an almost limitless authority that Congress could not have intended and that threatens our divided government. If in the interest of "national security," this Court concludes that the President has such authority, it will be hard pressed to limit, in any principled manner, the President's assertion of similarly unprecedented powers in other areas of civil society, so long as they purport to serve that same objective. Indeed, it is not hard to imagine a future President invoking this case as precedent, and asserting the need to subject American citizens to military commissions for any offense somehow connected to the "war on terror."

To avoid such dangers, even when Congress has authorized commissions, this Court has always construed that authority to be limited to trying offenders and offenses subject to commission trial under the law of war. It should adopt the same approach in this case and conclude that, even if some form of commission has been authorized, the commission created by the President here is unlawful. First, the commission fails to provide procedural protections required by statute, and long deemed essential to the legitimacy of military tribunals enforcing the law of war. Under 10 U.S.C. 836(a), Congress prohibited the use of procedures in commission trials that are "contrary to or inconsistent with" the UCMJ. Despite this express

restriction, the government acknowledges that the commission procedures do not afford essential UCMJ protections, including the right to be present during the proceedings (§ 839(b)). Second, Petitioner is not an offender subject to commission trial under the law of war. To the extent the government argues that petitioner is triable by commission because the conflict with al Qaeda is subject to the law of war, it must also acknowledge that he is entitled to the protection of the law of war, including the provisions of the Geneva Convention that prohibit commission trials.

Moreover, the law of war does not, in fact, extend to the offense with which Hamdan has been charged. Hamdan's single count of conspiracy has never constituted an offense against the law of war. Nor has the law of war ever been extended to acts of terrorism when they occur outside of a traditional battlefield in a declared war between nation-states. Instead, such crimes have long been tried, with nearly uniform success by the government, in civilian courts. If the American people have lost faith in their judicial institutions and have determined to abandon that tradition, that step must be taken clearly and deliberately by Congress, not through an assertion of unilateral power by the President.

II. The judgment below must be reversed for a further, independent reason. This is the first commission since ratification of the GPW in 1955. Hamdan—apprehended on the field of battle in a war between the United States and the government of Afghanistan, both signatories to that treaty—is entitled to its protections, which form an essential component of the law of war. Under the GPW, until a "competent tribunal" determines that Hamdan is not a POW, he is entitled to its protections. One such protection is the right to be tried before the same tribunal as American servicemembers charged with the same offense. The government does not dispute that this requires trial before a court-martial, with all the attendant procedural protections afforded American servicemembers that commissions deny.

The court of appeals erred further in concluding that Common Article 3 of the GPW does not protect Hamdan. That Article is a minimum baseline that applies to all conflicts. In the end, the President cannot claim that the

criminal offenses of the laws of war apply to the war on terror, and at the same time deny the accused the right to invoke any of the protections of the laws of war.

Finally, the court of appeals erred in concluding that rights protected by the GPW could not be judicially enforced. In this case, the rights at issue are part of the laws of war, and thereby constrain any authorization of a commission. Moreover, they have been codified in statutes and regulations, which are independently enforceable in habeas and mandamus actions.

III. Hamdan does not challenge the President's power to use troops or his power to temporarily detain true enemy combatants. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). He challenges the *further* assertion of power to subject detainees to *ad hoc* trials. Unlike forward-looking detentions—which implicate war powers and where courts lack comparative expertise—tribunals that look retrospectively at guilt intrude on areas where civilian courts have competence and protect our Constitution's checks and balances. *E.g., In re Yamashita*, 327 U.S. 1 (1946); *Quirin*, 317 U.S. 1; *United States v. Grimley*, 137 U.S. 147 (1890); *Ex parte Milligan*, 71 U.S. 2 (1866).

Nor does Hamdan challenge the government's right to try him for offenses proscribed by law in a civilian court or court-martial, under protections long considered fundamental to the legitimacy of *any* American court. And Hamdan does not challenge the authority of *Congress* to alter the traditional jurisdiction of civilian and military courts, subject to constitutional constraints. But in the absence of such a decision by the legislative branch, the President may not displace the jurisdiction of those regularly constituted courts and disclaim the treaty obligations to which Congress has committed the nation.

This is the rare case where invalidating the government's action preserves the status quo, a carefully crafted equilibrium in place for many decades. Our fundamental principles of separation of powers have survived many dire threats to this nation's security—from capture of the nation's capital by enemy forces, to Civil War, to the threat of nuclear annihilation during the Cold War—and those principles must not be abandoned now.

ARGUMENT

I. PETITIONER'S COMMISSION IS NOT AUTHORIZED

A. Military Commissions Play A Limited Role in the Nation's Constitutional Structure and Tradition

This Court has repeatedly recognized that "the Framers harbored a deep distrust of executive military power and military tribunals." *Loving v. United States*, 517 U.S. 748, 760 (1996); *Toth v. Quarles*, 350 U.S. 11, 22 (1955) ("Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service."). The traditions of this country favor civilian courts and courts-martial, not commissions, for the prosecution of war crimes.

Civilian Criminal Trials. Since the Founding, Congress has used civilian trials to address violence against Americans from stateless organizations, beginning with piracy and continuing to the present. 18 U.S.C. pt. 1, ch. 113B. In the aftermath of September 11, Congress enacted legislation to ensure the adequacy of civilian law enforcement agencies and the criminal justice system to respond to the modern threat of terrorism. USA PATRIOT Act, 115 Stat. 272 (Oct. 26, 2001). Congress also revised criminal statutes for offenses triable in federal court. *E.g.*, 18 U.S.C. 1993, 2331, 2339C, 2339D. Federal criminal laws have helped convict numerous terrorists, including those involved in the 1993 World Trade Center and the 1995 Oklahoma City bombings. These federal charges are available to try Petitioner and others. Accused 'dirty bomber' Jose Padilla has now been indicted on criminal charges in a federal civilian court.

Courts-Martial. Military courts have played an important but limited role. The traditional military court is the court-martial, a body that has long had jurisdiction to try service-members. In the 20th century, Congress gave courts-martial jurisdiction over violations of the laws of war. 10 U.S.C. 818.

Military Commissions. The jurisdiction of commissions has always been strictly confined. They have been permitted only as courts of necessity, convened temporarily by commanders in zones of active military operations and used

to try war crimes or enforce justice in occupied territory when no other courts were open or had jurisdiction. 2 WINTHROP, MILITARY LAW & PRECEDENTS 831 (2d ed. 1920).

Commissions were thus used on the battlefields of the Mexican-American war, but only "until Congress could be stimulated to legislate on the subject." 2 MEMOIRS OF LIEUT.-GENERAL SCOTT 392-93 (1864). They were used again during the Civil War, but subject to the "general rule" that they be used "only for cases which cannot be tried by a court-martial or by a proper civil tribunal." 1 THE WAR OF THE REBELLION 242 (2d Series 1894); Lieber Code, Gen. Order No. 100, *in* THE LAWS OF ARMED CONFLICT 3 (1988) (stating that commissions can only try offenses with no "jurisdiction conferred by statute on courts-martial"); *In re Egan*, 8 F. Cas. 367 (C.C.N.D.N.Y. 1866) (No. 4303) (Nelson, J.) (invalidating commission because "all authorities agree that it can be indulged only in case of necessity….This necessity must be shown affirmatively by the party assuming to exercise this extraordinary and irregular power."); *Madsen v. Kinsella*, 343 U.S. 341, 348, 355 (1952) (upholding commissions used overseas as a temporary court system in occupied territory).

Petitioner's commission does not fall within any of these traditional uses of commissions. Among other things, it was convened at Guantanamo Bay, which is neither a zone of combat nor occupied territory. Even *Quirin*, which marked the absolute outer bounds of the commissions used in World War II, recognized that war crimes tribunals have been exceptionally limited by constitutional tradition, specific legislation, and the laws of war. Here, however, the President has given the commission a jurisdiction that far exceeds any ever previously exercised.

B. Military Tribunals Must Be Strictly Limited

Concerns over the justice system and role of the military during the rule of King George III were grievances leading to the founding of this Nation. *See* DECLARATION OF INDEPENDENCE para. 11, 14, 20, 21 (U.S. 1776) (charging that the Crown had "affected to render the Military independent of and superior to the civil power"; "depriv[ed] us, in many cases, of the benefits of Trial by Jury"; "made Judges

dependent on his Will alone"; and "transport[ed] us beyond Seas to be tried for pretended offences."). This Court has recognized that commissions, which concentrate judicial functions into Executive hands in times of war when civil liberties are most imperiled, are fundamentally at odds with divided government and so must be used only out of great necessity. *Milligan*, 71 U.S. at 124 ("Martial law, established on such a basis [for military convenience], destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power.'").

Accordingly, "the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts," *Reid v. Covert*, 354 U.S. 1, 21 (1957). While *Reid* commanded a plurality, a majority soon extended it to noncapital crimes when "critical areas of occupation" were not involved. *Kinsella v. Singleton*, 361 U.S. 234, 244 (1960).

In order to guard against the unauthorized extension of the jurisdiction of military tribunals, this Court repeatedly reviews challenges to their jurisdiction and strikes down those that transgress statutory and constitutional limits. *See, e.g., Milligan*, 71 U.S. at 120-27 (commission may not try civilian charged with conspiracy and other violations when civilian courts remain open); *Duncan v. Kahanamoku*, 327 U.S. 304, 313, 324 (1946) (invalidating commission when civilian court able to function). Indeed, as the court of appeals acknowledged, *Quirin* provides "a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions." Pet. App. 3a.

C. Congress Must Authorize Military Commissions

The Constitution vests Congress with the power to create commissions and define their limits. Article II establishes the President's title as "Commander in Chief," but Article I, § 8 specifically grants Congress the power to "constitute Tribunals inferior to the supreme Court," "define and punish

…Offences against the Law of Nations," "declare War," "make Rules for the Government and Regulation of the land and naval Forces" and "disciplin[e] the Militia."

Citing this language, *Quirin* and *Yamashita* held that the authority to establish commissions rests with Congress:

> *Ex parte Quirin*…pointed out that Congress, in the exercise of the power conferred upon it by Article I, § 8, Cl. 10 of the Constitution to "define and punish… Offenses against the Law of Nations…," of which the law of war is a part, had by the Articles of War [ ] 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 7 (citation omitted); *see also Quirin*, 317 U.S. at 28-29; *Toth*, 350 U.S. at 14 ("this assertion of military authority over civilians cannot rest on the President's power as commander-in-chief"); Federalist No. 47, at 301 (Rossiter ed. 1961) (J. Madison); *Wiener v. United States*, 357 U.S. 349, 355 (1958); *Harisiades v. Shaughnessy,* 342 U.S. 580, 588 (1952).[1]

"There are powerful reasons for construing constitutional silence on [a] profoundly important issue as equivalent to an express prohibition." *Clinton v. New York*, 524 U.S. 417, 439 (1998). While the use of force requires unity and dispatch, the process of justice requires more than a military judiciary serving at the pleasure of the President. Here, the President exercises "legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of

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[1] *Milligan* split 5-4 on whether *Congress* could create commissions, *see* 71 U.S. at 136-37 (Chase, C.J.), but was unanimous that the President could not do so himself. *Id.* at 120 ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.")

governmental powers." *Reid*, 354 U.S. at 39 (plurality).

D. Congress Has Not Authorized Petitioner's Commission

The court of appeals held that Congress had authorized the commission in the AUMF and two long-standing UCMJ provisions, 10 U.S.C. 821, 836(a). *See* Pet. App. 5a-6a. None of these provisions authorize a commission; nor do they authorize the President to employ tribunals unfettered by tradition or the law of war. To whatever extent Congress *may* lawfully create commissions, none of the three statutes invoked by the President may be read to do so.

Sections 821 and 836(a). The court of appeals erred in holding that these provisions authorized this commission. At most, the provisions acknowledge that the President may, on occasion, be authorized to establish commissions, but *restrict* how the President may implement that authority.

10 U.S.C 821 makes clear that the UCMJ does not itself deprive an otherwise valid commission of its traditional jurisdiction. Unlike other contemporaneous provisions, such as 10 U.S.C. §§ 818, 904, 906, it does not confer any jurisdiction. Before § 821 is read to authorize a tribunal to mete out death sentences and life imprisonment, particularly one that lacks traditional constraints on executive authority and protections traditionally conferred upon the accused, a clear legislative statement is necessary.[2]

To the extent this provision can be read to sanction the

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[2] *See Amicus Br. of Richard Epstein et al.*, at 4-12.; *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) ("In traditionally sensitive areas…[a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.") (internal quotations and citation omitted); *Valentine v. Neidecker*, 299 U.S. 5, 9 (1936) ("the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law"); *Caldwell v. Parker*, 252 U.S. 376, 385 (1920)(requiring a "direct and clear expression of a purpose on the part of Congress…to bring about, as the mere result of a declaration of war…the extraordinary extension of military power….Certainly, it cannot be assumed that the mere existence of a state of war begot of necessity the military power asserted"); *Clinton*, 524 U.S. at 449 (Kennedy, J., concurring) (stating that the legislative and executive branches cannot informally "reallocate their own authority").

use of commissions, it necessarily limits that authority to the trial of "offenders or offenses that by statute or by the law of war may be tried by military commissions." 10 U.S.C. 821. That is precisely how this Court interpreted similar statutory language. *See Quirin*, 317 U.S. at 28-29; *Amicus Br. of the Brennan Center for Justice & William Eskridge*, at 15-23.

Nor is § 836(a) authority for the commission. It simply authorizes the President to issue regulations for the conduct of military trials. It does not authorize their establishment or define their jurisdiction. To the contrary, the provision specifically withholds from the President the power to define offenses triable by commissions, giving him instead only the authority to establish the "procedures" by which the offenses defined elsewhere may be tried. *Id.* And even then, the authorization is limited, precluding procedures "contrary to or inconsistent with this chapter." *Id.*

The AUMF. The AUMF authorizes 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, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." 115 Stat. 224. Determined not to provide the President "a blank check,"[3] Congress reserved from the President the full range of powers that accompany a Declaration of War.[4]

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[3] 147 Cong. Rec. H5655 (2001) (statement of Rep. Smith); *id.* at H5663 (AUMF "not a carte blanche for the use of force") (Rep. Schakowsky); S9949 ("It was not the intent of Congress to give the President unbridled authority…to wage war against terrorism") (Sen. Byrd); S9951 (similar) (Sen. Levin); H5654 (Rep. Smith); S9416 ("[W]ords in earlier drafts of this joint resolution, which might have been interpreted to grant a broader authority to use military force, were deleted") (Sen. Levin); S9417 (AUMF "does not give the President a blanket approval to take military action…It is not an open-ended authorization to use force in circumstances beyond those we face today.") (Sen. Kerry); H5671 (AUMF "not unlimited") (Rep. Udall); H5675 (AUMF "narrow") (Rep. Jackson); S9417 ("does not contain a broad grant of powers") (Sen. Feingold).

[4] 147 CONG. REC. H5638, H5680 (2001) ("By not declaring war, the resolution preserves our precious civil liberties"; "declarations of war

The object of the AUMF was to authorize military action.[5] It said nothing about criminal punishment. In *Quirin*, even the Declaration of War was not enough to authorize a commission; the Court relied instead on other statutes. *See supra* p. 12. If commissions qualify as a "use [of] force," then those words permit any action the President believes related to terrorism, however tangential. Indeed, the President has, in this case and elsewhere, claimed precisely such unlimited powers under his broad reading of the AUMF.

A plurality of this Court recently rejected the idea that "a state of war" can be "a blank check for the President," *Hamdi*, 542 U.S. at 536. It reached that conclusion in the far less onerous context of detention. *Id.* at 518 (citing sources for the proposition that "[c]aptivity in war is 'neither revenge, nor punishment'" and "'merely a temporary detention which is devoid of all penal character'"); *id.* (referring to "mere detention"); *id.* at 523 (stating that *Quirin* is "the most apposite precedent that we have on the question of whether citizens may be *detained* in such circumstances") (emphasis added). *But see id*. at 518 (describing history 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,' *Ex parte Quirin*, 317 U.S. at 28," but avoiding discussion of what body today must try unlawful combatants).[6] It is

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trigger broad statutes that…authorize the President to apprehend 'alien enemies.'") (Rep. Conyers); S9418 ("If this is indeed to be a war, then the President should seek a declaration of war.") (Sen. Feingold); H5646 ("We do not make a formal declaration of war today.") (Rep. Hoyer); H5662 (Rep. Davis); H5673 ("I would have strong reservations about a resolution authorizing the use of force in an open ended manner….This is not that resolution.") (Rep. Wu); H5653 ("We need a declaration of war" to "[g]ive the President the tools, the absolute flexibility he needs") (Rep. Barr).

[5] *See* 147 CONG. REC. H5646 (2001) ("[W]e authorize the President to use all necessary and appropriate military force") (Rep. Schiff); H5644 (Rep. Roukema); H5666 (Rep. Cardin); H5672 (Rep. Portman).

[6] Justice Thomas' dissent was carefully confined to detention, mentioning the term or its derivation at least forty-six times. *See Hamdi*, 542 U.S. at 578-98 (Thomas, J., dissenting). Justice Thomas found *punishment* to stand on entirely different footing, isolating *Milligan*: "More importantly, the Court referred frequently and pervasively to the criminal

wholly consistent with wartime precedent to interpret the AUMF as authority for one thing (detention) but not another (trial and punishment). "Congress in drafting laws may decide that the Nation may be 'at war' for one purpose and 'at peace' for another"; the "attitude of a free society toward the jurisdiction of military tribunals—our reluctance to give them authority to try people for nonmilitary offenses—has a long history." *Lee v. Madigan*, 358 U.S. 228, 230-32 (1959).

Even if "force" were stretched to mean something it does not, the AUMF only authorizes "necessary and appropriate" force. The government has not shown that resurrecting a tribunal eschewed in Korea and Vietnam (and which four years after the September 11 attacks has not even completed one trial) is somehow necessary or appropriate, let alone both. The *Hamdi* plurality held that "detention of individuals …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."[7] But the AUMF's language does not give the President unchecked authority to determine what is "necessary and appropriate."[8]

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nature of the proceedings instituted against Milligan…the punishment-nonpunishment distinction harmonizes all of the precedent." *Id.* at 593 (citations omitted). Commissions, in contrast, "implicate…the two primary objectives of criminal punishment: retribution or deterrence" and "affix culpability for prior criminal conduct." *Kansas v. Hendricks*, 521 U.S. 346, 361-62 (1997); *Hamdi*, 542 U.S. at 556-57 (Scalia, J., dissenting).

[7] 542 U.S. at 518. The decision looked to the GPW to provide guidance on what types of force were "necessary and appropriate." *Id.* at 521.

[8] The AUMF is narrower than previous congressional authorizations of force. Shortly after passage of the AUMF, Congress passed the Iraq Force Resolution, which authorized the President to "use the Armed Forces of the United States as *he determines* to be necessary and appropriate." 116 Stat. 1498 (2002) (emphasis added). *See also, e.g.*, 1 Stat. 95, 96 (1789 (first militia statute, authorizing President to use militia against Indians "as he may judge necessary"); 2 Stat. 130 (1802) (authorizing such use of "the armed vessels of the United States as may be judged requisite by the President" against Barbary pirates); 3 Stat. 471 (1811) (permitting President, in conflict with Spain, to "employ any part of the army and navy of the United States which he may deem necessary"); 78 Stat. 384 (1964) (Gulf of Tonkin Resolution stating that "Congress approves and supports the determination of the President...to take all necessary measures to repel any armed attack").

The Court has never considered an expansion of military jurisdiction that displaces traditional tribunals to be a "necessary" aspect of military operations. *Reid* rejected a similar argument by *both* the President and Congress regarding the Constitution's "Necessary and Proper" Clause, calling it a "latitudinarian interpretation…at war with the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority." 354 U.S. at 30; *Amicus Br. of General Brahms et al.*

Finally, assuming that "force" includes military tribunals, the AUMF only permits action necessary "to prevent" terrorism. Compare Br. Opp. at 22 (commission serves retributivist purpose). In light of Respondents' separate claim of power to detain Hamdan indefinitely as an enemy combatant, the burden can only be met if his trial serves general deterrence.[9] Terrorists fear being killed by our Armed Forces and intelligence community. If they cannot deter a terrorist, it is far-fetched to think that a prosecution of Hamdan at Guantanamo five years after his supposed crime would do so. Nor is it credible to suggest that a commission is "necessary" to "prevent" terrorism. After all, if Hamdan's prosecution promotes deterrence, it can take place in an Article III court or a court-martial. Both are authorized, available, and could have taken place years ago.

It is the Court's "duty 'to give effect, if possible, to every clause and word of a statute.'" *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (citation omitted). Congress passed a resolution circumscribed in scope, purpose, and effect; its words do not authorize commissions. This Court has never

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[9] The AUMF does not appear to contemplate general deterrence. Congress adopted the AUMF in lieu of a proposed White House Resolution that would have given the President the power "to deter and pre-empt any future acts of terrorism." 147 CONG. REC. S9951 (2001). Congress instead used the circumscribed "prevent" instead of broader "deter" language. Otherwise, the President could order assassinations of foreign leaders and a "little old lady in Switzerland," *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (2005), tangentially connected to terrorism. Furthermore, there is no evidence that legislators thought commissions "necessary and appropriate." If anything, they expressed a desire to use civilian trials. *E.g.*, 147 CONG. REC. H5680 (Rep. Conyers).

found that the laws of war supplant open civil and military courts when only "force" was authorized. Nor have other Presidents claimed as much. Here, the conflict in which the commission has been convened (the so called "war on terror") is not even tethered to a specific nation-state, location, or time period. Even if a limited authorization for military action such as the AUMF is sufficient to authorize a traditional commission to try traditional war crimes, that is not at all what the President has undertaken in this case.

E. This Court Should Enforce the Jurisdictional Limits of Military Commissions

Even if this Court were to conclude that the President possesses some inherent authority to convene military commissions, or that Congress has implicitly authorized their use, that authority must be strictly confined to safeguard liberty and our constitutional division of authority between the executive, legislative, and judicial branches. This Court has thus long construed authorizations for commissions to allow the President at most to employ them in accordance with their traditional use.

Accordingly, *Duncan* refused to read the "Organic Act," establishing the territorial Hawaiian government, to permit military courts to supplant civilian ones in World War II:

> [The Founders rejected placing] in the hands of one man the power to make, interpret and enforce the laws….We believe that when Congress passed the Hawaiian Organic Act and authorized the establishment of "martial law" it had in mind and did not wish to exceed the boundaries between military and civilian power…which had become part of our political philosophy and institutions prior to the time Congress passed the Organic Act. The phrase "martial law" as employed in that act, therefore,…was not intended to authorize the supplanting of courts by military tribunals.

327 U.S. at 322, 324. Although Hawaii was "under fire" and a "battle field," *id.* at 344 (Burton, J., dissenting), the Court embraced *Milligan*'s strict confinement of military tribunals, just four years after *Quirin.*

To hold otherwise would pose grave risks to liberty and the careful balance of legislative, executive and judicial power established under our Constitutional system:

> With the known hostility of the American People to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect.

Coleman v. Tennessee, 97 U.S. 509, 514 (1878); *see also Sterling v. Constantin*, 287 U.S. 378, 401 (1932) ("[T]he allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."); *Lincoln v. United States*, 197 U.S. 419, 427-28 (1905) (Holmes, J.) (rejecting claim that the "President's order" to tax goods "was a lawful exercise of the war power" because the statute "was not a power in blank for any military occasion").

F. Petitioner's Commission, By Ignoring Statutory and Common Law Constraints, Exceeds Any Possible Authorization Provided By Congress

The commissions created by the President fail to provide essential protections long afforded under the law of war and mandated in the UCMJ and Geneva Conventions.

1. *The Commission Violates Specific Statutory Restrictions*

Evading the procedures used in courts-martial has never been an acceptable rationale justifying the use of military commissions. The court of appeals radically extended this Court's jurisprudence by permitting wide-ranging procedural deviations once the Executive labels his tribunal a "commission." That has never been the law.

a. Commissions from the days of General Scott, *supra*, have applied court-martial procedure. General Order 1 in the Civil War likewise required them to "be constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial *in order to prevent abuses which might otherwise arise*." WAR OF THE REBELLION, *supra*, at 248 (emphasis added). Even with these safeguards, *Milligan* found commissions impermissible.[10]

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[10] Historical practice, legal commentary, and military regulations all

10 U.S.C. 836(a) codifies the longstanding requirement of consistency between commissions and courts-martial; it precludes the President from employing procedures in commissions that are "contrary to or inconsistent with" the UCMJ. It states that if Hamdan is merely "triable" in a court-martial, the UCMJ cannot be set aside. A commission that circumvents the procedural requirements of the UCMJ "exceeds the President's authority." *United States v. Douglas*, 1 M.J. 354, 356 (C.M.A. 1976). Because Hamdan's commission concededly does not conform to the procedures applied in courts-martial, it is unlawful. *See Amicus Br. of Military Law Historians; Amicus Br. of National Institute for Military Justice.*

10 U.S.C. 821 confirms this conclusion. Its drafter, General Crowder, stated it "just saves to these war courts…a concurrent jurisdiction with courts-martial…Both classes of courts have the same procedure." S. Rep. 64-130, at 40-41. Congress' use of the term "concurrent" jurisdiction *limits* commissions. The Court has held, for example, that the Tucker Act's grant of "concurrent jurisdiction" to district

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confirm that commissions follow court-martial rules. *E.g.*, WINTHROP, *supra*, at 841-42 ("[A]s a general rule and as the only quite safe and satisfactory course for the rendering of justice to both parties, a military commission will--like a court-martial--…ordinarily and properly be governed, upon all important questions, by the established rules and principles of law and evidence."); ROLLIN IVES, TREATISE ON MILITARY LAW 284 (1879) ("The forms of procedure…are the same as before courts-martial."); Manual for Courts Martial, prmbl. Pt. 2(b)(2) (2000) ("military commissions…shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial.").

For instance, JAG review invalidated a commission under Article of War 65. The Article prohibited the convening officer to charge, but its text only referenced courts-martial. 4 Stat. 417 (1830). Nevertheless, the Judge Advocate General agreed that the Article had been violated and disapproved the proceedings. Joseph Holt to Gen. John Pope (Nov. 3, 1863), *quoted in* Chomsky, *The United States-Dakota War Trials*, 43 STAN. L. REV. 13, 43 (1990). *See also* Mem., Procedural Law Applied by Military Commissions (National Archives, Legal Division Gen. D. MacArthur) ("If the conduct of military commissions in the past is to be a guide, the same rules for procedure and rules of evidence governing General Courts Martial would prevail."), *quoted in* Evan Wallach, *Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?*, 2003 ARMY LAW. 18, 31 n.118.

courts limits those courts.[11] Otherwise, litigants would "forum-sho[p]." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). Just as rule parity prevents litigants from forum-shopping their Tucker Act claims, parity here prevents the "abuses which might otherwise arise." Civil War Order 1, *supra*.

b. The commission's procedures are avowedly "contrary to or inconsistent with" the procedural protections afforded by the UCMJ and by historical practice. 10 U.S.C. 836(a). For example, the proceedings can "exclude the Accused." Mil. Order No. 1 § 6(B)(3). As the district court concluded, this rule, which has already been used to bar Hamdan's presence, is fatally inconsistent with 10 U.S.C. 839(b).[12] Pet. App. 47a. That provision protects the fundamental rights to be present throughout trial and to confront witnesses. Under § 839(b), except for voting and deliberation, "[a]ll other proceedings…shall be in the presence of the accused." *See United States v. Dean*, 13 M.J. 676, 678 (A.F.C.M.R. 1982) ("The accused must be present at all stages of his trial");

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[11] *United States v. Sherwood*, 312 U.S. 584, 591 (1941) (the Act "did no more than authorize the District Court to sit as a court of claims"); *Bates Mfg. Co. v. United States*, 303 U.S. 567, 571 (1938); *United States v. Jones*, 131 U.S. 1, 19 (1889) ("We cannot yield to the suggestion that any broader jurisdiction as to subject matter is given to the Circuit and District Courts than that which is given to the Court of Claims. It is clearly the same jurisdiction-'concurrent jurisdiction' only."); *DeCecco v. United States*, 485 F.2d 372, 374 (1st Cir. 1973); *Warren v. United States,* 94 F.2d 597 (2d Cir. 1938) (because claims court could not hear suits for treaty violations, neither could district court); *Hans v. Louisiana*, 134 U.S. 1, 18 (1890) ("concurrent jurisdiction" in federal question statute shows Congress "did not intend to invest its courts with any new and strange jurisdictions").

[12] Several commission procedures are contrary to the UCMJ on their face. Commission rules do not permit independent review, contrary to §§ 867 and 867a. The final decision lies with the President. Mil. Order No. 1 § 6(H)(6). Similarly, § 6(D)(1), permitting admission of evidence so long as it has "probative value to a reasonable person," conflicts with §836(a), which requires the rules of evidence generally to conform to those in the District Courts. The commission rule permits, for example, testimony obtained by torture. *See Amicus Br. of Human Rights First*.

The panel also relied on *Madsen,* but the UCMJ took effect after Madsen's trial. 343 U.S. at 345 n.6. And Madsen did not challenge commission procedures. *Id.* at 342. Strikingly, her commission guaranteed her "the rights … [t]o be present" and "cross-examine any witness." *Id*. at 358 n.24.

United States v. Daulton, 45 M.J. 212, 219 (C.M.A. 1996) (witness testimony). In fact, JAG review in the Civil War led to the dismissal of a commission for violation of this right. See *infra* p. 24; *Amicus Br. of American Jewish Congress et al.*[13]

Apart from § 839, the common law (which binds military commissions) requires the accused to be present. *See Diaz v. United States*, 223 U.S. 442, 455 (1912) ("[O]ur courts, with substantial accord, have regarded [the right to be present] as extending to every stage of the trial…*and as being scarcely less important to the accused than the right of trial itself.*") (emphasis added); *Lewis v. United States*, 146 U.S. 370, 372, 375 (1892) (right of presence at *voir dire* is of "peculiar sacredness" required by "the dictates of humanity"); *Dean*, 13 M.J. at 678; *Daulton*, 45 M.J. at 219. Customary international law also guarantees an accused the right to be "tried in his presence." Prot. I, Geneva Conventions relating to Protection of Int'l Armed Conflict, art. 75(4)(e) (1977) (Protocol I).

Similarly, this Court has held that "a criminal trial is not just unless one can confront his accusers." *Coy v. Iowa*, 487 U.S. 1012, 1018 n.2 (1988). Although the right to confront witnesses is reflected in the Sixth Amendment, it has a genesis in natural law and has been recognized as essential in military courts and international law. *Crawford v. Washington*, 541 U.S. 36, 49 (2004) ("'It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.'") (quoting *State v. Webb*, 2 N.C. 103 (1794)); *Mattox v. United States*, 156 U.S. 237, 243 (1895); *Daulton*, 45 M.J. at 219; Protocol I, art. 75(4)(g) (guaranteeing accused's right "to examine, or have examined, the witnesses against him"). Our Government, in fact, took the position during World War II that conducting a commission without the participation of the accused was a punishable violation of

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[13] After Hamdan filed his Certiorari Petition, the Government made some semantic changes to commission procedures. Pet. Br. App. 46a, 59a. Yet both old and new rules permit Hamdan's exclusion if "protected"—a category far broader than "classified"—information is considered. *Compare* 32 C.F.R. § 9.6(b), *with* § 6(D)(5)(b). The Government offers no authority to suggest that its new iteration of rules is consistent with the UCMJ.

the laws of war. Wallach, *supra*, at 45-47.

In the face of this precedent, the Government has offered no authority that permits a commission to be convened without rights of presence and confrontation. Nor have they offered anything to suggest that Congress has authorized a commission whose own procedures violate the laws of war.

c. Yet the panel below held that the President is free to dispense with virtually the entire UCMJ except in the rare instances where the words "military commission" explicitly appear. Pet. App. 15a. This holding reads out of existence the express language of § 836(a) and yields absurd results. Only three procedural rules in the UCMJ mention "military commissions": § 828 (requiring a court reporter); § 849(d) (permitting deposition testimony), and § 850(a) (permitting admission of prior sworn statements). The remaining places where the words appear are jurisdictional or refer to non-procedural rules. *See, e.g.*, §§ 821, 847-48, 904, 906. The panel concluded that Congress deliberately placed constraints through § 836(a), but limited those constraints to court reporters, depositions and affidavits.[14] The UCMJ's text and stated purpose belie such a notion, for it "covers both the substantive and the procedural law governing military justice," S. Rep. No. 81-486, at 1 (1949) ("Purpose of the Bill").

In effect, the panel replaced the UCMJ with the old Articles of War from *Yamashita*. Article 2 of those Articles did not extend procedural protections to persons facing commissions. *Yamashita*, 327 U.S. at 19-20. But as the district court held, the UCMJ supplanted *Yamashita*. Over the Army JAG's objection, it broadened Article 2 to include both "prisoners of war" and "persons within an area leased by or otherwise reserved or acquired for the use of the United

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[14] It would be highly peculiar for Congress to choose to regulate depositions and court reporters if it was Congress' intent to leave commissions otherwise deregulated. In the face of the clear language of § 836(a), the far more plausible explanation is that Congress' omission of the words "military commissions" from certain procedural rules in the UCMJ reflected the historical understanding of symmetry in procedure.

Indeed, the UCMJ fails to mention "courts-martial" in numerous sections, yet it is clear that those provisions nonetheless apply. *See, e.g.*, §§ 807, 813, 830. For example, 10 U.S.C. 855 forbids a court-martial from punishing through "flogging" or "branding."

States." § 802(a)(9), (10), (12); Pet. App. 42a-43a; Statement of Gen. Green, Sen. Armed Serv. Comm., May 9, 1949, at 266.

d. The President's commission also flouts other statutory commands. To take two examples, 10 U.S.C. 3037(c) provides:

> The Judge Advocate General…shall receive, revise, and have recorded the proceedings of courts of inquiry and military commissions.

"The Judge Advocate General adds integrity to the system of military justice by serving as a reviewing authority." LOUIS FISHER, MILITARY TRIBUNALS AND PRESIDENTIAL POWER 124 (2005). In the Civil War, JAG review led to invalidation of many commissions, including for denial of the right to be present.[15] Hamdan *has already been denied* this basic right. Pet. App. 45a. But the Military Order cuts the presidentially appointed and Senate-confirmed JAG out entirely.

Moreover, Congress has prohibited having non-citizens subject "to different punishments, pains, or penalties, on account of such person being an alien." 18 U.S.C. 242. This statute forbids "being subjected to different punishments, pains or penalties by reason of alienage…than are prescribed for the punishment of citizens." *United States v. Classic*, 313 U.S. 299, 326 (1941). No past commission, including *Quirin* itself, excluded citizens by design.[16]

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> [Judge Advocate General Holt] repeatedly overturned the decisions of trials by military commission (as well as courts-martial) for what can only be called legal technicalities...Holt reviewed the sentence of Mary Clemmens…[stating]: "Further, it is stated that the Commission was duly sworn—but does not add 'in the presence of the accused.' Nor does the Record show that the accused had any opportunity of challenge afforded her. These are particulars, in which it has always been held that the proceedings of a Military Commission should be assimilated to those of a Court Martial. And as these defects would be fatal in the latter case, they must be held to be so in the present instance."

MARK NEELY, THE FATE OF LIBERTY 162-63 (1991) (quoting Holt's opinion).

16 A separate statute, 42 U.S.C. 1981, contains a similar ban. Yet the Military Order funnels non-citizens, and only non-citizens, through this separate and unequal system. This discrimination explains why Congress cannot easily reverse the panel, and highlights the role of this Court. "[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply

2. Petitioner Is Not An Offender Triable By Commission

As discussed in Part II, *infra*, because Petitioner was captured on the battlefields of Afghanistan and claims POW protection, the law of war requires that he be afforded the protections provided to an American servicemember. Because Congress has not authorized the President to employ commissions that contravene the law of war, this commission lacks jurisdiction to try Petitioner.

This case is thus unlike *Quirin,* where the saboteurs (who shed their uniforms and admitted arriving with explosives) did not contest their unlawful combatant status. *See* 317 U.S. at 46 (commission appropriate "upon the conceded facts"); *Ex parte Endo*, 323 U.S. 283, 302 (1944) (detention not authorized "in case of those whose loyalty was not conceded or established"). But, as here, "where those jurisdictional facts are *not* conceded—where the petitioner insists that he is *not* a belligerent—*Quirin* left the pre-existing law in place." *Hamdi*, 542 U.S. at 571-72 (Scalia, J., dissenting).

This case is far closer to that pre-existing law of *Milligan* than it is to *Quirin*. Respondents call Milligan a "civilian," but the Government told the Court then that he was an unlawful belligerent who "conspired with and armed others."[17] Respondents' attempt to downplay *Milligan* is also

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legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Ry. Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

These difficulties are exacerbated because judicial decisions that transfer unintended powers to the President, like the opinion below, are difficult to correct when no trials have concluded and a bicameral supermajority is required. *See* U.S. Const., art. I § 7, cl. 2 (veto override); White House, Statement of Policy, July 21, 2005 (stating that the AUMF provides all the authority the President needs and recommending veto of a bill governing detention and trial of enemy combatants).

[17] Lambdin Milligan was charged with: 1. 'Conspiracy against the Government of the United States;' 2. 'Affording aid and comfort to rebels against the authority of the United States;' 3. 'Inciting insurrection;' 4. 'Disloyal practices;' and 5. 'Violation of the laws of war.' 71 U.S. at 6. The Government claimed that "These crimes of the petitioner were committed within…a State which had been and was then threatened with invasion, having arsenals which the petitioner plotted to seize…where … the

undermined by post-*Quirin* reliance on it in *Duncan,* 327 U.S. at 322, and *Reid*, 354 U.S. at 30 (plurality) (*Milligan* remains "one of the great landmarks in this Court's history").

Finally, this commission takes place outside of occupied territory or a zone of war, deviations from practice that Congress would not have anticipated and that this Court has not approved. *Milligan,* 71 U.S. at 127 ("confined to the locality of actual war."). Geographic limitations on jurisdiction ensure that commissions are used out of necessity, not to avoid procedural protections.[18] *Reid*, for

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petitioner conspired with and armed others." *Id.* at 17 (reprinting United States' argument) (emphasis added). *See also id.* at 130 (majority op.); *id.* at 132 (Chase, C.J., concurring); *Hamdi*, 542 U.S. at 566 (Scalia, J., dissenting).

The assertions in Hamdan's charge, by contrast, fail even to allege that he committed a crime during war. Conspicuously absent is any statement of when the supposed violation occurred. For a commission to have jurisdiction, it must be established that the crime was committed in a war.

Unlike Mr. Milligan, Petitioner has not even been charged with, let alone convicted of, conspiring to seize arsenals and release POWs. Even still, *Milligan* unanimously read Congress's silence to constitute lack of authorization. *See Milligan*, 71 U.S. at 122 ("Why was he not delivered to the Circuit Court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it; because Congress had declared penalties against the offences charged, provided for their punishment, and directed that court to hear and determine them.").

Furthermore, the charges in *Quirin* were statutorily authorized to be tried by commission. Charges 2 and 3 were violations of Articles of War 81 and 82, now codified as 10 U.S.C. 904 and 906, which explicitly authorized commission trial. In discussing the first, law of war, charge, the Court looked to Article 82. 317 U.S. at 41. And that first charge may have been pendant to charges 2 and 3. In fact, the government's formal specifications of the first charge tracked the statutory language of Articles 81 and 82. Katyal & Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1282-83 (2002). *Madsen* also observed that in *Quirin*, the "conviction of saboteurs…was upheld on charges of violating the law of war *as defined by statute*." 343 U.S. at 355 n.22 (emphasis added).

[18] *See* EDGAR DUDLEY, MILITARY LAW 313 (3d ed. 1910) (commissions only in battle zones); *Eisentrager,* 339 U.S. at 780 (the "grave grounds for challenging military jurisdiction" in *Quirin* included that the trial was not "in a zone of active military operations"); *Madsen*, 343 U.S. at 348 (limiting holding to "territory occupied by Armed Forces"); *Caldwell*, 252 U.S. at 387 (the phrase "'except in time of war,'" doubtfully does anything "more than to recognize the right of the military authorities, in time of war, within the areas affected by military operations or…where civil authority was either totally suspended or obstructed, to deal with the crimes

example, forbade military trial of dependents outside of conquered territory, in spite of Article 15 and treaties authorizing them. The Court would not indulge "[t]he concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient" because it would "destroy the benefit of a written Constitution and undermine the basis of our Government." 354 U.S. at 14. *Madsen* was "not controlling" because it "concerned trials in enemy territory which had been conquered and held by force of arms," *id.* at 35 n.63. The government argued that "present threats to peace" and "world tension" justified expanding the "battlefront" concept. *Id*. Yet the "exigencies which have required military rule on the battlefront are not present in areas where no conflict exists," *id*.

Respondents have had many opportunities to provide facts showing that Hamdan resembles the *Quirin* saboteurs. At every turn, including in their Return, they have failed. Their recitation of "facts" to show jurisdiction, many for the first time upon appellate review, is too little, too late. To permit the President, on his say-so, to place anyone before this *ad hoc* commission is to countenance an unprecedented expansion of Executive authority.

G. The Commission Lacks Jurisdiction Because Petitioner Has Not Been Charged With An Offense Triable By Commission Under the Law of War

Although Congress has authorized the President to promulgate *procedures* for trials within the jurisdiction of

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specified--a doubt which…would demonstrate…the entire absence of jurisdiction in the military tribunals."); *Reid*, 354 U.S. at 40 ("Throughout history many transgressions by the military have been called 'slight' and have been justified as 'reasonable' in light of the 'uniqueness' of the times," but "[w]e should not break faith with this nation's tradition of keeping military power subservient to civilian authority").

In *Quirin*, Attorney General Biddle stressed that the Eastern seaboard "was declared to be under the control of the Army." Pet. Br. App. 93a. The Court agreed. 317 U.S. at 22 n.1. *See also Yamashita*, 327 U.S. at 66 n.31; U.S. Br., *Yamashita*, at 42 ("Our army recaptured the Philippines by force of arms and has 'occupied' these Islands since within the meaning of the Regulations" governing the Trials of War Criminals).

commissions, 10 U.S.C. 836(a), it withheld the power to define the offenses subject to such trial. Rather, 10 U.S.C. 821 ordains that, at most, the jurisdiction of commissions would be defined by the law of war. This jurisdictional limitation is the defining feature of military tribunals and the most important protection against the threat to liberty and our constitutional separation of powers posed by the existence of military trials. *Milligan*, 71 U.S. at 127.

Quirin recognized that a court must examine if "it is within the constitutional power of the National Government to place petitioners upon trial before a military commission for the offenses with which they are charged." 317 U.S. at 29. The Court "*must therefore first inquire* whether any of the acts charged is an offense against the law of war cognizable before a military tribunal." *Id.* (emphasis added). The sole charge in this case, conspiracy, is not such an offense.

The charge fails to state a violation of the law of war for two reasons: 1) "conspiracy" is not an offense recognized by the laws of war; and 2) while acts of stateless terrorism are justifiably subject to severe punishment under civilian criminal law, they do not constitute war crimes falling within the jurisdiction of a military commission.

1. Conspiracy Is Not a Violation of the Laws of War

Neither the 1907 Hague Convention Respecting the Laws and Customs of War on Land, nor the Geneva Conventions of 1929 or 1949, make any mention of conspiracy as an offense against the law of war.[19] The failure of the 1949

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[19] In construing "longstanding law-of-war principles" in *Hamdi*, 542 U.S. at 521, the plurality relied primarily on provisions from the Hague and Geneva Conventions. *See also* Int'l Comm. of Red Cross, *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* 471 (Pictet ed. 1960) ("ICRC Commentary") ("In actual fact, since the codification of 1949, there are no customary rules which are not included in either the Hague Conventions or in the new [1949 Geneva] Conventions. The points for which no provision is made are precisely those on which there is a lack of agreement.") In this context, the GPW's judicial enforceability is irrelevant. It codifies customary laws of war which bind the commission: "the customary rules become fully applicable in the case of a prisoner whose country of origin, or the Power on which he depends, is not a party to the international instruments governing the laws of war." *Id*.

Geneva Conventions to identify conspiracy is particularly significant, since those treaties require signatories to punish so-called "grave breaches" of the Conventions by criminal prosecutions. *See, e.g.*, GPW, art. 129. To fulfill this obligation, Congress passed the War Crimes Act of 1996 and the Expanded War Crimes Act of 1997, codified at 18 U.S.C. 2441. The Acts define a "war crime" as any "grave breach" of the Geneva Conventions, or violation of select provisions of the 1907 Hague Convention or the Landmine Protocol.

Thus, Congress no longer relies on the "common law of war" to define war crimes (as it did in World War II); it now has "crystalliz[ed]," *Quirin*, 317 U.S. at 30, and occupied the field with legislation identifying such crimes. Reflecting the universal disregard of conspiracy in international law, conspiracy is not on that large congressional list of offenses.

Likewise, the statutes and treaties establishing the major tribunals punishing war crimes in Rwanda and Yugoslavia, as well as the International Criminal Court, do not regard conspiracy as a war crime. The absence of conspiracy as a stand-alone crime is deliberate—conspiracy is seen as an abusive tool of prosecutors and rejected throughout the world. *See Amicus Br. of Specialists in Conspiracy*, at 6-18, 21-25. Customary international law evidences the same refusal. The Nuremburg judges, for example, ruled that there was no offense of conspiracy to commit war crimes or crimes against humanity. They rejected broad language in the London Charter suggesting such offenses.[20] And conspiracy

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[20] The court confined conspiracy to crimes against peace (aggressive war), and only against very high-level German officials who were directly involved in specific acts of aggression. "The International Military Tribunal ultimately interpreted the [conspiracy] concept very narrowly, and adopted a construction of the Charter under which conspiracies to commit 'war crimes' or 'crimes against humanity' were ruled entirely outside the jurisdiction of the Tribunal." Telford Taylor, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials 70 (1949). As Assistant Attorney General Herbert Wechsler, head of the Criminal Division, stated, "it is an error to designate as conspiracy the crime itself, the more so since the common-law conception of the criminality of an unexecuted plan is not universally accepted in civilized law." *See The American Road to Nuremburg*, 84, 87 (Dec. 29, 1944 Mem.) (Smith ed. 1982).

doctrines have never been thought appropriate for war crimes charges against low-level offenders such as Hamdan.

In short, there is no stand-alone war crime of conspiracy that permits Petitioner's trial.[21] Accordingly, the commission lacks jurisdiction because Hamdan has not been charged with an offense that a commission may try.

2. The Law of War Does Not Subject Offenses From the "War on Terror" to Trial by Military Commission

As Petitioner's charge demonstrates, the President is attempting to use commissions as an alternative forum for the trial of criminal charges that historically have been tried in civilian courts. But if the Nation has lost confidence in the ability of its judicial system to adjudicate such claims, and has determined to shift the responsibility for the definition of offenses (and their trial and punishment) to the military, that decision must be made by Congress, not the President, and it must also be made with unmistakable clarity. No such decision is evident in the UCMJ or AUMF.

In using these commissions in the "war on terror," the President has expanded not only their traditionally limited jurisdiction, but also his own powers, both to "define and punish…Offenses against the Law of Nations" (a power vested in Congress in Art. I, § 8) and to adjudicate offenses (the province of the judiciary). The court of appeals ratified this maneuver, permitting the President to sweep aside not only the civilian, but also military, justice systems in circumstances untethered to armed conflict as traditionally understood. In *Hamdi,* for example, the Court could apply the laws of war to limit Executive detention because the

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[21] Indeed, Respondents' "definition" of conspiracy is woefully lacking. For example, it eliminates the most important element of conspiracy: agreement. Under Mil. Comm. Instr. No. 2, § 6(C)(6)(a)(1), a defendant need only "join[] an enterprise of persons who shar[e] a common criminal purpose." Furthermore, even under broad domestic standards, conspiracy is a specific intent crime. *See Clark v. La. State Penitentiary*, 694 F.2d 75 (5th Cir. 1982). Yet Hamdan's charge does not allege specific intent.

Domestic criminal law recognizes an offense of conspiracy because of its strong checks on prosecutorial and judicial abuse–indictment by a grand jury, jury trial, confrontation, access to exculpatory evidence, and so on. These procedural rights are preconditions before conspiracy is available.

conflict in Afghanistan is recognizable as a war.

The "war on terror"—which the Executive claims is a "separate conflict" under which Hamdan's commission is convened—is potentially unlimited in scope, duration, and all other criteria which traditionally separate a state of war from a state of peace. Thus, allowing any offense that could be associated with the "war on terror" to be tried by commission would permit thousands of civilian court prosecutions for terrorism to be transferred to commissions. Indeed, nothing prevents the President from extending his Military Order to American citizens. The careful jurisprudence and procedures of Article III courts, and those of courts-martial, would all be sacrificed for presidential flexibility. *See* Danny Hakim, *After Convictions, the Undoing of a U.S. Terror Prosecution*, N.Y. Times, Oct. 7, 2004, at A1 (describing Article III checks on prosecutorial abuse, particularly withholding exculpatory information, in terrorism cases). This case is the litmus test for such authority.

Quirin, decided in the context of a traditional war with conceded enemy belligerents, provides no precedent for such sweeping Executive authority. It even assumed "there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury." 317 U.S. at 29.

One way in which this Court has confined commissions is by insisting on a Declared War or closure of civilian courts. In this case, Congress has not issued a Declaration against al Qaeda, nor has it in any other way expressed its intent to authorize and extend the laws of war to punishment in that conflict through commissions. "To apply the laws of armed conflict and thereby displace domestic and international criminal and human rights law below that threshold would be to do violence to human rights and civil liberties that protect us all." Official Statement (Rona), ICRC, *http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList488/3C2914F52152E565C1256E60005C84C0* (2004).

In every instance in which this Court has approved a

commission, Congress had explicitly declared war against a nation-state. In *Quirin*, for example, the Declaration prominently figured: "The Constitution thus invests the President as Commander in Chief with the power to wage war which Congress has declared," 317 U.S. at 26.[22] The power was directly traced to the declared war, *id*. at 26-28, in the same way that the same Court, six years later, relied on the Declaration to invoke the Alien Enemy Act of 1798, *Ludecke v. Watkins,* 335 U.S. 160 (1948). Similarly, *Yamashita* permitted commissions "so long as a state of war exists–*from* its *declaration* until peace is proclaimed." 327 U.S. at 11-12 (emphasis added); *see also Madsen*, 343 U.S. at 346 n.9 (authorization from Declare War power); *Eisentrager*, 339 U.S. at 775 ("whenever a 'declared war' exists."). A Declaration puts government officials and defendants on notice that ordinary civilian processes must give way.[23]

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[22] *E.g.,* 317 U.S. at 21 ("After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school"); *id.* at 26. Moreover, the meaning of Article 15 changed when the UCMJ was codified. Congress deleted the words "in time of war" from another provision, Article of War 78, to make clear that *that* provision, evidently in contrast to such others as Article 15, permitted a court-martial to impose death for trespass in circumstances "amounting to a state of belligerency, but where a formal state of war does not exist." H.R. 2498 Hrg. H. Cmte. Armed Serv., 81st Cong. 1229 (1949).

It is not only the power inherent to Declarations, but their specific language, that authorizes commissions. In World War II, Congress stated:

> [T]he state of war between the United States and the Government of Germany…is hereby formally declared; and the President is hereby authorized and directed to employ the *entire* naval and military forces of the United States *and* the *resources of the Government to carry on war* against the Government of Germany; and, to bring the conflict to a successful termination, *all of the resources of the country* are hereby pledged by the Congress.

Jt. Res. Dec. 11, 1941, 55 Stat. 796, 796 (emphasis added); EDWIN CORWIN, TOTAL WAR AND THE CONSTITUTION 120 (1947). Other Declarations were similar. Jt. Res. Dec. 8, 1941, 55 Stat. 795 (Japan); Jt. Res. Dec. 7, 1917, 40 Stat. 429 (Austria-Hungary); Jt. Res. Apr. 6, 1917, 40 Stat. 1 (Germany).

[23] *See Youngstown*, 343 U.S. at 634 (Jackson, J., concurring); *id.* at 613 (Frankfurter, J., concurring); *N.Y. Times v. U.S.* 403 U.S. 713, 722 (1971) ("[T]he war power stems from a declaration of war") (Douglas, J., concurring); WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 218 (2000);

The laws of war also govern other extreme circumstances where war is not declared but the conflict ends civilian law. *The Prize Cases*, 67 U.S. 635, 667 (1863) (using "common law" test of whether war exists by examining if "the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open"); *id.* at 682 (finding war had not begun and returning seized property). *Milligan* followed that test, 71 U.S. at 120, even though the Government told the Court that Lambdin Milligan was an unlawful combatant who "plotted to seize" arsenals and "conspired with and armed others." *Id.* at 17.[24]

At the very most, Congress has authorized commissions to enforce the laws of war. But Hamdan's commission has not been constituted to try crimes from the Afghan conflict. *Compare* Pet. App. 12a, 18a, *with Hamdi*, 542 U.S. at 521 (the

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Leslie Gelb & Anne-Marie Slaughter, *Declare War*, ATLANTIC MONTHLY, Nov. 2005 (founders insisted on a declaration of war because it maximizes "political accountability"); J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402 (1992) (formal declaration of war needed).

Our courts have strictly policed military jurisdiction by insisting on declared war. In cases involving soldiers, who are always within military jurisdiction, courts are permissive. *E.g.*, *United States v. Bancroft*, 3 U.S.C.M.A. 3 (1953). But when such jurisdiction is contested, as it is here, courts consistently require a Declaration. *United States v. Averette*, 19 U.S.C.M.A. 363, 365 (1970) (finding that Vietnam conflict was not a time of war because general usage does "not serve as a shortcut for a formal declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction"); *Cole v. Laird*, 468 F.2d 829, 831 n.2 (5th Cir. 1972) (civilians are subject to court-martial in "a formally-declared, global war"); *Robb v. United States*, 456 F.2d 768, 771 (Ct. Cl. 1972) ("the phrase 'in time of war'…refers to a state of war formally declared by Congress despite the fact that the conflict in Vietnam is a war in the popular sense of the word"); *Willenbring v. Neurauter*, 48 M.J. 152, 157 (C.A.A.F. 1998).

[24] Even for seizure of wagons and mules during the Mexican-American War, the Court required that "danger must be immediate and impending; or the necessity urgent." *Mitchell v. Harmony*, 54 U.S. 115, 134 (1851). *See also Lee*, 358 U.S. at 233 ("The views of Blackstone on military jurisdiction became deeply imbedded in our thinking: 'The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land.'"); *Duncan*, 327 U.S. at 326 (Murphy, J., concurring); *id.* at 335-37 (Stone, C.J., concurring).

"United States may detain, for the *duration of these* hostilities, individuals legitimately determined to be *Taliban* combatants 'who engaged in an armed conflict against the United States'") (plurality) (emphasis added). This case presents the question *Hamdi* left open, that "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel." *Id.*; *see also id.* at 551-52 (Souter, J., concurring in part).

Whether Hamdan's commission is authorized is not answered by the World War II cases either, since those operated in a traditional war between nation-states. That conflict was obviously governed by the laws of war, and the defendants fell within commission jurisdiction as enemy aliens.[25] Al Qaeda, however, is not a nation-state, and an accused's enemy status cannot be determined by citizenship. With a declaration of war, the laws of war apply in full; otherwise, they apply only where Congress has authorized their extension.[26] Even staunch defenders of Executive power concede that the Declare War Clause's "primary function was to trigger the international laws of war".[27]

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[25] *E.g., Eisentrager*, 339 U.S. at 772 ("[i]n war, the subjects of each country were enemies to each other") (citation omitted). *Quirin* found that notwithstanding Haupt's U.S. citizenship, his joining of the German military made him an enemy under the "Hague Convention and the laws of war." 317 U.S. at 38. Haupt's relatives were tried by civilian courts because they had not joined the German military and were not "enemies."

[26] *See Bas v. Tingy*, 4 U.S. 37, 43 (1800) (Chase, J.) ("Congress is empowered to declare a general war, or Congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the jus belli, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws."); *id.* at 40 (Washington, J.) (similar); *Talbot v. Seeman*, 5 U.S. 1, 28 (1801) ("congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.") (Marshall, C.J.); *Brown v. United States*, 12 U.S. 110, 129 (1814) (rejecting Presidential authority to confiscate enemy property without explicit statute during declared war); *Little v. Barreme*, 6 U.S. 170 (1804) (same reasoning applied to the taking of ships on the high seas).

[27] John Yoo, *The Continuation of Politics by Other Means: The Original*

The panel somehow reached the conclusion that Hamdan could be tried for a violation of the laws of war, even though it also found that the conflict with al Qaeda was not governed by the canonical statement of the laws of war—the GPW. But if the laws of war do not apply, there is nothing to charge. As Colin Powell warned, a finding that the Geneva Conventions do not apply "undermines the President's Military Order by removing an important legal basis for trying the detainees before Military Commissions." Sec. of State Mem., Jan. 2002, at *http://msnbc.msn.com/id/4999363*. In other words, if the GPW does not apply, then the laws of war do not apply; if the laws of war do not apply, then a commission has no jurisdiction. The panel took the untenable view that Petitioner lacks rights under treaties and statutes, but is subject to their penalties. *See Milligan*, 71 U.S. at 131 ("If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?").

If the UCMJ were stretched to give the President the sole discretion to decide when the laws of war applied and when they did not, it would become an unconstitutional delegation. *See Clinton*, 524 U.S. at 449-53 (Kennedy, J., concurring); *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 545 (1981) (Rehnquist, J., dissenting); *Cal. Bankers v. Schultz*, 416 U.S. 21, 91-93 (1974) (Brennan, J., dissenting); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry v. United States*, 295 U.S. 495 (1935). Such an interpretation would give the President the ability to set up tribunals at will, define

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Understanding of War Powers, 84 CAL. L. REV. 167, 242-43 (1996) (citations omitted). *See also id*. at 245 (Declaration notifies citizens and enemies); *id.* at 248 (distinguishing between partial and complete war); Eugene Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 850 (1972) ("the term 'declare war' in the Constitution referred to the…sharp distinction between the law of war and the law of peace"); *id.* at 834-35, 856 (same); Eugene Rostow, *Once More Unto the Breach: The War Powers Resolution Revisited*, 21 VAL. L. REV. 1, 6 (1986) ("All international uses of force are not 'war' in the legal sense of the word, however bloody and extended the conflicts may be…A 'declaration of war' transforms the relationship between the belligerents"); *id.* at 51 (*Milligan* and *Covert* are among "the finest justifications of our claim to be a nation under law").

offenses as war crimes, and try cases before military judges that serve at his pleasure. Katyal & Tribe, *supra*, at 1290.

For this commission to be lawful, Respondents must show that the laws of war permit *this* offender and *this* charge in *this* conflict to be tried in a commission with *these* procedures. *Quirin* does not provide an adequate precedent, for the Court stated it had "no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals" and "hold[s] only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission." 317 U.S. at 45-46. Even with those limits, *Quirin* has been severely criticized. *Hamdi*, 542 U.S. at 572 n.4 (Scalia, J., dissenting) ("the *Quirin* Court propounded a mistaken understanding of *Milligan*"); *id.* at 592 (Thomas, J., dissenting); *Amicus Br.* of Quirin *Historians*. It is not a stable foundation for a dramatic expansion of Executive power that will become a permanent fixture in our law.

In the end, even if the "war on terror" is truly a war in which commissions can prosecute war criminals, the laws of war define their jurisdiction. Hamdan's commission falls well outside these parameters. The laws of war do not permit the charge, courts-martial and civilian courts are open, and the tribunal flouts court-martial rules and the laws of war themselves. Such a commission cannot be tolerated in a Republic such as ours, dedicated to the rule of law and the division of power, rather than its concentration in Executive hands.

II. PETITIONER'S COMMISSION VIOLATES THE THIRD GENEVA CONVENTION

Article 5 of the GPW requires a hearing to determine POW status "[s]hould any doubt arise." Until a "competent tribunal" decides otherwise, those captured "shall enjoy" its protections." *Id.* Hamdan was apprehended in a theater of military operations and asserts a right to GPW protection. JA 56-58. It is undisputed that no such Article 5 hearing has occurred. Thus, as the district court correctly concluded, Hamdan is entitled to presumptive POW status. One right

POWs hold is the Article 102 right to be tried by "the same courts, according to the same procedure as in the case of members of the armed forces of the Detaining Power." As such, even if Hamdan's commission is otherwise consistent with federal law, the Geneva Conventions bar his trial.

The district court's invalidation of the commission on this ground precisely tracks the views of our military. In 1951, the Manual for Courts Martial was revised because GPW ratification "will alter to a material extent the procedures heretofore applied by military commissions." Pet. Br. App. 34a. Under GPW Articles 85 and 102, "unless we are willing to try our own personnel who commit war crimes by military commission under a more summary procedure than that provided for courts-martial and under civil law rules of evidence—we will have to try enemy prisoners of war accused of war crimes under the same procedure as that prescribed for courts-martial." *Id.* Respondents have no authority to depart from this longstanding rule, which was designed to outlaw a spoils system of victor's justice.

A. The GPW Is Enforceable Without Its Self-Execution

The court of appeals did not reject Hamdan's GPW claim on the merits, but rather because the "Convention does not confer upon Hamdan a right to enforce its provisions in court." Pet. App. 10a. That conclusion is in error.

As an initial matter, the court of appeals was wrong in concluding that the rights to which petitioner lays claim are embodied solely in the GPW. To the contrary, the United States has implemented its obligations under the GPW by statute[28] and regulation,[29] both of which are subject to

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[28] *See* National Defense Authorization Act, § 1091(b)(4), Pub. L. No. 108-375, 118 Stat. 1811, 2069 (2004) ("It is the policy of the United States to …ensure that, in a case in which there is doubt as to whether a detainee is entitled to prisoner of war status under the Geneva Conventions, such detainee receives the protections accorded to prisoners of war until the detainee's status is determined by a competent tribunal."); *id.* § 1092(a) (directing Secretary of Defense to implement procedures to ensure that detainees are treated "in a humane manner consistent with the international obligations and laws of the United States and the policies set forth in section 1091(b)"); *id.* § 1092(b)(3) (requiring "[p]roviding all

enforcement through a mandamus or habeas corpus petition. *Miguel v. McCarl*, 291 U.S. 442, 451 (1934) ("[W]here the proper construction of a statute is clear, the duty of an officer called upon to act under it is ministerial in its nature and may be compelled by mandamus"); 28 U.S.C. 2241(c).[30]

Second, the GPW is part of the law of war and limits the jurisdiction of commissions, see 10 U.S.C. 821, a limitation

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detainees with information, in their own language, of the applicable protections afforded under the Geneva Conventions").

[29] *See* AR 190-8 § 1-5(a)(2) ("All persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is determined by competent legal authority."); *id.* § 1-6 ("A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status…who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists"); *id.* § 3-7 ("Judicial proceedings against [POWs] will be by courts-martial or by civil courts. When [POWs] are tried by courts-martial, pretrial, trial, and post-trial procedures will be according to the UCMJ and the U.S. Manual for Courts-Martial. [POWs] will not be tried by a civil court for committing an offense unless a member of the U.S. Armed Forces would be so tried.").

These regulations have long been included in military manuals, further evidencing GPW implementation. *See, e.g.,* Army Field Manual (FM) 27-10, *The Law of Land Warfare*, ch. 3 §I ¶71 (1956) ("[Article 5] applies to any person not appearing to be entitled to prisoner-of-war status…who asserts that he is entitled to treatment as a prisoner of war"); Judge Advocate General's School, *Operational Law Handbook* 22 (2003) ("regardless of the nature of the conflict, all enemy personnel should initially be accorded the protections of the GPW Convention").

[30] AR 190-8, as "authorized War Department regulations[,] have the force of law." *Standard Oil Co. v. Johnson*, 316 U.S. 481, 484 (1942). *See also Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959) ("[T]he Secretary…was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged petitioner summarily"); *Service v. Dulles*, 354 U.S. 363, 388-89 (1957) (same); *Paul v. United States*, 371 U.S. 245, 255 (1963) (same); *Nixon v. Sec'y of the Navy*, 422 F.2d 934, 937 (2d Cir. 1970) ("[t]he Navy is bound by its own validly promulgated regulations, and the district courts [on mandamus] are free to entertain suits by servicemen requesting compliance with such rules"); *United States v. Heffner*, 420 F.2d 809, 811 (4th Cir. 1969); *Hammond v. Lenfest*, 398 F.2d 705, 715 (2d Cir. 1968) ("a validly promulgated regulation binds the government [even when] the government action is essentially discretionary in nature.").

this Court has repeatedly enforced.[31] Thus, for example, in *Quirin*, this Court carefully considered the petitioners' status to discern whether they were, in fact, unlawful belligerents triable by commission. 317 U.S. at 36-37. The Government has acknowledged that the laws of war now include the GPW. (JA 207-8). As explained above, under GPW Article 102, Hamdan is not an "offender" triable by commission because a member of the U.S. armed forces is not subject to commission trial. Likewise, as explained above, "conspiracy" is not an "offense" recognized by the laws of war and thus is not triable in a commission.

Respondents' reliance on § 821 runs against the long-standing canon that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see also MacLeod v. United States*, 229 U.S. 416, 427 (1913) (interpreting a presidential order during Spanish-American War so that it is "consistent with the principles of international law"); *Cross v. Harrison*, 57 U.S. 164, 190 (1853) (adopting "the law of arms"); *Prize Cases*, 67 U.S. at 665 (addressing whether the President had "a right to institute a blockade…on the principles of international law"); *Brown*, 12 U.S. at 125-28; *id.* at 153 (Story, J., dissenting) ("when the legislative authority...has declared war in its most unlimited manner, the executive… cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or

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[31] *Quirin* interpreted the predecessor of § 821 to "incorporat[e] the law of war." 317 U.S. at 38. So, too, *Yamashita* found that the predecessor statute adopted rules "further defined and supplemented by the Hague Convention," 327 U.S. at 8. *See also* H. Armed Servs. Comm. Hrng., 81st Cong., at 959 (1949) ("'Law of war' is set out in various treaties like the Geneva convention and supplements to that.") (Col. Dinsmore).

10 U.S.C. 821 was enacted under Congress' Article I "define and punish" power. To read that Clause to permit tribunals whose procedures violate international law is contrary to its purpose. *See* Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 36 (1952). "[T]o pretend to define the law of nations which depend[] on the authority of all the Civilized Nations of the World[] would have a look of arrogance that would make us ridiculous." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 615 (Farrand ed. 1911) (James Wilson).

authorize proceedings which the civilized world repudiates and disclaims."); *Amicus Br. of Urban Morgan Institute* at 3-14. The *Hamdi* plurality followed this tradition by interpreting the AUMF in light of "longstanding law-of-war principles," including the GPW. 542 U.S. at 519-21.[32]

Third, Congress has specifically authorized courts to determine whether Petitioner's detention is "in violation of the Constitution or laws *or treaties* of the United States." 28 U.S.C. 2241(c)(3) (emphasis added). In accordance with that language, this Court has repeatedly entertained habeas corpus actions to enforce treaty-based rights.[33]

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[32] Moreover, under the last-in-time rule, when a treaty is subsequent to congressional action, the treaty controls. *Reid*, 354 U.S. at 18 n.34 (plurality). *Cook v. United States*, 288 U.S. 102, 119 (1933), found that a 1924 treaty trumped a 1922 statute, even though Congress reenacted the statute in 1930. Statutes enacted after a treaty do not trump the treaty without a clear statement. *Id.* at 120. Therefore, the Geneva Conventions, ratified in 1955, control this case and overcome any contrary implication from § 821.

[33] *Factor v. Laubenheimer*, 290 U.S. 276 (1933); *Mali v. Keeper of the Common Jail*, 120 U.S. 1, 17 (1887) ("we see no reason why [petitioner] may not enforce his rights under the treaty by writ of *habeas corpus* in any proper court of the United States"); *United States v. Rauscher*, 119 U.S. 407 (1886); *Chew Heong v. United States*, 112 U.S. 536, 560 (1884) (granting relief to habeas petitioner to re-enter the United States as established by treaty); *Medellin v. Dretke*, 125 S. Ct. 2088, 2104 (2005) (O'Connor, J., dissenting) ("This Court has repeatedly enforced treaty-based rights of individual foreigners, allowing them to assert claims arising from various treaties. These treaties…do not share any special magic words. Their rights-conferring language is arguably no clearer than the Vienna Convention's is, and they do not specify judicial enforcement.") (citing cases).

For example, *Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003), enforced a treaty based on implementing regulations. It did so despite the statute's language that "nothing in this section shall be construed as providing any court jurisdiction to consider or review claims under the Convention or this section." *Id.* at 140 (quoting 8 U.S.C. 1252). Such language "does not speak with sufficient clarity to exclude [treaty] claims from §2241 jurisdiction"; to conclude otherwise would raise constitutional concerns under *St. Cyr*. "'[A]t the absolute minimum, the Suspension Clause protects the writ as it existed in 1789.'" *Id.* at 143 (citation omitted). Other courts have reached the same conclusion. *St. Fort v. Ashcroft*, 329 F.3d 191, 202 (1st Cir. 2003); *Singh v. Ashcroft*, 351 F.3d 435, 441 (9th Cir. 2003).

Moreover, one theory holds that "a treaty that is ratified but not self-executing need not be implemented in order for a party to have a habeas

Likewise, treaty rights have long been enforced through petitions for mandamus. For example, *Jordan v. Tashiro*, 278 U.S. 123, 128-30 (1928), permitted such a petition to protect Japanese nationals' rights under a 1911 treaty. The Court articulated a fundamental canon of treaty interpretation: "where a treaty fairly admits of two constructions, one restricting the rights that may be claimed under it and the other enlarging them, the more liberal construction is to be preferred." *Id.* at 127. Notably, the Court went on to state: "The principle of liberal construction of treaties would be nullified if a grant of enumerated privileges were held not to include the use of the usual methods and instrumentalities of their exercise." *Id.* at 130. Of course, the "usual methods and instrumentalities" for enforcing rights include lawsuits. So long as the GPW is in effect in domestic law (and there is no dispute that it is), and so long as the GPW protects individual rights (and the Government admits that it does), then it is judicially enforceable, and Hamdan can rely on the habeas statute or common-law mandamus to supply the form of action. *See Rasul*, 542 U.S. at 483; *Factor*, 290 U.S. at 286; *Chew Heong*, 112 U.S. at 560; *Jordan*, 278 U.S. at 128-30.

The panel's decision in this case "amounts to the assertion that no federal court has the authority to determine whether the Third Geneva Convention has been violated, or, if it has, to grant relief from the violation." Pet. App. 34a. The Court should reject that claim, which strips the judiciary of its time-honored role as enforcer of treaty-based rights.

B. The GPW Provisions Are Directly Enforceable

Hamdan's rights are separately enforceable under the Supremacy Clause because the GPW is self-executing. A treaty is self-executing when "no domestic legislation is required to give the Convention the force of law in the United States." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). Treaties that "by their terms confer rights upon individual citizens," *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976), are generally self-

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cause of action under that treaty." *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 218 n.22 (3d Cir. 2003).

executing, unless a contrary intention is manifest. RESTATEMENT (THIRD) OF FOREIGN REL. LAW § 111 Rptr.'s n.5 (1987) ("RESTATEMENT").

"To ascertain whether [a provision] confers a right on individuals, we first look to the treaty's text as we would with a statute's." *Medellin v. Dretke*, 125 S. Ct. 2088, 2103 (2005) (O'Connor, J., dissenting); *id.* (stating that under *Foster v. Neilson*, 27 U.S. 253 (1829), "[b]ecause the [Vienna] Convention is self-executing,…its guarantees are susceptible to judicial enforcement just as the provisions of a statute would be."). The GPW's text plainly confers individual rights; it does not merely regulate relations among states. Nothing in the relevant GPW provisions (particularly Arts. 3, 5, and 102) calls for legislation. Congress knew "that very little in the way of new legislative enactments will be required to give effect to the provisions." Ratifying Report, *supra*, at 30. The Committee identified only four areas where additional legislation would be required, none at issue here. *Id.* at 30-31. Of course, "[s]ome provisions of an international agreement may be self-executing and others non-self-executing." RESTATEMENT, § 111 cmt. h; Pet. App. 36a.

The Government no longer contends that the GPW is not self-executing. Instead, it argues that the GPW does not contemplate judicial enforcement. The Court of Appeals accepted this argument by selectively quoting an 1884 case. Pet. App. 7a (quoting *Head Money Cases*, 112 U.S. 580, 598 (1884)). But the panel ignored language in the same opinion explaining when treaty provisions *are* judicially enforceable:

> But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country…. A treaty, then, is a law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision

> for the case before it as it would to a statute.

112 U.S. at 598-99. Indeed, this Court has repeatedly enforced treaty rights for two centuries without stopping to inquire whether a "private right of action" was created.[34]

In this case, the panel admitted that the GPW protects individual rights. Pet. App. 10a. However, it concluded that *dicta* in a footnote of *Eisentrager*, 339 U.S. at 789 n.14, about the 1929 Geneva Convention bound its decision. The panel's use of that footnote was gravely flawed. First, *Eisentrager* concerned jurisdiction, and that holding has been superseded by *Rasul*. The footnote merely reflected the Court's consideration of whether, apart from the habeas statute, the 1929 treaty provided a basis for jurisdiction.

Second, the GPW drafters thought the 1929 treaty failed to adequately protect POWs and wrote a completely different instrument. See *supra* p.2. A major innovation of the GPW is Article 5, which creates a presumption in favor of protection and the right to a status determination—an Article that was completely absent from the 1929 treaty:

> This amendment was based on the view that decisions which might have the gravest consequences should not be made by a single person…. *The matter should be taken to a court*...

ICRC Commentary, *supra*, at 77 (emphasis added). Article 5 thus illustrates that the GPW did not rely entirely on diplomatic enforcement. *See also id.* at 90-91 ("It was not until the Conventions of 1949…that the existence of 'rights'

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[34] *See, Amicus Br. of Louis Henkin et al.* (*Henkin Br.*); *Kolovrat v. Oregon*, 366 U.S. 187 (1961) (treaty-based rights of non-resident aliens enforced to prevent state action in taking of property); *Jordan, supra*; *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (affirming injunctive relief against ordinance that violated a treaty; "[the treaty] operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts."); *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833) (land grants confirmed by treaty are judicially enforceable); *Owings v. Norwood's Lessee*, 9 U.S. 344, 348 (1809) ("Whenever a right grows out of, or is protected by, a treaty…whoever may have this right, it is to be protected"); *United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801) ("[W]here a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of congress.").

conferred on prisoners of war was affirmed."); *id.* at 23 ("the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests."); Geoffrey Best, *War and Law Since 1945*, at 80-114 (1994).

Eisentrager itself reflects the weakness of the 1929 Convention. It held that no rights were at issue in the case because the 1929 treaty did *not* "appl[y] to a trial for war crimes." 339 U.S. at 790. The GPW specifically *reversed* that interpretation, which originated in *Yamashita*, 327 U.S. at 22. *See* GPW art. 85; ICRC Commentary, *supra,* at 413.

Finally, the fact that the GPW prescribes a role for neutrals or "Protecting Powers" in disputes does not remotely support the inference that diplomacy was intended as the *only* method of enforcement. Rather, its very first Article requires signatories to do all within their power "to respect and to ensure respect for the present Convention in all circumstances." Art. 1. *See* ICRC Commentary, at 17-18 ("it is not merely an engagement concluded on a basis of reciprocity" but "a series of unilateral engagements"; "it is for the Government to supervise the execution of the orders it gives" and "must of necessity prepare…the legal, material or other means of ensuring the faithful enforcement").

In this country, the mechanism for "ensur[ing] respect" for treaty rights includes the independent judiciary. Indeed, the GPW drafters understood that enforcement would be promoted by a combination of factors, including

> pressure of public opinion, pressure by Powers party to the Convention but not involved in the conflict, the fear of the members of the Government in power of being subsequently disavowed or even punished, and *court decisions*….The individual is considered in his own right. The State is not the only subject of law….

Id. at 86 (emphasis added).

Finally, the presence of diplomatic enforcement provisions has not precluded judicial enforcement. For example, in *Chew Heong*, the Court granted habeas corpus to protect a Chinese national's treaty rights, even though the treaty provided for diplomatic remedies and not for judicial enforcement. 112 U.S. at 542, 549-56. *See also Shanks v. Dupont*, 28 U.S. 242 (1830); *Louis Henkin Br., supra*, at 24-28.

C. The Geneva Conventions Protect Petitioner

The court of appeals concluded that Hamdan was chargeable under the law of war but not protected by it. The propositions are backwards. The laws of war do not apply in the allegedly separate "war on terror" in which Hamdan's commission has been convened, but they do protect those *captured* in the conflict in *Afghanistan*, including Hamdan. GPW Article 2 provides, in pertinent part:

> [T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties….The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party.

Afghanistan and the United States are High Parties. Yet Respondents claim that Hamdan is not protected because the "war against terror" is a separate conflict. This position ignores the undisputed facts of Hamdan's capture, is inconsistent with Article 2, and departs from American practice.

First, even if absolute deference is shown to the Executive with respect to its distinction between the Taliban and al Qaeda, and even if al Qaeda fighters are not protected by the GPW, Hamdan *denies* he is a member of al Qaeda. The Government cannot rely on an unproven allegation to deny Hamdan GPW protections pending an Article 5 hearing. This is the clear import not only of the Article, but also of federal statutes and regulations, *supra* pp. 37-41.[35]

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[35] "Doubt" triggering the Article 5 presumption of POW status arises from Hamdan's denial of al Qaeda membership, the circumstances surrounding his capture *(i.e.*, seizure by a local militia and delivery to U.S. forces in exchange for a bounty), and the sufficient but not necessary assertion of protected status under the GPW. *E.g.*, J.A. 49-54, 57; Jan McGirk, *Pakistani Writes of His US Ordeal*, Boston Globe, Nov. 17, 2002, at A30 ("Pakistani intelligence sources said Northern Alliance commanders could receive $5000 for each Taliban prisoner and 20,000 for a Qaeda fighter. As a result, bounty hunters rounded up any men who came near the battlegrounds and forced them to confess"). In addition, Hamdan has strong claims to protection under GPW Art. 4A(4) and 4A(1). *See Amicus Br. of Ryan Goodman, Derek Jinks & Anne-Marie Slaughter* at 6-16 (*Goodman/Jinks/Slaughter Br.*).

Second, it is undisputed that Hamdan was captured in a conflict that meets the conditions of Article 2. The alleged "separate conflicts" against al Qaeda and the Taliban were fought on the same territory, at the same time, with the same forces, under the same congressional resolution.[36] As the State Department Legal Advisor explained:

> [The suggestion that there is] a distinction between our conflict with al Qaeda and our conflict with the Taliban does not conform to the structure of the Conventions. The Conventions call for a decision whether they apply to the conflict in Afghanistan. If they do, their provisions are applicable to all persons involved in that conflict – al Qaeda, Taliban, Northern Alliance, U.S. troops, civilians, etc. If the Conventions do not apply to the conflict, no one involved in it will enjoy the benefit of their protection as a matter of law.

William Taft IV Memorandum, Legal Advisor, State Dep't ¶3 (2/2/02), at *http://www.fas.org/sgp/othergov /taft.pdf*.

This is consistent with the practice of the U.S. military in every major conflict since World War II. For example, in Vietnam, with its high incidence of irregular warfare, the military accorded POW status to both regular North Vietnamese Army and Viet Cong fighters. Even guerillas were given Article 5 hearings.[37] There was no gap.

A negative Article 5 finding would merely protect Hamdan under similar rights in the Fourth Convention. "Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention…*There is no* intermediate status; nobody in enemy hands can be outside the law." ICRC Commentary, *IV Geneva Convention Relative to the Protection of Civilian Persons* 50-51 (1960) (emphasis added).

[36] Respondent Rumsfeld stated that "the Taliban… were tied tightly at the waist to al Qaeda. They behaved like them, they worked with them, they functioned with them," at *http://www.defenselink.mil/news/Jan2002/ t01282002_ t0127sd2.html*.

[37] 60 DOCUMENTS ON PRISONERS OF WAR 722-31, 748-51 (Levie ed. 1979). Irregular fighters were given POW status unless caught in an act of "terrorism, sabotage or spying," and if denied POW status, they were given protections of the Fourth Geneva Convention. Elsea, Cong. Rsch. Serv., *Treatment of "Battlefield Detainees" in the War on Terrorism* 29 (2002).

Accordingly, under GPW Article 102, those committing offenses in the Afghan conflict may be tried by courts-martial for war crimes, not by commissions.

Third, the panel's deference to the President's determination that Hamdan was captured in a separate conflict is unwarranted. *See Amicus Br. of Retired Generals and Admirals*. The panel relied on *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221 (1986), but that case *rejected* a contention that the political question doctrine barred judicial resolution of an issue affecting foreign policy: "[T]he courts have the authority to construe treaties and executive agreements." *Id.* at 230. While the Executive's interpretation is "of weight," it is settled that "the construction of a treaty by the political department of the government" is "not conclusive upon courts called upon to construe it." *Factor*, 290 U.S. at 295. This Court has declined to adopt Executive interpretations many times. *See, e.g., Perkins v. Elg*, 307 U.S. 325, 335-42 (1939); *Johnson v. Browne*, 205 U.S. 309, 319-21 (1907); *De Lima v. Bidwell*, 182 U.S. 1, 181, 194 (1901).

In short, Respondents' contention that no individual assessment of Hamdan's status is required, and that he can be denied POW status by presidential fiat, is irreconcilable with text of Article 5, defeats its purpose, and departs from past American practice. This undermines "respect for the present Convention" (GPW art. 1) and compromises our ability to insist on GPW observance when American personnel fall into enemy hands. The Court should reject that position, and consistent with longstanding tradition, adopt the treaty interpretation that faithfully enforces the protections the United States has promised to others and expects for its own forces. *Factor*, 290 U.S. at 293.[38]

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[38] The panel also reached the extraordinary conclusion that Hamdan could raise his POW status claim in his commission. Pet. App. 16a. This acknowledges that "doubt" concerning Hamdan's status exists, and such doubt precludes a commission trial in the first place. It would condone an unprecedented procedural laxity, including a 4-year delay, in implementing a solemn treaty obligation. The commission also does not meet AR 190-8, and his status determination cannot take place in a tribunal trying him for war crimes. Finally, even if the commission could serve as an Article 5 tribunal, it has not been convened to do so. Instead,

D. Common Article 3 Protects Hamdan

The commission is also invalid because it violates GPW Article 3, which prohibits "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" in "the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." Pet. App. 12a. This provision sets forth the "most fundamental requirements of the law of war." *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995). Additional Protocol I, *supra*, which binds the United States as customary international law, separately requires a "regularly constituted court."

Even if Hamdan does not qualify as a POW under GPW Article 4, he is nonetheless protected by these provisions. The commission clearly does not comply with them because it is not a "regularly constituted court." As the ICRC's definitive recent work explains, a "court is regularly constituted if it has been established and organised in accordance with the laws and procedures already in force in a country." INT'L CTE. RED CROSS, 1 CUSTOMARY INT'L HUMANITARIAN LAW 355 (2005). The "court must be able to perform its functions independently of any other branch of the government, especially the executive." *Id.* at 356.

Instead, the commission is an *ad hoc* tribunal fatally compromised by command influence, lack of independence and impartiality, and lack of competence to adjudicate the complex issues of domestic and international law. Pet. 28; Pet. App. 96a-102a. The rules for trial change arbitrarily—and even changed after the Petition for Certiorari was filed. It is not regularly constituted; its defects cannot be cured without a complete structural overhaul and fixed rules. *See, Amicus Br. of Madeleine Albright et al.* at 4-19.

Commission procedures also fail to provide adequate "judicial guarantees" in many ways, including admitting

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the Executive contends that it has no obligation to provide a status determination and claims no court has the authority to say otherwise.

evidence extracted under duress and denying the fundamental rights of confrontation and presence. These flaws are not theoretical; they have already had practical consequence, as Hamdan's exclusion from *voir dire* reveals.

The divided panel nonetheless held that Article 3 does not apply because the conflict against al Qaeda is "international," and Article 3 only applies to internal conflicts. Even were that true, Article 3 extends to all conflicts as a matter of customary international law. And as Judge Williams recognized: "the logical reading of 'international character' is one that matches the basic derivation of the word 'international,' i.e., *between nations*." Pet. App. 17a. *Kadic* and other cases establish that Article 3 binds *all* conflicts, and *all* parties, as a minimum standard of conduct. *E.g.*, *Prosecutor v. Delalic*, Judgement, IT-96-21-A ¶143 (ICTY App. 2001) (Common Article 3 principles "are so fundamental that they are regarded as governing both internal and international conflicts"); *Nicaragua v. United States*, 1986 I.C.J. 14, 114 (Article 3 is "a minimum yardstick" for international conflict); *Goodman/Jinks/Slaughter Br.* at 17-27; *Amicus Br. of City Bar of New York*.

As an alternative holding, the panel found abstention appropriate on Common Article 3. But abstention on this claim is improper for the same reasons the panel gave in rejecting abstention earlier in its opinion. The panel approved of the *Quirin* defendants' pre-conviction challenge to the tribunal's lawfulness and jurisdiction. The animating concerns of *Councilman* abstention "do not exist in Hamdan's case and we are thus left with nothing to detract from *Quirin*'s precedential value." Pet. App. 3a.

For reasons developed already in this Court, this is not a typical abstention case because the lawfulness of the tribunal is at stake. Cert. Reply Br., at 1-6; C.A. Br. 25-30. If the commission is not a "regularly constituted court" under Common Article 3, it is not authorized under Section 821. The commission is not a regular trial applying regular procedures, like courts martial or Article III trials. Rather, it lacks speedy trial rights and Hamdan can languish for many years (indeed, forever) before a final decision is rendered. C.A. Br. 10-13. The commission lacks competence, expertise,

and impartiality. *Id.* at 13-20. And because, unlike courts-martial, the President makes the final decision in Hamdan's case, abstention is futile; the President has already stated his views on the questions presented. *Id.*

Unlike other settings, the abstention question here is integrally bound up with the merits. *See Amicus Br. of Arthur Miller*. On every other issue in this case, Respondents claim court-martial rules are irrelevant; yet here they seek to reap its favorable benefits such as *Councilman* abstention.

As the panel recognized, there are rights at the periphery of Common Article 3 that may necessitate trial before federal review. Pet. App. 13a. But the simple matters of whether the commission is a "regularly constituted court," and can deny fundamental rights (including the right to be present, trial by an impartial body, and trial without risk of testimony obtained by torture) are surely not among them. A commission that does not comply with such rules violates the laws of war and is improperly constituted. Waiting for a trial accomplishes nothing, except to put Petitioner in a state of limbo as to trial strategy and his fate that may persist for years. *See Amicus Br. of Prof. Richard Rosen et al*. at 6-24. Again, in contrast to all other American criminal processes, there is no incentive whatsoever to reach final decision under this scheme. In this rare setting, abstention does more harm to the rule of law than does reaching the merits.

* * *

This Court has long understood that, in all of American law, there is "no graver question" than the fundamental one presented here. *Milligan*, 71 U.S. (4 Wall.) at 118. Given the myriad ways in which Hamdan's trial would run afoul of constitutional, statutory, and treaty-based rights, Petitioner's entitlement to the modest relief sought is manifest.

CONCLUSION

The Court of Appeals' judgment should be reversed and Hamdan's Petition should be granted.

Respectfully submitted,

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