

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

SALIM AHMED HAMDAN,
Petitioner-Appellee,

v.

DONALD H. RUMSFELD, U.S. SECRETARY OF DEFENSE, ET AL.,
Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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REPLY BRIEF FOR APPELLANTS

SUMMARY OF ARGUMENT

The order under review in this case represents an unprecedented interference with the President's exercise of his constitutional authority as Commander in Chief to defend the United States. The district court erred by declining to abstain until the military commission's proceedings could be concluded, rejecting the President's reasonable interpretation of a treaty, overruling the President's determination concerning the application of a treaty to

al Qaeda, misreading provisions of the Uniform Code of Military Justice (UCMJ), and disregarding the President's inherent authority to establish military commissions to punish enemy combatants who violate the laws of war.

Hamdan fails to address the many flaws in the district court's reasoning. He provides no sound explanation why proceedings before a military commission — unlike all other military proceedings — should be immune from abstention rules. On the merits, he fails to overcome the extensive historical record demonstrating the President's authority to use military commissions to punish enemies who violate the laws of war. His claim that the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention) and the UCMJ have substantially diminished that authority lacks merit. The Geneva Convention is not judicially enforceable (in the sense of being privately enforceable by captured fighters), and, even if it were, neither it nor the UCMJ would call into doubt the jurisdiction or procedures of the commission established by the President.

ARGUMENT

I. THE DISTRICT COURT ERRED IN REFUSING TO ABSTAIN.

A. Hamdan's primary argument (Br. 25-30) — that abstention is unwarranted where the defendant challenges the "jurisdiction" of the tribunal — has been decisively rejected. "In *Councilman*, the Supreme Court made clear

that military courts are capable of, and indeed may have superior expertise in, considering challenges to their jurisdiction over disciplinary proceedings.” *New v. Cohen*, 129 F.3d 639, 645 (D.C. Cir. 1997) (citing *Schlesinger v. Councilman*, 420 U.S. 738, 760 (1975)).

Hamdan claims (Br. 26-27) that he is similarly situated to the spouses of servicemen in *Reid v. Covert*, 354 U.S. 1 (1957), and the ex-serviceman in *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955). In those cases, however, *as this Court has held*, it was “undisputed that the persons subject to the court-martials either never had been, or no longer were, in the military,” and thus were outside the authority of the military altogether. *New*, 129 F.3d at 644. That is self-evidently not the situation here. Hamdan is an enemy combatant, subject to continued military detention, who is to be tried for a war crime based on the charge that he is an al Qaeda conspirator who served as bin Laden’s trusted bodyguard and personal driver, received weapons training, and delivered weapons. JA 191-193. As the Supreme Court explained in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), “the power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others *charged* with violating the laws of war” is “well-established.” *Id.* at 786 (emphasis added) (internal quotation marks omitted). *See*

32 C.F.R. 9.3 (predicating commission's jurisdiction on President's determination of eligibility for commission trial and Charge).

The civilians in *Toth* and *Reid* were different from Hamdan in another crucial respect: they asserted a constitutional liberty interest enjoyed by citizens, but not aliens abroad. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1990) (“Since respondent is not a United States citizen, he can derive no comfort from the *Reid* holding.”); *Eisentrager*, 339 U.S. at 785 (“the Constitution does not confer [constitutional rights] upon an alien enemy engaged in the hostile service of a government at war with the United States”); see also *32 County Sovereignty Comm. v. Dep’t of State*, 292 F.3d 797, 799 (D.C. Cir. 2002); *People’s Mojahedin Org. of Iran v. Dep’t of State*, 182 F.3d 17, 22 (D.C. Cir. 1999). These holdings stand unaffected by *Rasul v. Bush*, 124 S. Ct. 2686 (2004), where the Court held as a *statutory* matter that Congress granted federal district courts authority to entertain habeas petitions filed by non-resident aliens detained at Guantanamo Bay, but did not address whether those aliens were entitled to substantive *constitutional* protections. *Id.* at 2692-2699. *Rasul*’s cryptic footnote 15 cannot be read, as Hamdan claims, to overrule *Eisentrager* or *Verdugo* on that issue, which was not before the Court. In light of the Court’s repeated and recent invocation of *Eisentrager*’s constitutional holding, see *Verdugo*, 494 U.S. at 273-

274; *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), it is inconceivable that the Court would jettison that understanding in a single oblique footnote.

If these differences were not enough, the jurisdictional challenge that the *Reid* and *Toth* defendants pressed was entirely independent of the veracity of the charges leveled against them. Here, by contrast, Hamdan's basic "jurisdictional" challenge is dependent on a showing that the allegations in the Charge are untrue, namely, that he did not knowingly participate in al Qaeda's war against the United States. *See* JA 52. That claim is clearly an issue for the military commission in the first instance. *See Yamashita v. Styer*, 327 U.S. 1, 17 (1946). Likewise, his procedural claims under the UCMJ, the Geneva Convention, and/or customary international law, JA 56-60, to which he ascribes jurisdictional status, can be raised before the commission and, if the commission rejects his arguments and he is not acquitted, can be raised on review in the military system, and are thus properly subject to abstention.

B. Hamdan also argues (Br. 9-16) that military commission proceedings are not entitled to abstention because they are not authorized by Congress. But the military commission was established by the President pursuant to the same authority the Court found sufficient in *Ex parte Quirin*, 317 U.S. 1, 27-29 (1942) (holding military commissions validly established pursuant to a provision now

codified at 10 U.S.C. § 821), and would in any event merit deference as an arm of the Executive Branch. *See McCarthy v. Madigan*, 503 U.S. 140, 144-145 (1992) (discussing the rule of administrative exhaustion).

Although Hamdan asserts (Br. 20) that abstention is unwarranted because his case implicates no military exigencies, the trial of combatants for war crimes is a central part of waging war — the basic rationale for *Councilman* abstention, 420 U.S. at 757 — whether or not the trial is removed in place or time from active hostilities. *See Yamashita*, 327 U.S. at 11; *Hirota v. MacArthur*, 338 U.S. 197, 208 (1949) (Douglas, J., concurring). Abstention pending the conclusion of commission proceedings is thus appropriate, regardless of whether the Executive could have declined to urge abstention — as it did in *Quirin*, on which Hamdan relies (Br. 19-20). *Cf. Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 626 (1986) (distinguishing prior abstention cases in which the State had “expressly urged [the court] to proceed to an adjudication of the constitutional merits”).

Finally, the need for abstention is underscored by the rule that a litigant may not invoke the habeas corpus jurisdiction of a federal court until he has employed all available procedures to correct the alleged error. *See, e.g., Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 490 (1973); *Gusik v. Schilder*, 340 U.S. 128,

131-132 (1950).

C. The additional equitable grounds relied on by Hamdan to evade abstention are insubstantial and would in many cases apply equally to courts-martial or garden-variety administrative proceedings. Hamdan contends (Br. 12 n.2), for example, that commission proceedings are inherently unfair because its members are selected by the President and their decisions are not directly reviewable in federal court. The same is true not only of numerous administrative agencies, but also of courts-martial, which are indisputably subject to abstention. *See* 10 U.S.C. §§ 822(a)(1), 825(d)(2); *compare Toth*, 350 U.S. at 17 (noting that procedures for courts-martial, such as appointment and removal of members by military commanders, do not meet “qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts”), *with Gusik*, 340 U.S. at 131-132 (mandating abstention pending exhaustion of military appeal rights following court-martial).

In the same vein, Hamdan claims (Br. 16-18) that he will not have an adequate opportunity to raise his claims before a military commission because that tribunal is “not competent to address the complex questions of constitutional law, international law, and jurisdiction present here.” The questions before the commission regarding the applicability and meaning of the Geneva Convention

and the UCMJ, however, are precisely the types of questions that military officials are well-suited to consider. Moreover, Hamdan's position cannot be reconciled with the Supreme Court's holdings that abstention in favor of military proceedings is equally applicable where the defendant claims a constitutional error such as a Sixth Amendment violation or attacks the tribunal's jurisdiction. *See, e.g., Gusik*, 340 U.S. at 129-132; *cf. Watson v. Buck*, 313 U.S. 387, 401 (1941) (“[E]quity will not interfere to prevent the enforcement of a criminal statute [in state court] even though unconstitutional.”) (quotation omitted); *Nat'l Lawyers Guild v. Brownell*, 225 F.2d 552, 557 (D.C. Cir. 1955) (“[A] claim of constitutional invalidity does not negative the requirement for exhaustion of [administrative] remedies.”).

Although Hamdan attacks the independence and constitutional fidelity of the commission review panel (Br. 14), the panel comprises a federal-court judge, one current and one former state-court judge, and a senior member of the Warren Commission and recipient of the presidential Medal of Freedom. *See Secretary Rumsfeld Swearing-In*, Sept. 21, 2004, <http://www.defenselink.mil/transcripts/2004/tr20040921-secdef1323.html>. As this Court has recognized, it would be improper to “assume in advance of a hearing that a responsible executive official of the Government will fail to carry out his manifest duty,” and a litigant casting speculative claims of prejudgment must “await the

event” and exhaust administrative remedies before seeking judicial relief.

Brownell, 225 F.2d at 555-556.

Hamdan also claims (br. 18) that the military commission will not give full and fair consideration to his arguments, but he offers no evidence to back that assertion. In fact, before the district court enjoined the commission proceedings, the Appointing Authority for Military Commissions, *see* 32 C.F.R. 9.2, issued a decision granting in part Hamdan’s motion to remove several commission members because there was reason to doubt their impartiality. The Appointing Authority’s opinion, *see* www.defenselink.mil/news/Oct2004/d20041021panel.pdf — which determined that the UCMJ rules providing protection against command influence, *see* 10 U.S.C. § 837(a), apply to Hamdan’s commission — refutes Hamdan’s speculative assertion that the process established by the President cannot be trusted to give fair consideration to his claims.

Moreover, Hamdan fails to show that the commission is *barred* from considering those arguments, and that is the showing necessary to defeat abstention in the analogous context of pending state proceedings. *See, e.g., Middlesex County Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 432, 435-436 (1982); *Ohio Civil Rights Comm’n*, 477 U.S. at 629. The Supreme Court has also made clear that a defendant cannot avoid *Councilman* abstention by

making the convenient assertion that exhaustion will be “futile” or that his defenses will not be given the consideration they deserve. *See, e.g., Councilman*, 420 U.S. at 754; *Gusik*, 340 U.S. at 133; *cf. Huffman v. Pursue, Ltd.*, 420 U.S. 592, 610-611 (1975).

Hamdan speculates (br. 10-13) that commission proceedings could be indefinitely delayed or otherwise manipulated to prevent him from obtaining meaningful judicial review. But the only thing delaying the commission proceedings at this point is the injunction Hamdan procured. Moreover, to justify an exception to abstention, Hamdan must make a concrete “showing of bad faith, harassment, or some other extraordinary circumstance.” *Middlesex County*, 457 U.S. at 435. Hamdan has made no such showing, and the district court did not find otherwise. Pretrial hearings on Hamdan’s motions were underway and the trial was scheduled to begin soon when the district court enjoined the proceedings.¹

¹ Despite Hamdan’s claim to the contrary (Br. 23), in determining whether abstention is appropriate, the Court looks to the current circumstances, not those prevailing at the time he filed suit. *See Middlesex County*, 457 U.S. at 436-437; *Hicks v. Miranda*, 422 U.S. 332, 348-350 (1975).

II. NEITHER THE GENEVA CONVENTION NOR OTHER FACTORS DEPRIVE THE MILITARY COMMISSION OF JURISDICTION.

A. Neither Congress Nor The Executive Has Made The Geneva Convention Judicially Enforceable.

Hamdan argues (Br. 31-37) that he is able to sue to enforce the Convention's provisions because the Convention "has been implemented" (*id.* at 31) in a variety of provisions of U.S. law. This argument is mistaken.

1. Hamdan first argues (Br. 31-32) that the Geneva restraints he posits are enforceable through 10 U.S.C. § 821. It is difficult to see, as a matter of chronology and common sense, how this statutory provision (first included in the Articles of War in 1916) recognizing the President's traditional authority to try offenses against the law of war could "implement" or "execute" the Geneva Convention ratified in 1956. Moreover, as we explained in our opening brief, pp. 32-38, that provision was not intended to *circumscribe* the President's military commission authority, but rather to *preserve* his historic authority to place before military commissions persons who, like Hamdan, are charged with offenses against the laws of war, *see Quirin*, 317 U.S. at 27-29, *or* persons otherwise subject to trial by military commission "by the law of war." Thus, even assuming the Geneva Convention could be read to contain procedural hurdles, Section 821 does not impose them as a limitation on the military commission jurisdiction that it

recognizes over offenses against the laws of war. In any event, a statutory reference to the “law of war,” without more, cannot justify enforcing a treaty that does not create judicially enforceable rights. *See Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2763, 2767 (2004). Accordingly, Hamdan (and the district court) cannot sidestep the question whether the treaty creates judicially enforceable rights by reliance on Section 821.

2. Next, Hamdan turns (Br. 32) to a “policy” statement by Congress in the 2004 National Defense Authorization Act, Pub. L. No. 108-375, § 1091(b)(4), 118 Stat. 1811 (2004). Such “sense of Congress” statements create “no enforceable federal rights.” *Monahan v. Dorchester Counseling Ctr., Inc.*, 961 F.2d 987, 994-995 (1st Cir. 1992); *see generally Yang v. California Dep’t of Soc. Servs.*, 183 F.3d 953 (9th Cir. 1999). Moreover, this policy statement simply reaffirms the acknowledged obligations of the United States under the Geneva Convention, and states that it is the policy of this Country to comply with the treaty. It says nothing about judicially enforceable rights.

3. Hamdan argues (Br. 33-35) that Army regulations instructing Army personnel in regard to implementation of the Geneva Convention have the effect of permitting enemy forces to enforce the treaty through suits in U.S. courts. By their own terms, however, those regulations do not extend any substantive rights;

to the contrary, they state expressly that they establish internal policies and are for planning and guidance only. Army Reg. 190-8 § 1-1(a).

B. The Convention Itself Does Not Provide Judicially Enforceable Rights.

Hamdan argues in the alternative (Br. 37-43) that the Geneva Convention itself provides judicially enforceable rights, principally because it protects the rights of individuals. This argument is a non-sequitur.

While treaties are regarded as the law of the land, *see* U.S. Const. art. VI, cl. 2, they “are not presumed to create rights that are privately enforceable.” *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992); *see also United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000); *United States v. Bent-Santana*, 774 F.2d 1545, 1550 (11th Cir. 1985). Hamdan disregards both that presumption and Supreme Court precedent holding that the prior version of the Geneva Convention, which also protected individual rights, did *not* create judicially enforceable rights. *See Eisentrager*, 339 U.S. at 789. Hamdan does suggest that the earlier Geneva Convention did not provide individual rights. In *Eisentrager*, however, the Supreme Court expressly recognized that the earlier Convention afforded such rights, *Eisentrager*, 339 U.S. at 789 n.14, but nonetheless held that it was the “obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities.” *Ibid.*

Accordingly, Hamdan must point to some clear indication that the President and the Senate meant to override both the general presumption against creating judicially enforceable rights and this aspect of *Eisentrager* when they ratified the current version of the Geneva Convention. There is no evidence suggesting such a radical transformation of U.S. law was intended, such that captured forces would now be granted judicially enforceable rights.

Instead, Hamdan simply claims (Br. 39) that, because the Geneva Convention speaks in terms of protections for the captured party, those “rights” must be judicially enforceable. This Court rejected just such an argument in *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972). There, U.S. soldiers cited the fact that the NATO Status of Forces Agreement granted individual members of the armed forces specific rights (e.g., speedy trial, confrontation, and legal representation), and argued that a federal court could adjudicate a claim based upon those treaty rights. *See id.* at 1213. This Court rejected that argument as unconvincing “when the corrective machinery specified in the treaty itself is nonjudicial.” *Id.* at 1222. The 1949 Geneva Convention, like the 1929 version, specifies nonjudicial corrective machinery. *See* Gov’t Op. Br. 27-30 (discussing Articles 1, 8, 11, and 132 of the 1949 Convention); *see also* Article 78 (recognizing the “right” of POWs “to apply to the representatives of the Protecting

Powers” regarding complaints about their conditions of captivity).

Hamdan’s reliance (Br. 42) on the International Red Cross commentary to support the recognition of new judicially enforceable rights in the 1949 revision of the Geneva Convention is also mistaken. In fact, the full text of that commentary states that the concept of prisoner rights was already “more clearly defined” in the 1929 treaty, and that the concept was then “affirmed” by the 1949 revision. ICRC, *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* 91 (1960). Moreover, the commentary goes on to explain that the rights are “secured” under the Convention through the right of the prisoner to enlist the aid of the “protecting power,” *id.* at 91-92, and through state criminal prosecutions of those who commit grave breaches of the Convention. There is no suggestion of enforcement of the Convention’s terms in court by captured enemy forces.

Finally, Hamdan argues (Br. 39-40) that the Geneva Convention is enforceable through habeas. Neither 28 U.S.C. § 1331 nor the habeas statute transforms a treaty that does not grant judicially enforceable rights into one subject to judicial enforcement at the behest of captured enemy forces. *See Wesson v. Penitentiary Beaumont*, 305 F.3d 343, 348 (5th Cir. 2002) (per curiam); *Wang v. Ashcroft*, 320 F.3d 130, 140 (2d Cir. 2003); *Bannerman v. Snyder*, 325 F.3d 722, 724 (6th Cir. 2003); *see also Al-Odah v. United States*, 321 F.3d 1134, 1146-1147

(D.C. Cir. 2003) (Randolph, J., concurring), *reversed and remanded on other grounds sub nom.*, *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *cf. Sosa, supra*. The decisions Hamdan cites (Br. 36-37) simply hold that aliens may assert rights under the Convention Against Torture because Congress has implemented that treaty through other legislation. *See, e.g., Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 218 n.22 (3d Cir. 2003); *Wang*, 320 F.3d at 142.

C. Hamdan Does Not Qualify For POW Status Under The Plain Terms Of the Convention.

Even if the Geneva Convention were judicially enforceable in this context, it would not assist Hamdan because the President correctly determined that it does not apply to al Qaeda, and Hamdan does not qualify for POW protection in any event.

1. Hamdan claims (Br. 46) that the district court properly rejected the President's finding because the United States was in an armed conflict with a High Contracting Party, Afghanistan, occupied its territory, and captured Hamdan as part of that conflict. First, the United States is not, and has never been, an occupying power in Afghanistan. It has never administered or purported to administer the powers of government over any portion of the country. *See Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention (IV), Oct. 18, 1907, art. 42(1), 36 Stat. 2277, 1 Bevans 631;*

Department of Defense News Briefing, Tuesday, Oct. 9, 2001 (statement of Secretary of Defense Rumsfeld) (“The United States of America, and certainly the United States military, has no aspiration to occupy or maintain any real estate in [Afghanistan].”). Second, whether to treat the ongoing fight against al Qaeda and the military conflict against the Taliban regime as one or two conflicts is a political and military matter “constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.” *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221, 230 (1986); see *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953) (“[J]udges are not given the task of running the [military].”); *Dep’t of Navy v. Egan*, 484 U.S. 518, 530 (1988) (“[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military * * * affairs.”).

2. Hamdan does *not* dispute that al Qaeda has consistently acted in flagrant defiance of the law of armed conflict. Article 4 of the Geneva Convention makes clear that POW status does not apply to such a group. Geneva Convention Art. 4(A)(2)(b)-(d). Article 4’s requirements serve an important humanitarian purpose by maintaining a clear distinction between civilians and combatants, which is why the United States has rejected an additional protocol to the Geneva Convention that would have relaxed the requirements for lawful combatancy. See Protocol

Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, Article 45 (adopted June 8, 1977) (Additional Protocol I); *see also* Message from the President Transmitting Protocol II to the U.S. Senate, *reprinted in* S. Treaty Doc. 100-2, at IV (1987) (explaining President Reagan’s decision not to submit Protocol I for ratification because it “would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war”). Hamdan does not claim, nor could he, that al Qaeda meets *any* of the requirements of the unrelaxed Article 4. Thus, there is no basis for a court to upset the President’s finding that al Qaeda operatives are not encompassed by Article 4. *Cf. United States v. Lindh*, 212 F. Supp. 2d 541, 558 n.39 (E.D. Va. 2002).

3. Hamdan and his *amici* assert that, under Article 5, all persons *claiming* POW status must be deemed POWs until a competent tribunal determines otherwise. Article 5 of the Convention applies, however, only if “doubt arise[s] as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy,” meet Article 4’s definition of POWs. Hamdan’s contention thus ignores the Convention’s plain terms, which do not extend POW protection to those who do not meet the Article 4 standards, and which require that there be

some “doubt” about whether the person qualifies for protection under Article 4 before mandating interim POW status. As we noted in our opening brief (p. 50), the more expansive position urged by Hamdan was adopted in a subsequent international protocol, which the United States specifically declined to adopt. *See* Additional Protocol I. The fact that a new agreement was required to expand the scope of POW coverage to anyone claiming such status is strong evidence that the Convention itself did not mandate such treatment. Indeed, in declining to submit Additional Protocol I to the Senate for ratification, President Reagan expressly considered the specific problem of extending Geneva Convention protections to members of terrorist organizations: “[W]e must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.” S. Treaty Doc. 100-2, at IV.

No “doubt” has ever arisen as to whether Hamdan, “having committed a belligerent act,” is nevertheless entitled to POW protection. As previously explained, Hamdan’s claim all along has been that he has never committed a belligerent act on behalf of al Qaeda and thus is an innocent civilian, not that he is a lawful belligerent. Even if Hamdan’s factual innocence claim itself raised a relevant “doubt” under Article 5, any such “doubt” was eliminated by the Combatant Status Review Tribunal, which is patterned after the type of

“competent tribunal” referred to in Article 5 and which found that he is an enemy combatant who is a member of or affiliated with al Qaeda.² The proper place for Hamdan to raise his factual innocence claim is before the military commission, not an Article 5 tribunal.

Indeed, the district court’s holding that al Qaeda detainees such as Hamdan are entitled to an Article 5 hearing is clearly wrong. That article does not require individual determinations for each detainee. In past conflicts, the United States has made group status determinations of captured enemy combatants. *See, e.g.,* Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 Int’l L. Stud. 1, 61 (1977) (Second World War); Adam Roberts, *Counter-terrorism, Armed Force, and the Laws of War*, 44 Survival no. 1, 23-24 (Spring 2002) (Vietnam). And “the accepted view” of Article 4 is that “if the *group* does not meet the first three criteria . . . the individual member cannot qualify for privileged status as a POW.” W. Thomas Mallison and Sally V. Mallison, *The Juridical Status of Irregular Combatants Under the International Humanitarian Law of*

² Hamdan contends (Br. 45) that the CSRT finding is “not part of the Record in this case” and that his counsel has not been provided it. The CSRT’s finding that Hamdan is an enemy combatant is part of the record, *see* JA 249; indeed, the district court treated it as part of the record, but concluded that the finding was irrelevant to Hamdan’s supposed right to an Article 5 hearing, JA 388-391. Moreover, the government repeatedly offered to supplement the record with the underlying materials, JA 250, 274, but neither the district court nor Hamdan’s counsel asked for them in this action.

Armed Conflict, 9 Case W. Res. J. Int'l L. 39, 62 (1977) (emphasis added).

D. Article 3 Does Not Provide A Basis For Relief.

Hamdan argues (Br. 48-49) that he is entitled to the protections of Article 3 of the Geneva Convention. That provision, however, applies only “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” Because the conflict between the United States and al Qaeda has taken place in several countries, the conflict *is* “of an international character,” and Article 3 thus is inapplicable.

The ICRC commentary for the Third Geneva Convention confirms that Article 3 means what it says. The commentary explains that the article “applies to non-international conflicts only.” ICRC Commentary 34. “Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, . . . which are in many respects similar to an international war, but take place *within the confines of a single country.*” *Id.* at 37 (emphasis added).

To the extent that international tribunals have held that the standards set out in Article 3 apply in all conflicts as customary international law, *see, e.g., Prosecutor v. Tadic*, No. 94-1, ¶ 102 (I.C.T.Y. Appeals Chamber, Oct. 2, 1995), that law cannot override a controlling executive act, such as the President’s Military Order in this case. *See The Paquete Habana*, 175 U.S. 677, 700 (1900).

In any case, Article 3 would not bar Hamdan's trial by military commission. The article 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." Hamdan's military commission, governed by the procedural guarantees set out in 32 C.F.R. Part 9, meets this standard.

E. Hamdan's Other Challenges To The Commission's Jurisdiction Lack Merit.

Hamdan makes a variety of other challenges to the jurisdiction of the military commission, none of which has merit.

Hamdan argues (Br. 67) that the history of military commissions suggests that their use has been restricted to "occupied territory or zones of war." That is plainly incorrect. The commission in *Quirin* was held at Department of Justice headquarters in *Washington, D.C.*, far removed from the place of the saboteurs' apprehension or any zone of active combat. 317 U.S. 1 (1942). Hamdan asserts (Br. 67) that the east coast of the United States was "under the control of the Army" during the Second World War. It is unclear exactly what this claim means, but if it is meant to suggest that civilian government in the District of Columbia was suspended, it is clearly false. Certainly the location of Hamdan's military commission — Guantanamo Bay, Cuba, a naval base with no civilian government

— is more exclusively under military control than was Washington, D.C., in 1942.³

Nor does the absence of a formal declaration of war (Br. 66) affect the commission's congressionally sanctioned jurisdiction. Recognizing that the September 11 attacks amounted to an act of war, Congress authorized the President to use all necessary force against al Qaeda and its supporters. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001). The plurality in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), held that that authorization triggered the exercise of the President's traditional war powers and relied on *Quirin* for the proposition that “the capture, detention, *and trial of unlawful combatants*, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’” *Id.* at 2640 (quoting *Quirin*, 317 U.S. at 28) (emphasis added). Moreover, contrary to Hamdan's suggestion, none of the UCMJ provisions that recognize the President's authority to convene military commissions requires a formal declaration of war, and it is settled that the UCMJ applies to armed conflicts that the United States has prosecuted without a formal

³ Other historical examples likewise refute Hamdan's claim. The commission in *Yamashita*, was held in the Philippines, not in enemy territory, and occurred *after* Japan had surrendered and the Second World War was effectively over. 327 U.S. at 5. Similarly, the commission in *Eisentrager* was held in China, a friendly country, after the conclusion of active military operations. 339 U.S. at 765.

declaration of war. *See, e.g., United States v. Anderson*, 38 C.M.R. 386, 386 (C.M.A. 1968); *United States v. Bancroft*, 11 C.M.R. 3, 5 (C.M.A. 1953).⁴

Finally, Hamdan mistakenly contends (Br. 70) that the conspiracy offense is not an offense triable under the laws of war. Conspiracy to commit a war crime has been prosecuted before military commissions throughout this Nation's history. *See Quirin* (petitioners charged with conspiracy), *supra*; *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956) (upholding trial by military commission of Nazi saboteur who was convicted, *inter alia*, of conspiracy); Charles Howland, *Digest of Opinions of the Judge Advocate General of the Army* 1071 (1912) (identifying conspiracy "to violate the laws of war by destroying life or property in aid of the enemy" as an offense against the laws of war that was "punished by military commissions" during the Civil War). Moreover, conspiracy liability was recognized as part of the post-WWII Nuremberg tribunals. *See* Charter of the International Military Tribunal at Nuremberg, Art. VI; Nuremberg International Military Tribunal Control Council Order No. 10, Art II (1)(a). Conspiracy is also an offense under the charters of modern international criminal tribunals. *See, e.g.,* Statute of the International Criminal Tribunal for the Former Yugoslavia (1993,

⁴ The *Averette* case on which Hamdan relies held only that a formal declaration is necessary before the UCMJ is applied to *civilians*. *See* 41 C.M.R. 363, 365 (C.M.A. 1970).

updated 2004), art. 4(3)(b); Statute of the International Criminal Tribunal for Rwanda (1994), art. 2(3)(a).⁵

III. HAMDAN'S CHALLENGES TO THE COMMISSION'S PROCEDURES LACK MERIT.

A. Article 36 Does Not Mandate That Military Commissions Conform To All UCMJ Procedures.

Hamdan contends (Br. 51-53) that Article 36 of the UCMJ strips a military commission of jurisdiction unless it complies with the court-martial procedures such as those set out in Article 39, which addresses the presence of the accused at a court-martial. First, Hamdan errs by couching an Article 39 defect as a jurisdictional problem. Neither the federal courts nor the military courts consider a defendant's temporary absence from trial proceedings to be a structural error depriving the court of jurisdiction; rather, they treat it as a type of trial error subject to review for harmlessness. *See United States v. Diggs*, 522 F.2d 1310, 1319 (D.C. Cir. 1975); *United States v. Daulton*, 45 M.J. 212, 218-219 (C.A.A.F. 1996); *United States v. Cordell*, 37 M.J. 592, 595 (A.F.C.M.R. 1993); *see also*,

⁵ Hamdan further contends that the definition of conspiracy does not include an agreement or specific intent. The regulations, however, provide that the prosecution must demonstrate that the accused entered an unlawful agreement or otherwise "joined an enterprise of persons who shared a common criminal purpose" to commit one or more of the listed offenses. 32 C.F.R. 11.6(c)(6)(i)(A). The prosecution must also prove that the accused "knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise" and "joined in it willfully." *Id.* § 6(c)(6)(i)(B).

e.g., *United States v. Harris*, 9 F.3d 493, 499 (6th Cir. 1993).

Second, the procedures governing the military commission are *not* “contrary to or inconsistent with” Article 39, which by its plain terms applies only to courts-martial. In this respect, Article 39 is no different from the vast majority of provisions in the UCMJ. *See* Hearings before Subcommittee of Committee on Armed Services on H.R. 2498 (Uniform Code of Military Justice), 81st Cong., 1st Sess. 1017 (1949) (statement of Robert Smart, Professional Staff Member of Subcommittee) (“We are not prescribing rules of procedure for military commissions here. This only pertains to courts martial.”). If Article 36 is read to require military commission rules to comply with the UCMJ rules, like Article 39, which apply to courts-martial only, then the language in other UCMJ provisions extending a particular rule to military commissions would be superfluous.

Contrary to Hamdan’s suggestion, there is nothing anomalous about a *statute* that comprehensively regulates the procedures for courts-martial while providing only limited restrictions on military commissions. That result is fully in keeping with historic reality that the President, rather than Congress, convened military commissions, and that one of their primary benefits was their flexibility.

It is settled that military commissions “will not be rendered illegal by the omission of details required upon trials by courts-martial,” and that the rules for

commissions may be altered by regulation or at the direction of the President. William Winthrop, *Military Law and Precedents* 841 (2d ed. 1920). Thus, although Major William Birkhimer wrote in *Military Government and Martial Law* (3d ed. 1914), that military tribunals “should observe, *as nearly as may be consistently with their purpose*, the rules of procedure of courts-martial,” he recognized that this “is not obligatory” and that military commissions were “not bound by the Articles of War.” *Id.* at 533-535 (emphasis added).

The *Quirin* precedent illustrates these points. On the day before the military trial began, the commission established by President Roosevelt “adopted a three-and-a-half page, double-spaced statement of rules,” which provided for closed hearings, no peremptory challenges, only one challenge for cause, and concluding language to the effect that “[t]he commission could * * * discard procedures from the Articles of War or the Manual for Courts-Martial whenever it wanted to.” Louis Fisher, CRS Report for Congress, *Military Tribunals: The Quirin Precedent* 8 (Mar. 26, 2002), available at <<http://www.fas.org/irp/crs/RL31340.pdf>>. See also *Madsen v. Kinsella*, 343 U.S. 341, 346-349 (1952) (a military commission is not bound by the rules applicable to courts-martial).

B. Hamdan’s Other Attacks On The Commission’s Procedures Are Without Merit.

Hamdan challenges the constitutionality of the rule permitting his exclusion

from proceedings in order to protect classified and other national security information, *see* 32 C.F.R. 9.6(b), (e), but, as an alien abroad, he has no constitutional rights to invoke. *See* p. 4, *supra*. Hamdan also attacks the rule as a violation of customary international law, but that law cannot override a controlling executive act. *See The Paquete Habana*, 175 U.S. at 700.⁶

Finally, Hamdan asserts (Br. 61) that the rule violates “common law,” but he cites no support for his assertion that military commissions are governed by common law standards for civil courts, or that any common law right would supersede the President’s Military Order. Notably, other “common law” rights, such as a trial by jury, do not apply to military tribunals. *See Quirin*, 317 U.S. at 40-45. Moreover, Article 36(a) itself provides that the rules applicable to criminal trials in civilian courts shall apply to military commissions only “so far as [the President] considers practicable,” 10 U.S.C. § 836(a), and the President specifically found that “it is not practicable” to apply those rules in military commissions “[g]iven the danger to the safety of the United States and the nature of international terrorism.” Detention, Treatment, and Trial of Certain Non-

⁶ In addition to citing customary international law, a number of the *amici* incorrectly rely upon the International Covenant on Civil and Political Rights (ICCPR), which creates no judicially enforceable rights. S. Exec. Rep. No. 102-23 at 9, 19, 23 (1992); *Sosa*, 124 S. Ct. at 2767. In any event, because Hamdan himself does not invoke the ICCPR or the other treaties that *amici* cite, this Court is not in a position to consider them. *See Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001).

Citizens in the War Against Terrorism § 1(f), 66 Fed. Reg. 57833 (Nov. 13, 2001).

IV. THE PRESIDENT HAS INHERENT AUTHORITY TO ESTABLISH MILITARY COMMISSIONS.

Even if there were any doubt surrounding the correct interpretation of Articles 21 and 36, the President's inherent authority to establish military commissions would call for reading them in a manner not to obstruct the exercise of his war powers. That Congress also has powers that may be relevant to the prosecution of terrorists, such as the power to establish inferior Article III courts and the power to define and punish offenses against the law of nations (Br. 63; U.S. Const. art. I, § 8), in no way undermines the President's authority, as Commander in Chief, to exercise the traditional functions of a military commander by using military commissions to punish enemies who violate the laws of war.

There is a well-established historical practice of military commissions created by the Executive alone, acting on the basis of the Commander-in-Chief power. Hamdan's attempt to overcome the clear historical record falls short. For example, he points out that on one occasion during the Revolutionary War, George Washington chose not to try an individual by a military commission. Br. 64. But he does not dispute that, on another occasion, Washington did convene a military commission to try a captured British spy. Likewise, Hamdan acknowledges that General Andrew Jackson set up military commissions in 1818, during a conflict

with the Creek Indians, without statutory authority. Hamdan attempts to overcome the force of this example by quoting (Br. 64) William Winthrop's *Military Law and Precedents* for the proposition that Jackson's action was "wholly arbitrary and illegal." But Hamdan takes this statement out of context; what Winthrop described as illegal was Jackson's disregard of the commission's judgment when he ordered that the defendant be shot even though the commission had imposed a lesser sentence. *See id.* at 465.

With respect to the Mexican War, Hamdan correctly notes (Br. 65) that the military commissions set up during that conflict had a rather limited jurisdiction. But he fails to mention the "councils of war" — essentially commissions by another name — that were established to try offenses against the law of war, such as crimes committed by guerillas. *See Winthrop, Military Law* at 832-33.

Finally, Hamdan notes (Br. 65) that military commissions during the Civil War were "explicitly authorized" by Congress. But the statute to which he refers was not enacted until 1863, by which time commissions had been in use for almost two years. *See Act of March 3, 1863, 12 Stat. 731; Winthrop, Military Law* at 833 (noting "military commissions convened as early as in 1861"). In addition, the statute did not "authorize" or create military commissions. Rather, in defining certain offenses, it provided that those offenses could be tried by either court-

martial or military commission. *See* Act of March 3, 1863, §§ 30, 38. Thus, Congress contemplated that commissions could exist independently of any explicit statutory authorization.

And while Hamdan claims that *Ex parte Milligan*, 71 U.S. 2 (1866), disapproved the use of military commissions during the Civil War, the Court in *Milligan* did not consider the legality of commissions generally. It simply held that “a citizen in civil life, in nowise connected with the military service,” may not be tried by military commission in a State where “the courts are open and their process unobstructed.” *Id.* at 121-122. This holding is inapplicable to Hamdan, an alien enemy combatant. *Cf. Hamdi*, 124 S. Ct. at 2642 (plurality opinion) (recognizing military authority to detain citizen enemy combatants). *Milligan* is entirely consistent with the proposition that the President, as Commander in Chief, has inherent authority to convene a military commission to try an enemy combatant charged with an offense against the laws of war. Because the President’s inherent power is well established, the district court’s ruling nullifying it cannot stand.

CONCLUSION

For the foregoing reasons, and the reasons set forth in our opening brief, the district court's ruling should be reversed.

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE**

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 6,978 words (which does not exceed the applicable 7,000 word limit).

A handwritten signature in black ink, appearing to read "Robert M. Loeb", written over a horizontal line.

Robert M. Loeb

CERTIFICATE OF SERVICE

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