[ORAL ARGUMENT SCHEDULED FOR MARCH 8, 2005]
No. 04-5393

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

BRIEF FOR APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties and Amici*

1. The Petitioner-Appellee is Salim Ahmed Hamdan. The habeas petition was originally brought in the name of Hamdan's appointed counsel, Charles Swift, in his capacity as Hamdan's "next friend." The petition has since been amended to be in Hamdan's name only.

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

3. *Amici* appearing in the District Court were: Washington Legal Foundation and Allied Educational Foundation; 271 United Kingdom and European Parliamentarians; International Law Professors in Support of Petitioner (William J. Aceves; Jeffrey F. Addicott, Donna E. Arzt, M. Cherif Bassiouni, Robert W. Benson, Arthur L. Berney, Christopher Lee Blakesley,

Carolyn Patty Blum, Bartram S. Brown, Daniel H. Derby, Sherri Burr, Laura Dickinson, Father Robert F. Drinan, Steven D. Jamar, Walter J. Kendall, III, Saul Mendlovitz, Jennifer Moore, Makau Mutua, Paula Rhodes, Leila Nadya, Nadine Strossen, A. Dan Tarlock, Mark E. Wojcik); Sixteen Law Professors (Bruce Ackerman, Rosa Ehrenreich Brooks, Sarah H. Cleveland, William S. Dodge, Martin S. Dodge, Martin S. Flaherty, Ryan Goodman, Oona Hathaway, Derek Jinks, Kevin R. Johnson, Jennifer S. Martinez, Judith Resnik, David Scheffer, Anne-Marie Slaughter, David Sloss, Carlos M. Vazquez, David C. Vladeck); General David M. Brahms, Admiral Lee F. Gunn, Admiral John D. Hutson and General Richard O'Meara in Support of Petitioner; and The Center for International Human Rights of Northwestern University School of Law (Louise Doswald-Beck, Guy S. Goodwin-Gill, Frits Kalshoven, and Marco Sassoli).

4. *Amici* appearing thus far in the Court of Appeals are Washington Legal Foundation and Allied Educational Foundation; and the American Center for Law and Justice.

B. Rulings Under Review

The present appeal is from the District Court's order in *Hamdan v. Rumsfeld, et al.*, No. 04-CV-1519, 2004 WL 2504508 (D.D.C. Nov. 8, 2004)

(Robertson, J.). Respondents-Appellants filed the notice of appeal on November 12, 2004.

C. Related Cases

The following cases that have been brought by other detainees at the Guantanamo Naval Base are pending in the District Court in this Circuit:

1. *Hicks (Rasul) v. Bush*, S.Ct.; D.C. Cir. No. 02-5284; No. 02-CV-0299 (D.D.C.) (J. Kollar-Kotelly)

2. *Al-Odah v. United States*, No. 02-CV-0828 (D.D.C.) (J. Kollar-Kotelly)

3. *Habib v. Bush*, No. 02-CV-1130 (D.D.C.) (J. Kollar-Kotelly)

4. *Kurnaz v. Bush*, No. 04-CV-1135 (D.D.C.) (J. Huvelle)

5. *O.K. v. Bush*, No. 04-CV-1136 (D.D.C.) (J. Bates)

6. *Begg v. Bush*, No. 04-CV-1137 (D.D.C.) (J. Collyer)

7. *Khalid (Benchellali) v. Bush*, No. 04-CV-1142 (D.D.C.) (J. Leon)

8. *El-Banna v. Bush*, No. 04-CV-1144 (D.D.C.) (J. Roberts)

9. *Gherebi v. Bush*, No. 04-CV-1164 (J. Walton)

10. *Boumediene v. Bush*, No. 04-CV-1166 (D.D.C.) (J. Leon)

11. *Anam v. Bush*, No. 04-CV-1194 (D.D.C.) (J. Kennedy)

12. *Almurbati v. Bush*, No. 04-CV-1227 (J. Walton)

13. *Abdah v. Bush*, No. 04-CV-1245 (D.D.C.) (J. Kennedy)

14. *Belmar v. Bush*, No. 04-CV-1997 (D.D.C.) (J. Collyer)

15. *Al-Qosi v. Bush*, No. 04-CV-1937 (D.D.C.) (J. Friedman)

16. *Al-Marri v. Bush*, No. 04-CV-2035 (J. Kessler)

17. *Paracha v. Bush*, No. 04-CV-2022 (J. Friedman)

18. *Zemiri v. Bush*, No. 04-CV-2046 (J. Kollar-Kotelly)

Counsel certifies that he is not aware at this time of any other related cases within the meaning of D.C. Cir. Rule 28(a)(1)(C).

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TABLE OF CONTENTS

GLOSSARY xxi

STATEMENT OF THE ISSUES ii

RELEVANT STATUTES AND REGULATIONS 3

STATEMENT OF THE CASE 3

STATEMENT OF THE FACTS 3

SUMMARY OF ARGUMENT 5

STANDARD OF REVIEW 8

ARGUMENT 8

I. THE DISTRICT COURT CORRECTLY REACHED THE MERITS 8

A. *Councilman* Does Not Support Abstention Here 9

1. Comity 9

a. Delay 10

b. Command Influence 13

2. Competence and Futility 16

3. No Exigency Requires Abstention 20

4. As in *Quirin*, the Public Interest Requires Immediate Review 21

5. Private Equities Counsel Against Abstention 23

B. *Councilman* Does Not Apply To Jurisdictional Challenges 25

1. The System Cannot Determine Its Own Jurisdiction 25

2. The Rights at Stake Are Jurisdictional 28

II. HAMDAN'S COMMISSION VIOLATES THE GPW 31

A. Domestic Law Implements The GPW 31

1. 10 U.S.C. §821 31

2. The National Defense Authorization Act 32

3. AR 190-8 33

4. M.C.M. 35

B. Hamdan May Challenge Appellants' Violation of Statutes and Regulations 36

C. Hamdan's GPW Rights Are Also Enforceable Under the Supremacy Clause 37

D. The 1949 GPW Does Not Rely Only on Diplomacy 40

E. The District Court Correctly Interpreted GPW Article 2 44

F. Appellants Have Violated Common Article 3 48

III. HAMDAN'S COMMISSION, WHICH HAS ALREADY DENIED THE RIGHT TO BE PRESENT, LACKS JURISDICTION 50

A. The UCMJ constrains the President 51

B. The Denial of Presence and Confrontation Destroys the Commission's Jurisdiction.....57

IV. THIS COMMISSION VIOLATES SEPARATION OF POWERS 63

A. Text 63

B. History 64

C. Precedent 65

D. The District Court Order Should Also Be Affirmed on Alternative Grounds 70

1. Subject-Matter Jurisdiction 70

2. Personal Jurisdiction 71

TABLE OF AUTHORITIES*

Cases

Abney v. United States, 431 U.S. 651 (1977).....28

Allen v. Grand Central Aircraft, 347 U.S. 535 (1954).....17

Andrews v. Heupel, 29 M.J. 743 (A.F.C.M.R. 1989).....27

* *Ankenbrandt v. Richards,* 504 U.S. 689 (1992)..... 8

Ardestanti v. I.N.S., 502 U.S. 129 (1991).....52

* *Asakura v. Seattle*, 265 U.S. 332 (1924).....39

* *Avocados Plus v. Veneman*, 370 F.3d 1243 (CADC 2004).....8, 9

* *Bacardi v. Domenech*, 311 U.S. 150 (1940).....43

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).....45

* *Bridges v. Kelly*, 84 F.3d 470 (CADC 1996).....8, 9

Chew Heong v. United States, 112 U.S. 536 (1884).....40, 43

* *Coit v. FSLIC,* 489 U.S. 561 (1989).....11

Cole v. Laird, 468 F.2d 829 (CA5 1972).....66

Coleman v. Tennessee, 97 U.S. 509 (1878).....65

Cook v. United States, 288 U.S. 102 (1933).....32

---

* Authorities upon which we chiefly rely are marked with asterisks.

Coy v. Iowa, 487 U.S. 1012 (1988) 61

* *Crawford v. Washington*, 124 S.Ct. 1354 (2004) 7, 61, 62

* *Diaz v. United States*, 223 U.S. 442 (1912) 57

* *Diggs v. Richardson*, 555 F.2d 848 (CADC 1976) 37, 38

Doe v. Braden, 57 U.S. 635 (1853) 45, 46

Doe v. Rumsfeld, 297 F. Supp. 2d 119 (D.D.C. 2003) 21

* *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) 68, 71, 72

Ex Parte Milligan, 71 U.S. 2, 127 (1866) ..... passim

* *Ex parte Quirin*, 317 U.S. 1 (1942) ..... passim

Factor v. Laubenheimer, 290 U.S. 276 (1933) 39, 42

Faretta v. California, 422 U.S. 806 (1975) 58

Flanigan v. United States, 465 U.S. 259 (1984) 30

Freeman v. B&B Assocs., 790 F.2d 145 (CADC 1986) 49

* *Gibson v. Berryhill,* 411 U.S. 564 (1973) 11, 16, 18

Gilliam v. Foster, 75 F.3d 881 (CA4 1996) (en banc) 29

Gregory v. Ashcroft, 501 U.S. 452 (1991) 65

Grupo Dataflux v. Atlas Global Group, 124 S.Ct. 1920 (2004) 23

* *Guagliardo v. McElroy*, 259 F.2d 927 (CADC 1958), *aff'd,* 361 U.S. 281 (1960) 26, 27

* *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004) ..... passim

Hamdi v. Rumsfeld, 316 F.3d 450 (CA4 2003), which was vacated, 124 S.Ct. 2633 43

Hammond v. Lenfest, 398 F.2d 705 (CA2 1968) 19, 26, 35

Handy v. Shaw, 325 F.3d 346 (CADC 2003) 8

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) 8

* *Head Money Cases*, 112 U.S. 580 (1884) 39

Hirota v. MacArthur, 338 U.S. 197 (1948) 66

Houghton v. Shafer, 392 U.S. 639, 640 (1968) 19

Huffman v. Pursue, 420 U.S. 592 (1975) 11

Illinois v. Allen, 397 U.S. 337 (1970) 58

In re Swine Flu Immunization Prods. Liability Litig., 880 F.2d 1439 (CADC 1989) 49

In re Yamashita, 327 U.S. 1 (1946) 55, 64, 66

* *INS v. St. Cyr*, 533 U.S. 289 (2001) 36

JMM Corp. v. District of Columbia, 378 F.3d 1117 (CADC 2004) 14

Johnson v. Robison, 415 U.S. 361 (1974) 17

* *Jordan v. Tashiro*, 278 U.S. 123 (1928) 39

* *Kadic v. Karadzic*, 70 F.3d 232 (CA2 1995) 48, 49

* *Kinsella v. Singleton*, 361 U.S. 234 (1960) 26, 69

* *Kolovrat v. Oregon*, 366 U.S. 187 (1961) 39

Lamie v. United States Trustee, 124 S.Ct. 1023 (2004) 55

* *Lewis v. United States*, 146 U.S. 370, 372 (1892) 57-58

Lidas v. United States, 238 F.3d 1076 (CA9 2001) 38

Machado v. Commanding Officer, 860 F.2d 542 (CA2 1988) 27

Madsen v. Kinsella, 343 U.S. 341 (1952) 55, 56, 67

* *Mali v. Keeper of Common Jail*, 120 U.S. 1 (1887) 39

Mannes v. Gillespie, 967 F.2d 1310 (CA9 1992) 29

Mattox v. United States, 156 U.S. 237 (1895) 62

* *McCarthy v. Madigan*, 503 U.S. 140 (1992) 11, 16, 17, 18

McClaughry v. Deming, 186 U.S. 49 (1902) 29

McKart v. United States, 395 U.S. 185 (1969) 17

McNeese v. Board of Educ., 373 U.S. 668 (1963) 17

* *Mehinovic v. Vuckovic*, 198 F. Supp.2d 1322 (N.D.Ga. 2002) 49

Murray v. The Charming Betsy, 6 U.S. 64 (1804) 51

* *New v. Cohen*, 129 F.3d 639 (CADC 1997) .....passim

Nixon v. Sec'y of Navy, 422 F.2d 934 (CA2 1970) 35, 36

* *Noyd v. Bond*, 395 U.S. 683 (1969) 7, 14

* *Ogbudimkpa v. Ashcroft*, 342 F.3d 207 (CA3 2003) 37, 40, 43, 44

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 26

* *Parisi v. Davidson*, 405 U.S. 34 (1972) 7, 24

Pointer v. Texas, 380 U.S. 400 (1965) 62

* *Rasul v. Bush*, 124 S.Ct. 2686 (2004) .....passim

Reaves v. Ainsworth, 28 App. D.C. 157 (CADC 1906) 23

* *Reid v. Covert*, 354 U.S. 1 (1957) .....passim

Relford v. Commandant, 401 U.S. 355 (1971) 26

Robb v. United States, 456 F.2d 768 (Ct. Cl. 1972).....66

* *Saint Fort v. Ashcroft*, 329 F.3d 191 (CA1 2003).....37, 43

* *Schlesinger v. Councilman*, 420 U.S. 738 (1975).....passim

Service v. Dulles, 354 U.S. 363 (1957) 34

Showery v. Samaniego, 814 F.2d 200 (CA5 1987).....29

Singh v. Ashcroft, 351 F.3d 435 (CA9 2003).....37

Smith v. Ill. Bell Tel., 270 U.S. 587 (1926).....11

Standard Oil Co. v. Johnson, 316 U.S. 481 (1942) 35

State v. Webb, 2 N.C. 104 (1794)..... 7

Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (CADC 1984).....43

* *Toth v. Quarles*, 350 U.S. 11 (1955) .....passim

United States v. Averette, 19 U.S.C.M.A. 363 (1970) 66

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) 45

United States v. Daulton, 45 M.J. 212 (U.S.A.F. 1996).....59, 62

United States v. Day, 48 C.M.R. 627 (1974) 29

United States v. Dean, 13 M.J. 676 (A.F.C.M.R. 1982) 59

United States v. Douglas, 1 M.J. 354 (C.M.A. 1976) 56

United States v. Gordon, 829 F.2d 119 (CADC 1987) 59

United States v. Heffner, 420 F.2d 809 (CA4 1969).....35

United States v. MacDonald, 435 U.S. 850 (1978).....30, 31

United States v. Mead, 16 M.J. 270 (C.M.A. 1983).....34

United States v. Noriega, 808 F. Supp. 791 (S.D. Fla. 1992).....40, 43

United States v. Norsian, 47 C.M.R. 209 (1973).....29

* *United States v. Percheman*, 32 U.S. 51 (1833).....39

United States v. Postal, 589 F.2d 862 (CA5 1979).....38

* *United States v. Rauscher*, 119 U.S. 407 (1886).....40

United States v. Rezaq, 134 F.3d 1121 (CADC 1998).....62

United States v. Rodriguez, 37 M.J. 448 (C.M.A. 1993).....51

United States v. Schultz, 4 C.M.R. 104 (C.M.A. 1952).....22

United States v. Stuart, 489 U.S. 353 (1989).....43

* *United States v. Uchiyama* Tr., Case 35-36, War Crimes Branch, JAG Records.....61

* *United States v. Washington*, 705 F.2d 489 (CADC 1983).....58

* *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959).....34

Walker v. Southern Ry., 385 U.S. 196 (1966).....11

* *Wang v. Ashcroft*, 320 F.3d 130 (CA2 2003).....36, 43

* *Weirman v. United States*, 36 Ct. Cl. 236 (1901).....29

Wilcox v. Jackson, 38 U.S. 498 (1839).....30

Williamson v. Berry, 49 U.S. 495 (1850).....30

* *Younger v. Harris*, 401 U.S. 37 (1971).....passim

Statutes

* 10 U.S.C. §3037(c) 15, 63

10 U.S.C. §802(a)(12) 55

* 10 U.S.C. §821 ..... passim

10 U.S.C. §828 54

* 10 U.S.C. §836 ..... passim

10 U.S.C. §836(a) 55

10 U.S.C. §836(b) 55

* 10 U.S.C. §839(b) 57, 62

10 U.S.C. §844(a) 11

10 U.S.C. §849(d) 54, 62

10 U.S.C. §850(a) 54, 62

10 U.S.C. §854 57

10 U.S.C. §856 54

10 U.S.C. §862(a)(1) 11

10 U.S.C. §904 70

10 U.S.C. §906 70

50 U.S.C. §38 66

Other Authorities

1 *The War of the Rebellion* 242 (1894) 65

1 *Writings of George Washington* 467 (Fitzpatrick ed. 1931) 64

2 *Memoirs of Lieutenant-General Scott* 392-93 (1864) 65

2 William Winthrop, *Military Law and Precedents* (2d ed. 1920).....53, 64-67

Army, Military Judges Benchbook for Trial of Enemy Prisoners of War, Oct. 2004.....59

Attorney General Biddle, Proceedings, http://www.soc.umn.edu/~samaha/nazi_saboteurs/nazi01.htm.....20

Benet, *Treatise on Military Law* 15 (1862) 53

Best, *War and Law Since 1945*, 80-114 (1994) 42

Black's Law Dictionary 322, 766 (1990) 55

Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am.J. Int'l L. 695 (1995) 41

Chief Justice William Rehnquist, *All The Laws But One* 137 (1998) 20

Defense Dep't. Background Briefing on CSRTs, http://defenselink.mil/transcripts/2004/tr20040707-0981.html.....45

Dudley, *Military Law* 13 (1910).....30, 67

Eugene Fidell, *Judicial Review of Presidential Rulemaking Under Article 36: The Sleeping Giant Stirs*, 4 Mil. L.Reptr. (1976) 57

George B. Davis, *A Treaty on the Military Law of the United States* 309 (1913) 53

Glazier, Note, *Kangaroo Court or Competent Tribunal?*, 89 Va. L.Rev. 2005 (2003).....14, 55

Glenn, *Army and Law* 42 (1918) 53

Golden, *After Terror, A Secret Rewriting of Military Law*, N.Y. Times, Oct. 24, 2004 25

Hunt, 4 American Mil. Govt. of Occupied Germany, 1918-1920 (1920) 53

Int'l Comm. Red Cross, *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War*(1960) 41

Ives, Treatise on Military Law (1879) 53

Jennifer Elsea, Congressional Research Service, *Treatment of "Battlefield Detainees" in the War on Terrorism* 29 (2002), http://fpc.state.gov/documents/organization/9655.pdf 47

Jinks and Sloss, *Is the President Bound by the Geneva Conventions?*, 90 Cornell L.Rev. 97 (2004) 48, 49

Judge Advocate General's School, *Operational Law Handbook* 22 (2003) 34

Katyal & Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259 (2002) 66

Lewis, *FBI Memos Criticized Practices at Guantanamo*, N.Y. Times, Dec. 7, 2004 13

Lewis, *Guantanamo Tribunal Process in Turmoil*, N.Y. Times, Sept. 26, 2004, A29 13

Louis Fisher, *Military Tribunals and Presidential Power* 124 (2005) (lodged with Court) 15

Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am.U.J. Int'l L.&Pol'y 419 (1987) 60

Neely, *The Fate of Liberty* 162 (1991) 16

Patrick Philbin, Office of Legal Counsel, *Legality of the Use of Military Commissions to Try Terrorists* (2001) 18

Paust, *Antiterrorism Military Commissions*, 23 Mich. J. Intl. L. 1, 3-4 (2001) 24, 67

President George W. Bush, Press Conference, Dec. 20, 2004, at http://www.whitehouse.gov/news/releases/2004/12/20041220-3.html 18

Press Briefing by Scott McClellan, http://www.whitehouse.gov/news/releases/2004/12/20041210-9.html 19

Secretary Rumsfeld Statement, www.defenselink.mil/news/Jan2002/t01282002_t0127sd2.html 46

Secretary of Defense Statement, Feb. 13, 2004, http://www.defenselink.mil/transcripts/2004/tr20040213-0445.html 19

Secretary of the Navy Memorandum, http://www.defenselink.mil/news/Jul204/d20040730comb.pdf 45

Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 319 (1868) 29

Treatise on Military Law 284 (1879) 53

U.S. Army Field Manual 27-10, *The Law of Land Warfare*, ch.3 ¶ 71 (1956) 34

White House Fact Sheet, http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html 47

William E. Birkhimer, *Military Government and Martial Law* (3d ed. 1914) 16, 19

Rules

Commission Rule §13.3(c)(3) 54

Pub. L. No. §108-375, §1091(b)(4), 118 Stat. 1811, 2068-69 (2004) 32

Pub. L. No. §108-375, §1092(b)(3), 118 Stat. 1811, 2069-70 (2004) 32

R.C.M. 1001(c) 54

R.C.M. 901(d)(4)(D) 55

Regulations

32 C.F.R. §9.10 ..... 4, 51

32 C.F.R. §9.11 4

32 C.F.R. §9.5(m) 54

32 C.F.R. §9.5(p) 11

32 C.F.R. §9.6(b) 57

32 C.F.R. §9.6(b)(3) 3

32 C.F.R. §9.6(d)(3) 3

* Army Regulation 190-8 ..... passim

Army, *Law of War Workshop Deskbook* (2000) 40

Legislative Materials

Annals, 15th Cong., 2d Sess. 515-27 (1819) 64

* S. Exec. Rep. No. 84-9 (1955) 38

S. Rep. 64-582 at 40 (1916) 53

Executive Order

M.C.M. 201(f)(1)(B)(ii) 35

GLOSSARY

Addendum ..... Appellee's Addendum filed herewith

App. Br. .....Appellants' Brief to this Court

CSRT ....Combatant Status Review Tribunal

GPW ..... Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949

Hamdan Reply Br. .... Respondent-Appellee Hamdan's Reply Brief in the District Court in this Circuit

JA ..... Joint Appendix

JAG ..... Judge Advocate General

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

POW ..... Prisoner of War

UCMJ ..... Uniform Code of Military Justice

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLEE

STATEMENT OF THE ISSUES

1. Whether the District Court erred in determining not to abstain from exercising jurisdiction over Petitioner-Appellee Hamdan's petition by construing the laws, treaties, and Constitution of the United States.

2. Whether the District Court erred in determining that the 1949 Geneva Conventions, as ratified treaties of the United States, constitute the law of the land applicable in this case.

3. Whether the District Court erred in holding that, until a competent tribunal determines that Hamdan is not entitled to POW status under the Geneva Conventions, he may be tried only by court-martial for the offense with which he is charged.

4. Whether the District Court erred in holding that Hamdan's Military Commission lacks jurisdiction because it violates rights of confrontation and presence guaranteed by the UCMJ, military law, international law, common law, and the Constitution.

5. Whether the President has unilateral power to create military commissions, including those that contravene military law and the laws of war.

RELEVANT STATUTES AND REGULATIONS

Relevant statutes and regulations are set forth, in pertinent part, in the Addendum filed herewith.

STATEMENT OF THE CASE

This case involves a petition for a writ of mandamus and habeas corpus filed by Salim Ahmed Hamdan. The petition challenges Hamdan's pretrial detention at Guantanamo Bay Naval Base, and, among other things, the validity of the military commission that was to try him. The District Court found that the commission was inconsistent with the laws and treaties of the United States, specifically, the UCMJ and the Geneva Conventions.

STATEMENT OF THE FACTS

On November 13, 2001, the President issued a Military Order to create military commissions.

The rules that govern these commissions do not provide the fundamental protections mandated for an accused in the UCMJ. Commission rules permit the exclusion of the accused from portions of his trial, 32 C.F.R. §9.6(b)(3); deny him the ability to represent himself, and permit the admission of unsworn statements in lieu of testimony, §9.6(d)(3). The rules further provide that the limited protections

available to defendants, such as the presumption of innocence and the right to not testify, are not "enforceable" in any way and can be stripped at any time. 32 C.F.R. §9.10-11.

In late November 2001, Hamdan was captured by Afghani militia forces while attempting to flee Afghanistan and return his family to his native country of Yemen. After being turned over to American forces, Hamdan was taken to Guantanamo Bay, where he was placed with the general detainee population at Camp Delta. On July 3, 2003, the President announced that there was "reason to believe" that Hamdan was subject to trial by commission. Hamdan was then placed in solitary confinement in Camp Echo, where he remained from December 2003 until late October 2004 (approximately four days before this case was argued in the District Court). JA 374-75. While in solitary, Hamdan exhibited symptoms consistent with acute mental injury including suicidal inclinations. JA 168-72.

In December 2003, Lieutenant Commander Swift was detailed, at the prosecution's request, to serve as Hamdan's counsel for the limited purpose of negotiating a plea. JA 154-55. On February 12, 2004, Hamdan filed a demand with the Appointing Authority for charges and a speedy trial under the UCMJ. The Appointing Authority rejected Hamdan's demand, concluding that the UCMJ does not apply. Hamdan filed this Petition in April 2004. In July 2004, approximately

thirty-two months after Hamdan was detained and eight months after the beginning of his solitary confinement, Appellants charged Hamdan with conspiracy.

SUMMARY OF ARGUMENT

Correctly characterized, the decision below is not "extraordinary," "unprecedented" or "counterintuitive." The District Court construed the laws and treaties of the United States. It did not "overrule" the President, other than in the sense that any federal court might do so in determining that Executive action did not comply with the laws and treaties of the United States. The District Court did not limit the Commander-in-Chief powers in the absence of Congressional authority; rather, it found that Congress in the UCMJ and the Geneva Conventions set forth rules governing the treatment of Hamdan.

Although this case undoubtedly raises issues of national and international importance, the court below did not unduly restrict the powers of the Executive as historically recognized by the courts; it simply did not acquiesce to claims for the substantial broadening of those powers at the expense of traditional functions reposed in the Judicial Branch and Congress.

Whenever a federal court construes the Constitution, statutes or treaties, the court, to a degree, impinges upon Executive and Legislative prerogatives. That it does so is inherent in the nature of our tripartite form of government. Only in the

most rare and extreme cases does the exercise of the judicial function cause serious tensions between the branches of government. The decision of the court below is not one of those cases. It would have been such a case only if the District Court had concluded that the Executive's interpretation of the UCMJ and the Geneva Conventions urged by Appellants was superior to and could not be reviewed by the judiciary.

The District Court correctly determined that the commission lacks jurisdiction to try Hamdan because it violates his right to be present and the right to confront witnesses. The right to be present at all stages in criminal proceedings is fundamental, guaranteed by military law, common law, constitutional law, and international law. Even without the UCMJ, a commission that denied these rights would be dismissed for want of jurisdiction. The UCMJ codifies this longstanding tradition of justice.

Hamdan's rights have already been abridged, as he has been excluded from portions of the *voir dire*. The commission rules permit Hamdan to be excluded from portions of the trial as well, and the Prosecutor has announced his intention to exclude Hamdan for two days of testimony. These actions violate the longstanding guarantee of confrontation, one "founded on natural justice." *Crawford v.*

Washington, 124 S.Ct. 1354, 1363 (2004) (quoting *State v. Webb*, 2 N.C. 104 (1794)).

The court below correctly concluded that abstention was not appropriate under *Schlesinger v. Councilman*, 420 U.S. 738 (1975) and *New v. Cohen*, 129 F.3d 639 (CADC 1997). It did so because the courts in *Councilman* and *New* were asked to defer to courts-martial, the very process that the Government rejects for Hamdan. Unlike a court-martial, the commission Hamdan faces was not created by Congress. It is not equipped to construe the Constitution, laws and treaties at issue; nor is it an established or mature system designed to protect the rights of the accused. The commission, an *ad hoc* body tainted by command influence, is not due comity.

The District Court also observed that *Councilman* and *New* repeated the determination in *Noyd v. Bond*, 395 U.S. 683, 696 n.8 (1969), that it would be "especially unfair to require exhaustion . . . when the complainants raised substantial question whether the military may try them at all." Having determined that Hamdan raised that substantial question, the District Court held that abstention was neither required nor appropriate.

In reaching this conclusion, the District Court reviewed the policy factors favoring abstention set forth in *Parisi v. Davidson*, 405 U.S. 34 (1972), and recited

in *New*. Deferring to the commission would not "aid[] the military judiciary in its task of maintaining order and discipline in the armed services," would not "eliminate[] needless friction between the federal civilian and military judicial systems," and would not deny "due respect to the autonomous military judicial system created by Congress." JA 379.

STANDARD OF REVIEW

A district court's abstention decision is reviewed for abuse of discretion. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984); *Handy v. Shaw*, 325 F.3d 346, 349 (CADC 2003).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY REACHED THE MERITS

Abstention "is the exception, not the rule" "because of 'the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.'" *Bridges v. Kelly*, 84 F.3d 470, 475 (CADC 1996) (citation omitted); *Ankenbrandt v. Richards,* 504 U.S. 689, 705 (1992) (abstention "rarely should be invoked").

Abstention is *required* only when Congress states "in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision." *Avocados Plus v. Veneman*, 370 F.3d 1243, 1248

(CADC 2004) (quotation omitted). Congress has said nothing about abstention in this case, let alone in the requisite "[s]weeping and direct statutory language." *Id.*

A. *Councilman* Does Not Support Abstention Here

The government's reliance on *Councilman* is misplaced and ironic. *Councilman* emphasized that in creating the modern court-martial, Congress carefully balanced military necessities against procedural fairness. It is precisely this system that Appellants reject. This rejection has significant consequences for abstention and its underlying elements of comity, competence, exigency, and equity.

1. Comity

The commission lacks the factual predicate of abstention, a system "established by Congress and carefully designed to protect not only military interests but [the defendant's] legitimate interests as well." *Councilman*, 420 U.S. at 760; *see also New*, 129 F.3d at 643; JA 379.

Councilman and *New* did not challenge the process's fairness and legality; Hamdan does. As this Court has held, without "proceedings that would have afforded appellants a full and fair opportunity to litigate their [federal] claims, the predicate for *Younger* abstention [i]s simply absent." *Bridges*, 84 F.3d at 478 (citation omitted).

Appellants have acknowledged they are "plowing new ground" in conducting the first military commissions since 1948. *Plowing New Ground in Military Commissions,* http://www.defenselink.mil/news/Aug2004/n08232004_2004082301.html. Notions of comity are simply inapposite when the tribunal's legitimacy is itself at issue.

Appellants cannot harvest the comity benefits of court-martial cases like *Councilman* and simultaneously claim they are not bound by court-martial rules. As noted above, *supra* pages 3-4, the supposed "rights" Appellants highlight are not "rights" at all and can be taken away at any time. Only Presidential fiat constrains this commission.

Abstention to courts-martial is built on the rock of a fair system established by Congress. This commission, a purely Executive creation, cannot make similar appeals to comity. Consider two examples.

a. Delay

Unlike courts-martial, commissions have no time limits. Appellants insist that Hamdan lacks court-martial speedy-trial rights. Under the current commission rules, Hamdan's trial may not take place for years, if ever.

If a trial eventually took place and the commissioners found Hamdan not guilty, the Appointing Authority and Review Board can send his case back to the

commission.[1] If Hamdan were found guilty, review by the Secretary of Defense and the President would occur. That review has absolutely no timetable or fixed guidelines. (It took nearly three years to simply charge Hamdan.)

Abstention principles are inapplicable when there is "an unreasonable or indefinite timeframe for administrative action." *McCarthy v. Madigan*, 503 U.S. 140, 147 (1992); *see Gibson v. Berryhill,* 411 U.S. 564, 575 n.14 (1973) (administrative remedy inadequate "[m]ost often . . . because of delay by the agency"); *Coit v. FSLIC,* 489 U.S. 561, 587 (1989) (because "regulations do not place a reasonable time limit on FSLIC's consideration of claims, Coit cannot be required to exhaust those procedures"); *Walker v. Southern Ry.,* 385 U.S. 196, 198 (1966); *Smith v. Ill. Bell Tel.,* 270 U.S. 587 (1926).

Commissions do not meet *Younger*'s premise of being the "most appropriate forum for the resolution of constitutional contentions." *Huffman v. Pursue*, 420 U.S. 592, 609 (1975). Permitting the military's process to run its course is only appropriate where there *is* process in the first place and where that process

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[1] While the Review Panel cannot directly turn a finding of not guilty into a finding of guilty, the rules unjustly permit them to return the case for further proceedings simply because they are unhappy with the results. *Compare* 32 C.F.R. §9.5(p) *with* 10 U.S.C. §§844(a), 862(a)(1) (UCMJ provisions preventing double jeopardy).

comports with basic fairness. Neither is evident here. Even the mere CSRT finalization procedure was so opaque that Appellants' own counsel was unsure of it. JA 249. Appellants make procedures up as they go along, dragging out deliberations or finalizing them in whatever way prevents them from having to defend their actions. This suspect process is not entitled to presumptive legitimacy.

Even if the commission or the President acquitted Hamdan, *that* would not end the matter. Commission rules permit Hamdan to be charged with another offense (such as conspiring to commit some other offense, or even aiding and abetting the *same* object offenses for which he is currently charged). As long as the Military Order stands, Appellants can bring new charges—and subject Hamdan to new trials—until conviction. Therefore, Appellants' argument that Hamdan's conviction may not be affirmed is irrelevant; he will always be subject to yet another proceeding under the Military Order. Review of that Order is essential now. [2]

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[2] While *amicus* WLF "do not doubt" that that the federal courts would possess habeas jurisdiction after a conviction, Appellants offer no such assurance. The Military Order tries to preclude civilian review. When this Court abstained in *New*, it noted the variety of remedies available after the court-martial ended. 129 F.3d at 647-48. If the President keeps post-verdict review to a minimum, then federal courts must rule on the commission's legality and jurisdiction at the outset.

Unlike *Councilman*, this is not a case where the defendant is subjected to the period of uncertainty and anxiety attendant upon a typical prosecution. Hamdan is subjected to unending uncertainty. His case presents serious allegations of ongoing psychological damage, harm that is irreparable, "great and immediate." *Younger v. Harris*, 401 U.S. 37, 46 (1971); Lewis, *FBI Memos Criticized Practices at Guantanamo*, N.Y. Times, Dec. 7, 2004. Abstention could mean Hamdan is placed in solitary confinement again indefinitely to await further proceedings, creating irreparable psychological harm and eviscerating Hamdan's ability to defend himself at trial. Hamdan Reply Br. 15-16.

b. Command Influence

Councilman was premised on structural safeguards in the court-martial system and judges "completely removed from all military influence or persuasion." 420 U.S. at 758. The commissioners here (all hand-picked by Appellants) entirely lack this insulation. Even worse, the Prosecution has recognized that some have close personal connections with senior Pentagon officials who oversee the proceedings. Lewis, *Guantanamo Tribunal Process in Turmoil*, N.Y. Times, Sept. 26, 2004, A29. Command influence in a process that mixes adjudication of law and fact represents a "half-century leap backward in military legal norms."

Glazier, Note, *Kangaroo Court or Competent Tribunal?*, 89 Va. L.Rev. 2005, 2019 (2003).

Judicial insulation, another predicate of comity, is missing. "When after the Second World War, Congress became convinced of the need to assure direct civilian review over military justice, it deliberately chose to confide this power to a specialized Court of Military Appeals, so that *disinterested* civilian judges could gain *over time* a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces." *Noyd*, 395 U.S. at 694 (emphasis added).

Unlike that system, the Commission's *ad hoc* Review Board took oaths that excluded obeying the Constitution and laws. *See* Secretary Rumsfeld Swearing-In, Sept. 21, 2004, http://www.defenselink.mil/transcripts/2004/tr20040921-secdef1323.html; *JMM Corp. v. District of Columbia*, 378 F.3d 1117, 1123 (CADC 2004) (applying *Younger* because "there is no reason to presume that the courts of the District cannot be trusted to adequately protect federal constitutional rights"). "[T]he duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty," *Ex parte Quirin*, 317 U.S. 1, 19 (1942), should not be delegated to officials who claim the Constitution does not apply and take an oath to implement only the rules that they themselves have created.

The lack of safeguards against command influence is also evident in Appellants' defiance of 10 U.S.C. §3037(c), which provides:

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

The JAG by statute is Presidentially appointed and Senate confirmed for this task. The commission therefore not only lacks the sanction of Congress present in *Councilman*, it actively flouts congressional rules.

"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 commission convictions, including for denying the right to be present:

> [Judge Advocate General Holt] repeatedly overturned the decisions of trials by military commission...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."

Neely, *The Fate of Liberty* 162-63 (1991) (quoting Holt's opinion). The denial of this right to be present *has already happened to Hamdan*. JA 411.

Appellants are asking this Court to abstain to a process that denies basic rights and eliminates the advisory review required by Congress. These procedural failings counsel against application of comity and abstention.

2. Competence and Futility

Younger "presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Gibson*, 411 U.S. at 577. Hamdan's commission is not competent to address the complex questions of constitutional law, international law, and jurisdiction present here. The commission's presumed knowledge of military operations is simply irrelevant.[3] The legal questions demand the competence and careful consideration of an Article III court. *McCarthy*, 503 U.S. at 148 (exhaustion not "required where the

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[3] The issue is how military officers will be used: in a commission whose rules are made up on the fly, or a court-martial whose procedures have been carefully crafted over two centuries by Congress. *See* William E. Birkhimer, *Military Government and Martial Law* 533-34 (1914) ("The customs of courts-martial are the teaching of ages. They have been transmitted from one generation of soldiers to another . . . besides, experience has demonstrated that changes, unless carefully made, are more apt to embarrass than to facilitate and render certain the administration of justice through military tribunals").

challenge is to the adequacy of the agency procedure itself"); *Allen v. Grand Central Aircraft*, 347 U.S. 535, 540 (1954).

In contrast to courts-martial, Hamdan's commission is conducted largely by non-lawyers and reviewed by executive-branch officials. Its legal rulings are unlikely to provide guidance to the federal courts. While the Court of Military Appeals may provide insights into the meaning of the Geneva Conventions, the commission proceedings will not.

Even with professional military judges, *Councilman* pointedly rejected the argument that "the expertise of military courts extended to the consideration of constitutional claims." 420 U.S. at 759 (quoting *Noyd, supra*). *See also McKart v. United States*, 395 U.S. 185, 197-98 (1969).

Moreover, because it is doubtful that commissions can declare their own existence unconstitutional, they "lack authority to grant the type of relief requested." *McCarthy*, 503 U.S. at 148. "[A]n agency . . . may be unable to consider whether to grant relief because it lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute." *Id.* at 147-48; *Johnson v. Robison*, 415 U.S. 361, 368 (1974); *McNeese v. Board of Educ.*, 373 U.S. 668, 675 (1963).

In addition, abstention is not appropriate when the administrative body has "predetermined the issue." *McCarthy*, 503 U.S. at 148; *Gibson*, 411 U.S. at 577. Appellants have predetermined the issues in this case, namely, the legality and constitutionality of commissions, by promulgating the Military Order and accompanying regulations. Moreover, Appellants evidently rely on an Office of Legal Counsel opinion, which binds the entire federal government, stating that commissions are legal. Memorandum for Alberto Gonzales from Patrick Philbin, Office of Legal Counsel, *Legality of the Use of Military Commissions to Try Terrorists* (2001). Appellants also claim that a Presidential Order resolves the issue of whether the Geneva Conventions apply. App. Br. 40-46.

The President's recent statements underscore the futility of abstention:

> [T]o the extent that people say, well, America is no longer a nation of laws -- that does hurt our reputation . . . [O]ur courts have made a ruling, they looked at the jurisdiction, the right of people in Guantanamo to have habeas review. . . . We want to fully vet the court decision, because I believe I have the right to set up military tribunals. And so the law is working to determine what Presidential powers are available and what's not available.

Press Conference, Dec. 20, 2004, at http://www.whitehouse.gov/news/releases /2004/12/20041220-3.html; *see also* http://www.whitehouse.gov/news/releases/

2004/12/20041210-9.html; Remarks by Secretary of Defense, Feb. 13, 2004, http://www.defenselink.mil/transcripts/2004/tr20040213-0445.html.

The Military Order, OLC opinion, and other documents make clear that exhaustion is futile. *Houghton v. Shafer,* 392 U.S. 639, 640 (1968); *Hammond v. Lenfest*, 398 F.2d 705, 713 (CA2 1968) ("a court-martial would consider itself bound by the determination of the Chief of Naval Personnel"). Commissions have long been subject to this problem. *E.g.,* Birkhimer, *supra*, at 357 (a soldier "who assumes to question the order of his commander does so at his peril. This rule . . . leads to unquestioned obedience" so that officers feel bound to obey orders convening commissions).

In *Quirin*, Attorney General Biddle explained why exhaustion was futile. Responding to the defense's claim that "this court is invalid and unconstitutional," Biddle opened the first day of proceedings:

> I cannot conceive that a military commission composed of high officers of the Army, under a commission signed by the Commander-in-Chief, would listen to argument on the question of its power under that authority to try these defendants . . . [T]he question of the law involved is a question, of course, to be determined by the civil courts . . . I cannot think it conceivable that any commission would listen to an argument that [enemy] armed forces . . . have any civil rights that you can listen to in this proceeding.

Proceedings ("Saboteur Tr.") at 5-6, http://www.soc.umn.edu/~samaha/nazi_saboteurs/nazi01.htm. Consistent with Biddle's logic, the commission was halted so that the federal case could be filed and decided.[4] The same result is required here.

3. No Exigency Requires Abstention

Appellants also renew the military-exigency claim that failed in *Reid v. Covert*, 354 U.S. 1 (1957). Deference to the President goes to the merits, not abstention. And no exigency exists. Hamdan has been in military custody for over three years and the government has stated it may detain Hamdan independently and indefinitely as an enemy combatant. Hamdan is also subject to court-martial and civilian trial. The needs of the military are protected.

Councilman, moreover, had nothing to do with deference to the exigencies of war, it was concerned exclusively with *internal* military discipline. 420 U.S. at 757. As *Toth v. Quarles*, 350 U.S. 11, 22 (1955), stated: "Army discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier

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[4] *See* William Rehnquist, *All The Laws But One* 137 (1998); Saboteur Tr. at 2765 (adjourning commission so defendants could proceed in Supreme Court); *id.* at 2935 (JAG stating that Supreme Court "probably will straighten out the question as to whether this is a theater of operation").

who has been wholly separated from the service . . . [D]iscipline provide[s] no excuse for new expansion of court-martial jurisdiction." When the fighting function is not implicated, neither is abstention. *See Doe v. Rumsfeld*, 297 F. Supp.2d 119, 128 (D.D.C. 2003). Whether Hamdan is tried by commission or court-martial has no effect on discipline.

Appellants' delay also belies their claim that commissions are essential for security. Unlike past commissions, which dispensed quick justice, this commission took over two years to charge Hamdan, and almost three years to begin proceedings. Whatever benefits this commission may have for Appellants, speedy efficiency is not among them.

4. As in *Quirin*, the Public Interest Requires Immediate Review

Appellants' conduct at Guantanamo is the subject of intense interest and concern. As President Bush recently suggested, *see supra* Page 18, a good portion of the nation, indeed the world, is watching these proceedings.

This is the first commission since the World War II era. In the decades since, the Geneva Conventions were ratified and the UCMJ enacted. A clear, efficient, and just resolution of the questions presented is essential now. If commissions are worth doing, they are worth doing right the first time.

In *Quirin*, the Supreme Court reached the conclusion that equity required reaching the merits without delay:

> In view of the public importance of the questions...and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay, we directed . . . a special term of this Court . . .

317 U.S. at 19. Even in the midst of World War, the Court understood that the cloud of legal uncertainty must be cleared before a commission's verdict. Antecedent civilian review avoided the far greater comity threat of courts setting aside commission verdicts. That is why a Nixon Administration DOD Report concluded that pre-trial habeas review would benefit the Government. *See Amici* International Law Scholars' Brief App. 9. The years since *Quirin* have seen dramatic changes in both domestic law and laws of war. "By definition, the law of war must be a concept which changes with the practice of war and the customs of nations." *United States v. Schultz*, 4 C.M.R. 104, 114 (C.M.A. 1952). As in *Quirin*, Article III courts must address the legality of commissions in light of these changes.

Appellants, not pleased with this aspect of *Quirin*, contend it was overruled by *Younger* and *Councilman*. But this is flatly wrong. Abstention law in 1942 did not look significantly different. *See Councilman*, 420 U.S. at 754-56; *Younger*, 401 U.S. at 45-46; *Reaves v. Ainsworth*, 28 App. D.C. 157 (CADC 1906). And again, *Councilman* dealt with the carefully designed Congressional system of military justice, which is precisely what Appellants reject.

5. Private Equities Counsel Against Abstention

When Hamdan filed suit, he had been languishing in solitary confinement for five months and detention for over two-and-one-half years with no commission and no charges. Before filing suit, he did everything possible to exhaust his claims, including requesting charges and a speedy trial.[5] His request was denied in a legal opinion that essentially rejected Hamdan's statutory and constitutional claims. JA 104.[6]

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[5] Appellants' July 27 filing stated that "'the jurisdiction of the Court depends upon the state of things at the time of the action brought.'" *Grupo Dataflux v. Atlas Global Group*, 124 S.Ct. 1920, 1924 (2004). Events after the April 2004 petition do not concern jurisdiction.

[6] The opinion necessarily rejected the Nixon Pentagon Report conclusion that the UCMJ and Constitution apply to commissions, which found:

After refusing to apply the UCMJ, Appellants tried to derail this litigation. First, they asked the Court to hold the proceedings in abeyance pending *Padilla* and *Rasul* and then brought *post-hoc* charges to take advantage of *Councilman*. Second, although Hamdan has continuously warned of the irreparable psychological harm accruing each day of solitary confinement, Appellants waited until the eve of oral argument to move him and then highlighted that change at argument. JA 246-47, 261, 357. Third, well after filing their Return, Appellants launched a CSRT and concluded it a few days before oral argument but not soon enough to introduce any findings into the record or provide them to opposing counsel.

The procedural history of this case makes clear that it was the Government's own manipulations and not Judge Robertson's decision that created "needless friction" between the civilian and military systems. *Parisi,* 405 U.S. at 40. It is

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> [T]he specific protections of the Bill of Rights, unless made inapplicable to military trials by the Constitution itself, have been held applicable to courts-martial. Both logic and precedent indicate that a lesser standard for military commissions would not be constitutionally permissible. In this regard, Winthrop stated: "Military commissions . . . are commonly conducted according to the rule and forms governing courts-martial."

Appellants that violated comity by trying to derail Hamdan's pre-existing federal case.

Reversal of the judgment below, moreover, may eviscerate *Rasul* by enabling Appellants to evade habeas review of *all* Guantanamo detainee cases for years by designating detainees eligible for commissions. *See* Golden, *After Terror, A Secret Rewriting of Military Law*, N.Y. Times, Oct. 24, 2004, at 1 (stating that Counsel to the Vice President "urged" the White House Counsel to "seek a blanket designation of all the detainees being sent to Guantanamo as eligible for trial under the president's order" and that White House Counsel "agreed").

B. *COUNCILMAN* DOES NOT APPLY TO JURISDICTIONAL CHALLENGES

1. The System Cannot Determine Its Own Jurisdiction

Councilman recognized that a military-court system needs an external determination of jurisdiction and power. It is "especially unfair to require exhaustion . . . when the complainants raise[] substantial arguments denying the right of the military to try them at all." 420 U.S. at 759 (citation omitted). This language from *Councilman* was quoted by this Circuit in *New*, 129 F.3d at 644,

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Quoted in Paust, *Antiterrorism Military Commissions*, 23 Mich. J. Int'l L. 1, 3-4

and tracks the longstanding rule. *See Guagliardo v. McElroy*, 259 F.2d 927, 929 (CADC 1958) (previous exhaustion cases are "inapposite, for there court-martial jurisdiction over the accused unquestionably existed" and here "the question is whether appellant is subject to court-martial jurisdiction at all"), *aff'd,* 361 U.S. 281 (1960); *Kinsella v. Singleton*, 361 U.S. 234, 240-41 (1960) (rejecting Government's argument to consider a civilian's impact on discipline because "[t]he test for jurisdiction . . . is one of *status*"); *Hammond*, 398 F.2d at 714 (abstention inappropriate because government "fails to explain wherein lies [its] power to convene the court-martial"); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

Councilman upheld the denial of abstention in *Toth* and *Reid, supra*, because "[t]he constitutional question presented *turned on the status of the persons* as to whom the military asserted its power." 420 U.S. at 759 (emphasis added). The challenge in *Councilman*, by contrast, was brought under the fact-specific "ad hoc" 12-factor test of *Relford v. Commandant*, 401 U.S. 355, 366 (1971). Such factual determinations are irrelevant here, as in *Toth, Reid*, and *Guagliardo*.

The expansion of military jurisdiction is disfavored because it is harsh even at its best. Accordingly, federal courts always police the boundary at the outset.

(2001).

Appellants try to flip the burden through manufacturing a new test: civilian status must be "undisputed." App. Br. 20. But *Councilman* and *New* both require only "substantial arguments." *Councilman*, 420 U.S. at 759; *New*, 129 F.3d at 646; *Andrews v. Heupel*, 29 M.J. 743, 747 (A.F.C.M.R. 1989). Abstention has been rejected when the Petitioner "colorably claim[ed]" that he was a civilian. *Machado v. Commanding Officer,* 860 F.2d 542, 546 (CA2 1988). New's claim of civilian status, in contrast, was so insubstantial that he abandoned it. 129 F.3d at 646.

Moreover, Appellants' portrayal of uncontested civilian status in *Toth* and *Reid* is revisionist history. The Solicitor General argued in *Toth* that "ninety years" of precedent explain why Toth was "not a civilian." Petr. Br., *Toth v. Quarles*, No. 3 (1955), at 12. The Solicitor General argued that Mrs. Reid was "part of the American military contingent abroad" and Congress made her "subject to discipline under American military law." App. Br., *Reid*, No. 701, at 31-32.

Appellants also assert, after failing to provide any evidence to the Court below, that Hamdan "clearly falls within the jurisdiction and authority of the military." App. Br. 20-21. The Solicitor General in *Toth* and *Reid* advanced that argument to no avail. Moreover, the question is not whether Hamdan is under the military's jurisdiction writ large, but whether the commission has jurisdiction. Under Appellants' reasoning, because Councilman and New were under "the

jurisdiction and authority of the military" they could be subjected to any "commission" the President created.

In fact, any difference between Hamdan and Toth cuts *against* Appellants. No civilian court had jurisdiction to prosecute Toth. Petr. Brief, *supra*, at 7. Hamdan does not ask for Toth's windfall. Judge Robertson did not grant Hamdan immunity; he required prosecution under procedures that comply with law.

Appellants also repeat their irrelevant assertions that Hamdan is not entitled to constitutional protection. *Councilman* focused not on constitutional rights, but fairness to a defendant's "interests." 420 U.S. at 757. Moreover, *Rasul v. Bush*, 124 S.Ct. 2686, 2698 (2004), made clear that "nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the privilege of litigation." The Government must "make their response to the merits of petitioners' claims." *Id.* at 2699. Finally, footnote 15 of *Rasul* shows that the Constitution protects Hamdan. Hamdan Reply Br. 39-43.

2. The Rights at Stake Are Jurisdictional

Hamdan "is contesting the very authority of the Government to hale him into court to face trial on the charge against him." *Abney v. United States*, 431 U.S. 651, 659 (1977). Abstention is inappropriate when a defendant asserts a right such

as Double Jeopardy, which protects against the unconstitutional trial process itself. *Gilliam v. Foster*, 75 F.3d 881, 904 (CA4 1996) (en banc); *Mannes v. Gillespie*, 967 F.2d 1310 (CA9 1992); *Showery v. Samaniego*, 814 F.2d 200 (CA5 1987).

In addition to his status-based claim, Hamdan raises several other jurisdictional challenges. In military courts, a defendant's presence at every stage of the trial is a jurisdictional requirement:

> "[H]e has *the right* to be present, and must be present, during *the whole* of the trial, and until the final judgment. If he be absent . . . there is a want of jurisdiction over the person, and the court can not proceed with the trial, or receive the verdict, or pronounce the final judgment."

Weirman v. United States, 36 Ct. Cl. 236 (1901) (emphasis in original) (quoting Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 319 (1868)). In military courts, a defendant's presence continues to be jurisdictional. *United States v. Day*, 48 C.M.R. 627 (1974); *United States v. Norsian*, 47 C.M.R. 209 (1973).

Likewise, the failure to follow statutory authorization is jurisdictional: "A court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute or else it is without jurisdiction." *McClaughry v. Deming*, 186 U.S. 49, 62 (1902).

See also Dudley, *Military Law* 13 (1910) ("The military commission . . . [has] jurisdiction only within the limits prescribed by law. Being courts of special jurisdiction, the fact that they have jurisdiction must appear in every case, because without it their acts are wholly void."); *Wilcox v. Jackson*, 38 U.S. 498, 510-11 (1839); *Williamson v. Berry*, 49 U.S. 495, 540-41 (1850).

United States v. MacDonald, 435 U.S. 850, 861 n.7 (1978) suggested that Sixth Amendment speedy-trial guarantees could be vindicated after trial, but the Court cautioned that its holding "is not to be confused with the quite distinct proposition that certain claims (because of the substance of the rights entailed, rather than the advantage to a litigant in winning his claim sooner) should be resolved before trial." *See Flanigan v. United States*, 465 U.S. 259, 266 (1984). Hamdan asserts a "right not to be tried." *MacDonald*, 435 U.S. at 861. Furthermore, *MacDonald*'s Sixth Amendment analysis does not control UCMJ and the Geneva Conventions speedy-trial rights, which are far more extensive.

Finally, even rights that can be vindicated post-trial may be properly adjudicated without abstention when a patently severe violation occurs. *Younger*, 401 U.S. at 53-54.

II. HAMDAN'S COMMISSION VIOLATES THE GPW

The District Court's GPW ruling should be affirmed. In challenging this ruling, Appellants disparage the Court's power under the Judiciary and Supremacy Clauses, mischaracterize the ruling below, and disregard the Suspension Clause.

A. Domestic Law Implements The GPW

The GPW has been implemented, as no less than four separate provisions confirm.

1. 10 U.S.C. §821

The District Court correctly noted that "Hamdan has not asserted a 'private right of action' under the Third Geneva Convention." JA 394. It held that the GPW is implicated by a federal statute, 10 U.S.C. §821. The statute limits commissions to "offenders or offenses that . . . by the law of war may be tried by military commissions." *Quirin* held that the predecessor of §821 incorporated the law of war. 317 U.S. at 38. Appellants acknowledge that the law of war includes the GPW. JA 292; Addendum 29a.

Under GPW Article 5, when any doubt arises, a person "shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." Addendum 3a. Under Article 102, a POW

can be tried only "by the same courts according to the same procedures as in the case of members of the armed forces of the Detaining Power." Addendum 4a.

Appellants claim that §821, by referring to "offenders *or* offenses," permits trial by commission because "Conspiracy" violates the law of war. This is false, *see infra* Part IV.D.1, as well as far too expansive. Furthermore, under the "last in time" rule, any such reading of §821 was overruled by subsequent GPW ratification. *Cook v. United States,* 288 U.S. 102, 120 (1933).

2. The National Defense Authorization Act

Implementation of the GPW is also evident in the National Defense Authorization Act, which provides:

> 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.

Pub. L. No. §108-375, §1091(b)(4), 118 Stat. 1811, 2068-69 (2004), Addendum 57a. Congress further directed in §1092(b)(3) that "all detainees [be provided] with information, in their own language, of the applicable protections afforded under the Geneva Conventions." *Id.* §1092(b)(3), 2069-70.

3. AR 190-8

Army Regulation 190-8 provides:

> 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 authority.

190-8 §1-5(a)(2), Addendum 55a. Section 1-1(b) explicitly states that it implements international law and the GPW. AR 190-8 was "adopted to implement the Geneva Convention." *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2658 (2004) (Souter, J., concurring).

GPW Articles 5 and 102—the provisions the District Court relied on—are specifically implemented:

> *a.* In accordance with Article 5, GPW, if *any doubt* arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to *any* of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention *until* such time as their status has been determined by a competent tribunal.
>
> *b.* 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.

AR 190-8 §1-6 (emphasis added). Thus, the mere assertion of protected status is sufficient.

Section 3-7(b) implements Article 102, providing that "judicial proceedings . . . will be by courts-martial or by civil courts," that the UCMJ applies to courts-martial, and that POWs are to be treated like American soldiers in judicial proceedings.

These regulations and their predecessors have long been included in military-training manuals. U.S. Army Field Manual 27-10, *The Law of Land Warfare*, ch. 3 ¶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 or concerning whom any other doubt of a like nature exists"); Judge Advocate General's School, *Operational Law Handbook* 22 (2003).

"It has been repeatedly held that authorized military regulations have the force of law." *United States v. Mead*, 16 M.J. 270, 273 (C.M.A. 1983). Courts enforce them, even against the military. *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959) ("Having chosen to proceed against petitioner on security grounds, the 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);

Standard Oil Co. v. Johnson, 316 U.S. 481, 484 (1942); *Nixon v. Sec'y of Navy*, 422 F.2d 934, 937 (CA2 1970) ("the Navy is bound by its own validly promulgated regulations, and the district courts are free to entertain suits by servicemen requesting compliance with such rules"); *United States v. Heffner*, 420 F.2d 809, 811 (CA4 1969); *Hammond*, 398 F.2d at 715 ("we agree with the District of Columbia Circuit that 'the District Court may review actions by military authorities which violate their own established regulations.'" (citation omitted)).

4. M.C.M.

The M.C.M., promulgated by President Bush's Executive Order, limits military tribunals under the Geneva Conventions:

> When a general court-martial exercises jurisdiction under the law of war, it may adjudge any punishment permitted by the law of war.
>
> Discussion
> Certain limitations on the discretion of military tribunals to adjudge punishment under the law of war are prescribed in international conventions. See, for example, Geneva Convention Relative to the Protection of Civilian Persons. . . .

M.C.M. 201(f)(1)(B)(ii).

B. Hamdan May Challenge Appellants' Violation of Statutes and Regulations

Given Appellants' violation of statutes and regulations, mandamus relief is appropriate. *Nixon*, 422 F.2d at 937 (mandamus available when Navy violated regulations). The same is true of habeas: "unless Congress acts to suspend it . . . the Great Writ . . . serv[es] as an important judicial check on the Executive's discretion in the realm of detentions." *Hamdi*, 124 S.Ct. at 2650 (plurality) (citing *INS v. St. Cyr*, 533 U.S. 289 (2001)).

In *Wang v. Ashcroft*, 320 F.3d 130 (CA2 2003), an alien sought habeas relief claiming that his deportation violated the Convention Against Torture (CAT). The Government claimed, and the petitioner did not dispute, that CAT was neither self-executing nor judicially enforceable. Nevertheless, the Court held that the violation of the implementing statute and regulations could be challenged in a habeas action, despite this statutory language: "[n]otwithstanding any other provision of law, . . . nothing in this section shall be construed as providing any court jurisdiction to consider or review claims under the [CAT] or this section." *Id.* at 140. Such language "does not speak with sufficient clarity to exclude CAT claims from §2241 jurisdiction," and that to conclude otherwise would create serious Suspension Clause issues. *Id.* at 142. *Accord Ogbudimkpa v. Ashcroft*,

342 F.3d 207, 221 (CA3 2003); *Saint Fort v. Ashcroft*, 329 F.3d 191, 202 (CA1 2003); *Singh v. Ashcroft*, 351 F.3d 435, 442 (CA9 2003). The court relied on *St. Cyr*, where "[T]he [Supreme] Court explained that at an absolute minimum, the Suspension Clause protects the writ as it existed in 1789, and at that time the use of the writ encompassed detentions based on errors of law, including the erroneous application or interpretation of statutes." *Wang*, 320 F.3d at 143.

Hamdan's claims are similar, indeed stronger, arising from his detention due to Appellants' erroneous interpretation of §821, the National Defense Authorization Act, and AR 190-8.

C. Hamdan's GPW Rights Are Also Enforceable Under the Supremacy Clause

Even absent the implementing statutes and regulations, Hamdan has rights under the GPW that are judicially enforceable by virtue of the Supremacy Clause. This is because the GPW is self-executing and protects individual rights in a manner capable of judicial enforcement.

"In determining whether a treaty is self-executing courts look to the intent of the signatory parties as manifested by the language of the instrument, and, if the instrument is uncertain, recourse must be had to the circumstances surrounding its execution." *Diggs v. Richardson*, 555 F.2d 848, 851 (CADC 1976). Non-self-

executing treaty provisions typically "call upon governments to take certain action." *Id.* at 851. Treaties that "by their terms confer rights upon individual citizens" and can be given effect by courts without legislation are generally self-executing. *Id.* The GPW clearly speaks in terms of individual rights, as Appellants admit. JA 270.

Some provisions of a treaty may be self-executing and others non-self-executing. *Lidas v. United States*, 238 F.3d 1076, 1080 (CA9 2001); *United States v. Postal*, 589 F.2d 862, 884 (CA5 1979). Nothing in Articles 5 and 102 calls for future government action. "[I]t appears that very little in the way of new legislative enactments will be required to give effect to the provisions contained in the four [Geneva] conventions." S. Exec. Rep. No. 84-9 (1955) ("Ratifying Report") at 30. The Senate Foreign Relations Committee identified only four areas where additional legislation would be necessary to implement the GPW, none relevant here. *Id.*

Appellants no longer contend that the GPW is not self-executing. They acknowledge that it is in effect in domestic law. App. Br. 27, 31. However, they assert that the GPW does not contemplate judicial enforcement. That claim depends primarily on whether the treaty purports to protect individual rights or, by contrast, addresses itself only to governments. For example, the instrument in

Diggs—a UN resolution calling on states to embargo South Africa—was "not addressed to the judicial branch" and did not confer rights upon individuals. 555 F.2d at 851. However, the Court has made clear that certain treaty provisions are judicially enforceable:

> 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.

Head Money Cases, 112 U.S. 580, 598-99 (1884) (emphasis added).

Thus, if the GPW provides a rule to determine an individual's rights, courts will enforce it. *E.g.*, *Kolovrat v. Oregon*, 366 U.S. 187 (1961); *Jordan v. Tashiro*, 278 U.S. 123, 130 (1928); *Asakura v. Seattle*, 265 U.S. 332, 341 (1924); *United States v. Percheman*, 32 U.S. 51, 89 (1833). None of these cases ask whether a "private right of action" exists.

Moreover, the Court has repeatedly held that the habeas statute permits enforcement of treaty-based individual rights. *Factor v. Laubenheimer*, 290 U.S. 276, 286 (1933); *Mali v. Keeper of Common Jail*, 120 U.S. 1 (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 (1884); *Ogbudimkpa*, 342 F.3d at 218 n.22.

Indeed, the Executive Branch has itself acknowledged that the GPW provides rules of decision that can be invoked by enemy detainees in a habeas action. *United States v. Noriega*, 808 F. Supp. 791, 797 (S.D. Fla. 1992) ("The government has maintained that if General Noriega feels that the conditions in any facility in which the BOP imprisons him do not meet the Geneva III requirements, he can file a *habeas corpus* action under 28 U.S.C. 2255"); U.S. Army, *Law of War Workshop Deskbook* 85 (2000) (prisoners of war "have standing to file a Habeas Corpus action . . . to seek enforcement of their GPW rights").[7]

D. The 1949 GPW Does Not Rely Only on Diplomacy

Appellants mistakenly assume that diplomacy is the exclusive means of enforcement. The fact that the GPW does not expressly mandate judicial domestic enforcement is not unusual given the variety of legal regimes in place among signatories. Carlos Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89

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[7] Available at https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/fc6fd99c6c0745e185256a1d00467742/$FILE/LOW%20Deskbook%202000.pdf.

Am.J. Int'l L. 695, n.36, n.63 (1995). The GPW contemplates the most scrupulous enforcement by whatever means are constitutionally appropriate. Its very first Article requires the Parties "to respect and to ensure respect for the present Convention in all circumstances."

> By undertaking this obligation at the very outset, the Contracting Parties drew attention to the fact that it is not merely an engagement concluded on a basis of reciprocity. . . . It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations vis-à-vis itself and at the same time vis-à-vis the others.
>
> The Contracting Parties do not undertake merely to respect the Convention, but also to ensure respect for it. It is self-evident that it would not be enough for a Government to give orders or directions and leave the military authorities to arrange as they pleased for their detailed execution. It is for the Government to supervise the execution of the orders it gives.

Int'l Comm. Red Cross, *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* 17-18 (1960). Its framers intended signatories to employ all necessary internal mechanisms for domestic compliance, and to use diplomacy to promote compliance abroad. In our country, the Constitution's structural reliance on courts entails their participation to "ensure respect for the [GPW] in all circumstances."

Appellants also fail to recognize that the 1949 Conventions, unlike the 1929 treaty, protect *individual* rights:

> It was not until the Conventions of 1949 . . . that the existence of "rights" conferred on prisoners of war was affirmed.

Id. at 90-91. Nothing in the GPW suggests that it is enforceable only through diplomatic protest, which was a flaw in the 1929 treaty that the GPW sought to remedy. Best, *War and Law Since 1945*, at 80-114 (1994).

In ratifying the GPW, the Senate looked at the 1939-45 failures of the earlier Convention and sought to provide "greater and more effective protection for the persons whom they were intended to benefit." Ratifying Report at 1-2. "To tighten up the obligations of the parties," *id.* at 6, the GPW replaced ineffective diplomatic protest with legally binding injunctions. The Senate Committee hailed the GPW as a "landmark" in the protection of human rights, cautioning "[w]e should not be dissuaded by the possibility that at some later date a contracting party may invoke specious reasons to evade compliance." *Id.* at 32.

The task of interpreting the GPW rests ultimately with the Courts. While an interpretation urged by the Executive is "of weight," it is well 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.

Appellants' interpretation ignores the GPW's spirit and purpose, disregards canons of interpretation, and offends the Suspension and Supremacy Clauses.

"According to the accepted canon, we should construe the treaty liberally to give effect to the purpose which animates it. Even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred." *Bacardi v. Domenech*, 311 U.S. 150, 163 (1940); *accord United States v. Stuart*, 489 U.S. 353, 368 (1989); *Chew Heong*, 112 U.S. at 540. "After all, the ultimate goal of Geneva III is to ensure humane treatment of POWs–not to create some amorphous, unenforceable code of honor among the signatory nations." *Noriega*, 808 F. Supp. at 799; *United States v. Lindh*, 212 F. Supp. 2d 541, 554 (E.D.Va. 2002).[8]

Finally, even had the GPW denied the right to judicial review (which it does not), domestic statutes and regulations create one. *Ogbudimkpa*, 342 F.3d at 228; *Saint Fort*, 329 F.3d at 201; *Wang*, 320 F.3d at 141.

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[8] Judge Bork's concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (CADC 1984), concerned a claim for damages and did not comment on the provisions at issue in this case. Its conclusions regarding the GPW are not controlling. Nor are those of *Hamdi v. Rumsfeld*, 316 F.3d 450, 468-68 (CA4 2003), which was vacated, 124 S.Ct. 2633.

E. The District Court Correctly Interpreted GPW Article 2

The District Court's ruling was not based on "determinations" that only the Executive may make. Rather, it was based on three facts that were *not disputed* by Appellants below: (1) Hamdan was captured in Afghanistan during hostilities after 9/11, (2) he has asserted a right to protection under the GPW, and (3) Appellants have not convened a competent tribunal.

Appellants now challenge facts (2) and (3), but those challenges are not part of the record and can easily be disposed of. First, Hamdan has clearly claimed protected GPW status. JA 57-59, 65. It is true that he denies he was a combatant, but the GPW by its terms protects persons not directly involved in hostilities. GPW Articles 3, 4, 5.

Second, with respect to Article 5, Appellants admitted that the CSRT had no bearing on POW status and had "zero effect" on their motion to dismiss. JA 250-51. Appellants now contend that the CSRT was the functional equivalent of an Article 5 hearing. Yet the CSRT determines enemy combatancy, not POW status. Memorandum from Secretary of the Navy, http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf. Appellants have stated that CRSTs are not Article 5 tribunals. Defense Dep't. Background Briefing on CSRTs, http://defenselink.mil/transcripts/2004/tr20040707-0981.html. In any

event, Hamdan's CSRT findings are not part of the Record in this case and have not been given to Hamdan's lawyers (who hold security clearances). JA 294-95.

The cases cited by Appellants do not remotely stand for the proposition that a federal court cannot interpret a treaty to determine whether it applies to undisputed facts. For example, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), did not even involve a treaty. It dealt with an Executive Order implementing a joint resolution of Congress. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), rejected the Executive's argument that Cuba should be refused access to U.S. courts, establishing that the judiciary will not be marginalized by Executive claims about foreign-policy prerogatives. Likewise, *Doe v. Braden*, 57 U.S. 635 (1853), merely held that the Executive determines whether a foreign government ratified a treaty:

> [T]he Constitution declares that all treaties made under the authority of the United States should be the supreme law of the land.
>
> The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms.

Id. at 657 (emphasis added).

Furthermore, the District Court's Article 2 determination is correct. Afghanistan and the United States are GPW High-Contracting Parties. U.S. Armed Forces invaded Afghanistan "to wage a military campaign against al Qaeda and the Taliban regime that had supported it." *Rasul*, 124 S.Ct. at 2690. The Taliban controlled the Afghan state. Thus, the U.S. was in armed conflict with a High Contracting Party and occupied its territory.

Appellants' contention that the Afghani conflict was actually two separate conflicts is strained, reminiscent of the "specious reasons to evade compliance" decried in the Ratifying Report. These alleged "separate conflicts" were fought against forces working in concert, on the same territory, at the same time, arrayed against the same American and allied forces. Appellant Rumsfeld stated: "With respect to the Taliban . . . they were tied tightly at the waist to al Qaeda. They behaved like them, they worked with them, they functioned with them, they cooperated with respect to communications, they cooperated with respect to supplies and ammunition. . . ." Rumsfeld Statement, www.defenselink.mil/news/Jan2002/t01282002_t0127sd2.html. Application of the GPW in these circumstances is consistent American military practice in every major conflict. Jennifer Elsea, Congressional Research Service, *Treatment of "Battlefield*

Detainees" in the War on Terrorism 29 (2002), http://fpc.state.gov/documents/organization/9655.pdf.

Appellants concede that the Geneva Conventions apply in the conflict against the Taliban. *See* White House Fact Sheet, http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html. Because Hamdan was captured in that conflict, the GPW applies.

As the District Court found, "doubt" of Hamdan's POW status arises from multiple circumstances, including his denial that he is al Qaeda, his assertion of protected status, the civil war in Afghanistan, and the fact, undisputed by Appellants, that he was seized by an Afghan militia and exchanged for a bounty. JA 153.

Moreover, AR 190-8 makes clear that the mere *assertion* of POW status requires a tribunal. "The United States has in the past interpreted [Article 5] as requiring an individual assessment of status before privileges can be denied. Any individual who claims POW status is entitled to an adjudication of that status." Elsea, *supra*, at 29.

Furthermore, it is arguable that even al Qaeda members can receive GPW protections, and need not meet Article 4(a)(2)'s criteria if they are "members of militias or volunteer corps forming part of [a Party's] armed forces." GPW 4(a)(1);

D. Jinks and D. Sloss, *Is the President Bound by the Geneva Conventions?*, 90 Cornell L.Rev. 97, n.79 (2004). The District Court did not need to reach this question because Hamdan did not receive an Article 5 hearing.

Finally, Appellants' argument about GPW Article 2, ¶ 3's reference to "mutual relations" is irrelevant. Appellants cannot rely on their allegation that Hamdan is "affiliated" with al Qaeda to deny him GPW protections. The GPW, a federal statute, and Army regulations each require an Article 5 hearing first.

F. Appellants Have Violated Common Article 3

The District Court's holding that Article 3 applies should be affirmed. JA 388, 391. The court cited authorities establishing that Article 3 sets forth the "most fundamental requirements of the law of war." *Kadic v. Karadzic*, 70 F.3d 232, 243 (CA2 1995). While invoking the law of war as authorizing Hamdan's commission, Appellants disregard other aspects of that law constraining their conduct. One such constraint is Article 3's requirement of "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

Appellants argue that Article 3 does not apply because the conflict against al Qaeda is international. This argument "is plainly incorrect as a matter of law." Jinks and Sloss, *supra*, at n.87. In fact, as *Kadic* and the other authorities cited by

the District Court establish, Article 3 is binding in all conflicts, on all parties, as a minimum standard. Indeed, American courts have found individuals liable for "violations of Common Article 3 and the customary international humanitarian norms embodied in those provisions." *Mehinovic v. Vuckovic*, 198 F. Supp.2d 1322, 1351 (N.D.Ga. 2002).

Hamdan's *ad hoc* commission is not regularly constituted because it is established in violation of statutes, the GPW, the Constitution, and the laws of war; compromised by command influence; and not competent to address the complex issues presented. It fails to afford adequate judicial guarantees, denying confrontation and other basic rights while not providing independent and impartial review.

While the District Court correctly recognized that Article 3 applies, it abstained from ruling further. JA 398-99. However, this Court can and should affirm the court below because of Appellants' Article 3 violation. *Freeman v. B&B Assocs.*, 790 F.2d 145, 151 (CADC 1986) (appellate court "will freely consider any argument by an appellee that supports the judgment of the district court including arguments rejected by the district court"); *In re Swine Flu Immunization Prods. Liability Litig.*, 880 F.2d 1439, 1444 (CADC 1989).

III. HAMDAN'S COMMISSION, WHICH HAS ALREADY DENIED THE RIGHT TO BE PRESENT, LACKS JURISDICTION

Appellants contend that the President can shape the proceedings as he chooses, unconstrained by the UCMJ and fundamental principles of law. They have already abridged Hamdan's right to be present by barring him from portions of his *voir dire*. JA 131-32. In addition, the prosecution has stated that it will put on two days of testimony without Hamdan present. *Id.*

The involuntary exclusion of the accused from trial proceedings is universally rejected and unprecedented in military justice. As noted above, the failure to guarantee the right to presence is jurisdictional; indeed the judgment of a military commission during the Civil War was dismissed for violating presence rights. *See supra* pages 15-16, 29. In World War II, the United States even *prosecuted* Japanese officers who conducted a military commission that abridged the defendant's right to participate.

The right to be present is foundational in the UCMJ, international law, military law, common law, and the Constitution. Each provides an independent basis to void the commission.

First, UCMJ provisions 821 and 836 require commissions to conform to the laws of war and the UCMJ, respectively.

Second, even before the UCMJ's enactment, commissions could not take actions contrary to the laws of war. *See infra* Part IV. The laws of war also establish a rule by which Sections 821 and 836 should be interpreted. "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Charming Betsy*, 6 U.S. 64, 118 (1804).

Third, Presidential rules for military tribunals must follow "well-recognized principle[s] of military law." *United States v. Rodriguez,* 37 M.J. 448, 454 (C.M.A. 1993). Appellants state that commissions are "commonlaw war courts." App. Br. 55. They are bound by that common law, too.

Fourth, the constitutional right to be present is fundamental and cannot be denied in Guantanamo. *See Rasul*, *supra*, at n.15.

A. The UCMJ constrains the President

10 U.S.C. §821 permits the President only to punish in conformity with the laws of war. *See supra* Part II.A.1. But denial of the right to be present not only removes the commission from established law-of-war principles, it creates a grave breach of them.

An independent UCMJ provision, 10 U.S.C. §836(a), limits Presidential power:

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

Based on this Congressional mandate that the UCMJ is a procedural baseline, the District Court properly held that the commission cannot try Hamdan. JA 414. The plain language of 10 U.S.C. §836, historical practice, and military-court interpretation all support that decision.

The fundamental principle of statutory interpretation is to follow the text. *Ardestanti v. I.N.S.*, 502 U.S. 129, 135 (1991). This Court need go no further than the UCMJ's text. Section 836 does not say "contrary to or inconsistent with" rules in the UCMJ that specify military commissions; it says "this chapter." The President expressly relied on §836 to establish this commission. Addendum 13a. He cannot invoke words in §836 that empower him and simultaneously ignore words that constrain him.

Even if the UCMJ did not exist, the President could not depart from fundamental court-martial rules. Prior to the UCMJ, commissions followed the same procedures as courts-martial with the exception of the number of members:

> [Commissions] while in general even less technical than a court-martial, will ordinarily and properly be governed, upon all important questions, by the established rules and principles of law and evidence. Where essential, indeed, to a full investigation or to the doing of justice, these rules and principles will be liberally construed and applied.

2 William Winthrop, *Military Law and Precedents*, 842 (2d ed. 1920). *Accord* Glenn, *Army and Law* 42 (1918) ("in all matters of procedure, [commissions] are governed by the practice obtaining in regular courts-martial"); Ives, *Treatise on Military Law* 284 (1879) ("The forms of procedure are the same as before courts-martial"); *id.*, at 281; George B. Davis, *A Treaty on the Military Law of the United States* 309 (1913) ("the rules which apply in these particulars to general courts-martial have almost uniformly been applied to military commissions"); Benet, *Treatise on Military Law* 15 (1862) (commissions must "be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise."); Instructions No. 5, Hunt, 4 American Mil. Govt. of Occupied Germany, 1918-1920, 50 (1920) (commission procedure in occupied Germany would "be in substance the same as in trial by General Court-Martial").

Appellants point to General Crowder's "authoritative" testimony, App. Br. 35, neglecting to mention that Crowder's next sentence is that commissions and courts-martial "*have the same procedure.*" S. Rep. 64-582 at 40 (1916).

Section 836 reflects this traditional equivalence. As the District Court noted, it permits procedures for courts-martial to differ from commissions in some respects, but subordinates both to fundamental UCMJ principles.

The District Court's reading is not a "death knell" for Presidential flexibility. Rules for commissions *can* differ from the rules for courts-martial when they are consistent with the UCMJ. JA 406.[9]

Appellants contend that §836 only prevents the President from prescribing procedural rules that are contrary to the nine UCMJ sections where "military commissions" are specifically mentioned. App. Br. 53-54. Yet only three of these nine sections specify procedural rights: 10 U.S.C. §828 (requiring court reporter and, where necessary, interpreters); §849(d) (permitting authenticated depositions); §850(a) (permitting prior sworn statements). Appellants' position is, quite simply, that the <u>only</u> procedural rules it must provide are the presence of a court reporter and interpreter, and the ability to read into evidence prior sworn statements or deposition testimony. This is an absurd statutory reading that not only defies the

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[9] For example, Commission Rule 32 C.F.R. §9.5(m) permits, in contrast to R.C.M. 1001(c), "the Accused to make a statement during sentencing proceedings." Although these rules differ, neither is contrary to 10 U.S.C. §856 or other UCMJ provisions. Commission Rule §13.3(c)(3) gives defense counsel

plain meaning of §836(a), but also ignores §836(b), which states: "All rules and regulations made under this Article shall be uniform insofar as practicable."

Appellants claim that the District Court made the nine commission mentions surplusage, neglecting that their reading renders §836 entirely superfluous. If the President has the inherent authority to set up commissions as he pleases, §836 is a nullity. Appellants' reading creates a second layer of superfluousness, too, since "contrary to" has a narrower meaning than "inconsistent with." The latter looks to the animating purpose and spirit. *Black's Law Dictionary* 322, 766 (1990). Appellants' surplusage argument fails for other reasons as well, Glazier, *supra*, at 2022; *Lamie v. United States Trustee*, 124 S.Ct. 1023, 1031 (2004).

Appellants' reliance on *Yamashita* and *Madsen* is misplaced. As the District Court noted, *Yamashita* was decided five years before extension of UCMJ jurisdiction over "persons within an area leased by or otherwise reserved or acquired for the use of the United States." §802(a)(12); JA 407-408. Indeed, when proposed, ¶12 was criticized for greatly expanding Article 2. General Green, the Army JAG, stated:

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primary responsibility for identifying conflicts-of-interest; R.C.M. 901(d)(4)(D) makes the military judge primarily responsible. Neither violates §838.

> Article 2(12) is not limited to time of war or national emergency, nor does it exclude purely military offenses. Its effect would be to make subject to military law, without limitation or qualification, any person residing in or visiting a base area at any time. The enactment . . . will inevitably lead to international complications.

Statement, U.S. Senate, Armed Services Committee, 5/9/1949, at 266. Despite this criticism, ¶12 was adopted without the limitations in §1201. The UCMJ applies under ¶12, as well as ¶¶9,10.

Appellants' misleading quotation of four words from *Madsen*'s description of the *history* of commissions does not enlarge its holding, which was merely that commissions may try civilians under circumstances not present here. *See infra* Part IV.C. *Madsen* touched on procedure only in passing because procedure was not challenged, but that dicta undermines Appellants. *Id.* at 358-59 ("The rights of individuals were safeguarded by a code of criminal procedure dealing with warrants, summons, preliminary hearings, trials, evidence, witnesses, findings, sentences, contempt, review of cases and appeals."). Of most relevance, the Commission Rules in *Madsen explicitly* guaranteed "the rights . . . To be present" and to "cross-examine any witness." *Id.* at 360 n.24.

The District Court's holding is consistent with judicial enforcement of §836 in courts-martial. *United States v. Douglas*, 1 M.J. 354, 356 (C.M.A. 1976)

(M.C.M. provision contrary to 10 U.S.C. §854 "exceeds the President's authority under Article 36, UCMJ, and is inoperative."). "Under [Article 36] a variety of Manual provisions have been invalidated, although it has occasionally been difficult to perceive the exact textual conflict between the Code and Manual provisions." Eugene Fidell, *Judicial Review of Presidential Rulemaking Under Article 36: The Sleeping Giant Stirs*, 4 Mil. L.Reptr. 6049, 6051 (1976) (footnote/citations omitted).

B. The Denial of Presence and Confrontation Destroys the Commission's Jurisdiction

The District Court correctly concluded that commission rule 32 C.F.R. §9.6(b), which permits portions of Hamdan's trial to be conducted outside of his presence and robs him of the right to confront witnesses, destroys the commission's jurisdiction. JA 403-405.

Section 839(b) reflects a fundamental truth: A trial without the accused present is a sham. "In cases of felony our courts, with substantial accord, have regarded [the right to be present] as extending to every stage of the trial, inclusive of the empanelling of the jury and the reception of the verdict, *and as being scarcely less important to the accused than the right of trial itself.*" *Diaz v. United States*, 223 U.S. 442, 455 (1912) (emphasis added); *Lewis v. United States*, 146

U.S. 370, 372, 375 (1892) ("A leading principle *that pervades the entire law of criminal procedure* is that, after indictment found, nothing shall be done in the absence of the prisoner."); *id.* (right to be present is of "peculiar sacredness" and it would be "*contrary to the dictates of humanity*" to allow defendant to waive it) (emphasis added); *United States v. Washington*, 705 F.2d 489, 497 (CADC 1983) ("the defendant's presence is fundamental to the basic legitimacy of the criminal process.") (citations omitted).

While presence rights for disruptive defendants has been cut back, *e.g.*, *Illinois v. Allen*, 397 U.S. 337 (1970), no case questions the fundamental common law proposition that absent waiver, the accused must be present during *voir dire*. The presence of counsel is not enough. *Lewis*, 146 U.S. at 373-74 (specifically addressing exclusion from *voir dire* and stating that defendant's "life or liberty may depend upon the aid which, by his personal presence, he may give to counsel. . . . The necessities of the defense may not be met by the presence of his counsel only."); *Faretta v. California*, 422 U.S. 806, 819 (1975). This Court, for example, reversed a conviction when a defendant was not present during *voir dire*, finding the right to be present fundamental at both common law and in the Constitution:

> During *voir dire*, for example, "what may be irrelevant when heard or seen by [defendant's] lawyer may tap a memory or association of the defendant's which in turn may be of some use

> to his defense"....A defendant's presence at *voir dire* is essential not only because it is necessary to the appearance of impartiality but, "because the defendant has unique knowledge which is important at all stages of trial, including the *voir dire*. ....He may also have knowledge of facts about himself or the alleged crime which may not have seemed relevant to him in the tranquility of his lawyer's office, and thus may not have been disclosed, but which may become important as the individual prejudices or inclinations of the jurors are revealed."

United States v. Gordon, 829 F.2d 119, 124-25 (CADC 1987) (citations omitted).

Military courts require presence for a trial to comport with the UCMJ. *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. The integrity of the military justice system is jeopardized . . . without all parties to the trial being present."); *United States v. Daulton*, 45 M.J. 212, 219 (U.S.A.F. 1996) ("§839(b)[ ]requires that all proceedings, except deliberations and voting of members, be conducted in the accused's presence."). *See also* Army, Military Judges Benchbook for Trial of Enemy Prisoners of War, Oct. 2004, at 202 (pattern instruction for judge to defendant, "you have the right to be present at every stage of your trial").

Similarly, international law recognizes the right to be present as fundamental. This fact is confirmed by the rules for Iraqi tribunals, written by Appellants. They provided as "minimum guarantees" that the accused will be "tried without undue delay" and "*tried in his presence*."

Art. 20(d), http://www.cpa-iraq.org/regulations/20031210_CPAORD_48_IST_and _Appendix_A.pdf. As the Fourth Geneva Convention, Art. 67, specifies, an occupying power may only prescribe rules of trial that are *required* by international law, and presence is one such required rule.

Tribunals for war crimes in Rwanda and the former Yugoslavia also guarantee the right to be present. Yugoslavia Art. 21, http://www1.umn.edu/humanrts/icty/statute.html; Rwanda Art. 20, http://www.ictr.org/ENGLISH/basicdocs/statute.html. GPW Article 75, Protocol I of the GPW, recognized as binding,[10] similarly guarantees defendants:

> an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include . . . . the right to be tried in his presence . . . . [and] the right to examine, or have examined, the witnesses against him

During World War II, when Japanese Judge-Advocates tried our soldiers in a military commission that, *inter alia*, deprived American soldiers of the right to participate and violated Japanese rules for courts-martial, America responded by

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[10] Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am.U.J. Int'l L.&Pol'y 419 (1987).

prosecuting the Japanese. *United States v. Uchiyama* Tr., Case 35-36, War Crimes Branch, JAG Records, at 20 (Prosecution's opening statement: "[The accused] applied to them a special type of summary procedure which failed to afford them the minimal safeguards for the guarantee of their fundamental rights which were given them both by the written and customary laws of war."). The defense unsuccessfully made the same argument voiced by the Government in this case--that "there is no standard of procedures" for war criminals in commissions and that the Americans had no legal rights.

Everything from common law to modern international law, *Uchiyama* to the UCMJ, the Civil War to contemporary Iraq, is aligned in guaranteeing the right to be present. No authority relied on by Appellants suggests that the President can dictate rules that violate international law or military principles.

As with presence, the right to confront witnesses reflects a protection fundamental to the common law, military law, and international law. As Justice Scalia put it: "'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.'" *Crawford v. Washington*, 124 S.Ct. 1354, 1363 (2004) (quoting *Webb*, *supra*); *Coy v. Iowa*, 487 U.S. 1012, 1017n.2 (1988) (referring to "both the antiquity and currency of the human feeling that a criminal trial is not just unless

one can confront his accusers"); *Pointer v. Texas*, 380 U.S. 400, 405 (1965) ("fundamental requirement for . . . fair trial"); *Mattox v. United States*, 156 U.S. 237, 243 (1895) ("general rule of law defended since the days of Magna Charta"). Unsurprisingly, given its bedrock nature, military courts interpret §839(b) to guarantee confrontation. *Daulton*, 45 M.J. at 219 (witness' testimony outside the presence of the accused violated Article 39). UCMJ §849(d) and §850(a) have been similarly interpreted.

Appellants offer no justification for their unprecedented denial of confrontation rights. Assuming it is based on the need to protect classified information, alternative procedures exist. *United States v. Rezaq*, 134 F.3d 1121, 1142 (CADC 1998) (applying Classified Information Procedures Act). Moreover, trials with a significant political dimension, such as Hamdan's, provide a stronger, not weaker, rationale for these confrontation rights. *Crawford*, 124 S.Ct. at 1373-74 (in securing confrontation rights, "the Framers had an eye toward politically charged cases like Raleigh's—great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear").

Appellants do not dispute that excluding Hamdan and denying his confrontation rights is "contrary to or inconsistent with" §839(b). Appellants' <u>only</u> argument is that §836 permits the President to ignore any UCMJ provision that

does not expressly mention commissions, even if that means denying Hamdan the right to attend his own trial or cross-examine his accusers. The District Court properly rejected this interpretation, and its ruling should be affirmed.

IV. THIS COMMISSION VIOLATES SEPARATION OF POWERS

The commissions blatantly violate statutory requirements such as UCMJ §3037(c), *supra* Part I.A.2.b, as well as the UCMJ. As the District Court found, these defects place them in the last, most restrictive, category of *Youngstown*. JA 384-85.

The animating assumption of the Government's appeal is a never-accepted notion of inherent Presidential power. *See Quirin*, 317 U.S. at 29. They believe that the President has the absolute discretion to determine international law, the jurisdiction of commissions, and common-law requirements. "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 governmental powers." *Reid*, 354 U.S. at 39 (plurality); *Toth*, 350 U.S. at 17.

A. Text

Article I, §8 grants Congress the power to "constitute Tribunals inferior to the supreme Court" and "define and punish . . . Offences against the Law of

Nations." It speaks with specificity; Article II does not. *See In re Yamashita*, 327 U.S. 1, 7 (1946) (referring to "define and punish" clause); *id.* at 8-10.

B. History

Appellants' examples undermine their point.

Washington. Even in the pre-founding and pre-separation-of-powers era, General Washington urged "the necessity of enforcing the articles of war in all its parts," because they preserve "the rights and liberties of the people against the arbitrary proceedings of the military officers." 1 *Writings of George Washington* 467 (Fitzpatrick ed. 1931). Washington also disapproved a court-martial for an offense similar to the one at issue here because "the Civil authority of that State has made provision for the punishment of persons taking Arms with the Enemy." 11 *id.* 262.

1818. The House Committee on Military Affairs stated that it could find "no law of the United States authorizing a trial before a military court" for the convicted offenses, including piracy. Annals, 15th Cong., 2d Sess. 515-27 (1819). Appellants' own authority states that Jackson's order "was wholly arbitrary and illegal. For such an order and its execution a military commander would now be indictable for murder." Winthrop, *supra*, at 465.

1847. During a declared war, General Scott convened battlefield commissions out of bare necessity "until Congress could be stimulated to legislate on the subject." 2 *Memoirs of Lieutenant-General Scott* 392-93 (1864). The Order specifically applied court-martial rules and procedures. *Id.* at 540-44. It stated that punishment must be "in conformity with known punishments" in State law. It further provided "no military commission shall try any case clearly cognizable by any court-martial." *Id.*

The Civil War. Congress explicitly authorized commissions. The "general rule" was to use commissions "only for cases which cannot be tried by a court-martial or by a proper civil tribunal." 1 *The War of the Rebellion* 242 (1894). General Order 1 required commissions to

> [B]e 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.

Id. at 248 (emphasis added). Despite such limitations, *Milligan* found commissions impermissible. Appellants fail their own historical practice test.

C. Precedent

Today, no clear statement by Congress exists to supplant civilian courts or courts-martial. *See Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991); *Coleman v.*

Tennessee, 97 U.S. 509, 514 (1878) (applying rule to military justice); Katyal & Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259 (2002).[11] Congress has authorized "force," which has as its incident *prospective* detention, not *retrospective* punishment. Congress did not authorize commissions by implication, which had not been used in a half-century and even then in far more restrained circumstances.

While *Quirin* and *Yamashita* found the predecessor to 10 U.S.C. §821 permitted commissions, those commissions were in war zones, and the Court relied on 50 U.S.C. §38, which has been repealed. *Yamashita*, 327 U.S. at 7; *Quirin*, 317 U.S. at 27. The Court's interpretation of §821 was confined to declared wars, tracking the longstanding military-justice rule about jurisdiction. *E.g., United States v. Averette*, 19 U.S.C.M.A. 363, 366 (1970) (finding that the Vietnam conflict was not a time of war because general terminology "should 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 (CA5 1972); *Robb v. United States*, 456 F.2d 768, 771 (Ct. Cl. 1972).

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[11] *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948), stated that federal courts could not review international tribunals. *Id.* at 208 (Douglas, J., concurring).

In *Quirin*, Biddle stressed that the Eastern seaboard "was declared to be under the control of the Army." Saboteur Tr. at 79. The Court agreed. 317 U.S. at 22 n.1. It cited Winthrop repeatedly, which states:

> Jurisdiction. . . The place must be the theatre of war or a place where military government or martial law may legally be exercised; otherwise a military commission (unless specially empowered by statute) will have no jurisdiction of offense committed there.

Winthrop, *supra*, at 836; Dudley, *supra,* 313 (same). No court has ever, to Appellee's knowledge, upheld commissions in places that are not occupied territory or zones of war. Accordingly, the commission is not properly constituted and must be struck down. Paust, *supra*, at 1363; *Ex Parte Milligan,* 71 U.S. 2, 127 (1866) ("confined to the locality of actual war").[12]

Madsen concerned occupation courts. Its holding was limited to "territory occupied by Armed Forces" "in time of war". 343 U.S. at 348, 355. Guantanamo does not qualify. Indeed, *Reid* held that dependents away from conquered territory could not be subject to military trial, in spite of Article 15 and treaties authorizing it: "*Madsen* [] is not controlling here. It concerned trials in enemy territory which

had been conquered and held by force of arms and which was being governed at the time by our military forces." 354 U.S. at 35 n.63.[13] The government claimed the "battlefront" was worldwide due to "present threats to peace" and "world tension." *Id.* at 33-35. The Court rejected this argument: "exigencies which have required military rule on the battlefront are not present in areas where no conflict exists." *Id.* at 35.

"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, a tradition . . . firmly embodied in the Constitution." *Id.* at 40. *Accord Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Toth*, 350 U.S. at 23.

The *Hamdi* plurality's recent invocation of *Quirin* is descriptive and does not answer *what body* must try unlawful combatants. *See* 124 S.Ct. at 2660. It also strongly rejected a similar executive-deference argument, looked to the GPW to

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[12] Involving civilians in the commission, perhaps for the first time in history, creates separation-of-powers difficulties as well. Winthrop, *supra*, at 835.

outline Government powers, and weakened the Government's equal protection claim here. *Id.* at 2641, 2650, 2461.

The Government's putative fifth vote, Justice Thomas's dissent, dealt only with detention, mentioning it forty-six times. *See id.* at 2674, 2677-85. He found *punishment* stands on entirely different footing, isolating *Milligan*: "the punishment-nonpunishment distinction harmonizes all of the precedent." *Id.* at 2682 (citations omitted).

The President has neither the authority to defy Congressional restrictions on commissions nor the authority to establish *this* commission under present circumstances. This is the first commission insulated from a theater of war. War has not been declared, years have elapsed since Hamdan's capture, necessity is lacking, courts-martial and civilian courts are open, the offense is not authorized for commission trial, and the commission flouts court-martial rules and the laws of war themselves. While such a commission may be possible in some other country, it is most assuredly not in a regime under law, dedicated to dividing power instead of concentrating it in the Executive.

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[13] *Reid* commanded a plurality, three years later a majority affirmed and expanded it when "critical areas of occupation" were not involved. *Singleton*, 361 U.S. at 244.

D. The District Court Order Should Also Be Affirmed on Alternative Grounds

The District Court's decision should also be affirmed because the commission lacks subject-matter and personal jurisdiction. Both defects demonstrate an undue expansion of presidential power and distinguish *Quirin*.

1. Subject-Matter Jurisdiction

Quirin held that a court must examine whether "constitutional power" exists to try an offense. 317 U.S at 29. The first inquiry is "whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial." *Id.*

By statute, only two offenses are triable by commission, aiding the enemy and spying. *See* 10 U.S.C. §§904,906. Yet rather than employ these carefully crafted statutes, the Government invents an offense, conspiracy, unknown to the laws of war. *Quirin*'s offenders were charged, *inter alia*, under the predecessor versions of §§904,906.

Conspiracy is not triable by commission. It is not mentioned in the Geneva Conventions or the other treaties identified by Congress to define war crimes. Hamdan Reply Br. 64-66. Furthermore, Appellants' definition of conspiracy does not require its essential elements—agreement and specific intent. *Id.*

2. Personal Jurisdiction

Appellants have introduced no evidence in their Return or elsewhere to rebut Hamdan's claim that he is not an unlawful combatant. The petitioners in *Quirin*, by contrast, admitted they received sabotage training, were members of German armed forces, came ashore with explosives, and shed their German uniforms. 317 U.S. at 20-21. *Quirin* held the commission had jurisdiction "upon the conceded facts." *Id.* at 46. *See Hamdi*, 124 S.Ct. at 2670 (Scalia, J., dissenting).

Even if Appellants' allegations are taken at face value, Mr. Hamdan resembles Mr. Milligan, not Mr. Quirin. The Solicitor General argued that Milligan "conspired with and armed others," and "plotted to seize" arsenals. *Milligan*, 71 U.S. at 17. The Court struck down the commission nevertheless, *id.* at 130; *id.* at 132 (separate opinion). Appellants' attempt to downplay *Milligan* is undermined by what the Court said after *Quirin*:

> [T[he founders of this country are not likely to have contemplated complete military dominance within the limits of a Territory made part of this country and *not recently taken from an enemy*. They were *opposed* to governments that placed in the hands of one man the power to make, interpret and enforce the laws. . . . *Ex parte Milligan*. Legislatures and courts are not merely cherished American institutions; they are indispensable to our government.

Duncan, 327 U.S. at 322 (emphasis added); 354 U.S. at 30 (*Milligan* is "one of the great landmarks in this Court's history").

Appellants have had numerous opportunities to provide facts showing that Hamdan resembles the *Quirin* saboteurs. At every turn, they have failed. Their recitation of "facts," many of them for the first time before this Court, is too little, too late. To permit the President, on his say-so, to label anyone subject to a commission is to countenance an expansion of Presidential authority that this nation has never before seen.

CONCLUSION

For the reasons stated above, the district court ruling should be affirmed.

Respectfully submitted,

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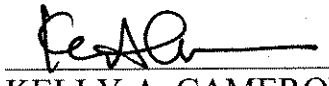

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

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 type face of 14 point and contains 13,991 words (which does not exceed the applicable 14,000 word limit).

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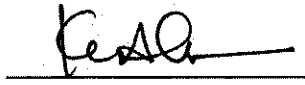

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