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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

DAVID M. HICKS,)	
)	
)	
Petitioner,)	
)	Civ. Act. No. 1:02-cv-00299-CKK
v.)	
)	Judge Kollar-Kotelly
GEORGE W. BUSH, President of the United States;)	
DONALD RUMSFELD, United States Secretary of)	
Defense; GORDON R. ENGLAND, Secretary of the)	
United States Navy; JOHN D. ALTENBURG, JR.,)	
Appointing Authority for Military Commissions,)	
Department of Defense; Brigadier General JAY)	
HOOD, Commander, Joint Task Force, Guantanamo)	
Bay, Cuba, and Colonel BRICE A. GYURISKO,)	
Commander, Joint Detention Operations Group,)	
Joint Task, Guantanamo Bay, Cuba)	
)	
Respondents, all sued in their)	
individual and official capacities.)	

**PETITIONER DAVID M. HICKS’S OPPOSITION TO RESPONDENTS’
MOTION TO DISMISS AND REPLY BRIEF IN SUPPORT OF HIS MOTION
FOR PARTIAL SUMMARY JUDGMENT**

August 31, 2005

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**PETITIONER DAVID M. HICKS'S OPPOSITION TO RESPONDENTS'
MOTION TO DISMISS AND REPLY BRIEF IN SUPPORT OF HIS MOTION
FOR PARTIAL SUMMARY JUDGMENT**

Respondents intend to try Mr. Hicks for “crimes” they have made up, using a military commission structure that ensures a biased evaluation of these charges, and that applies only to non-citizens such as Mr. Hicks, without any rational justification for the distinction between citizens and non-citizens. Respondents also seek to proceed with this trial belatedly, nearly four years after Mr. Hicks was detained.

Respondents make little effort to defend the merits of the military commissions. They do not, for example, even assert that the biased structure of the commissions is compatible with Due Process. And it is not. Indeed, the structure is so flawed that internal e-mails show that the Chief Prosecutor “repeatedly said” that despite doubts about the sufficiency of the evidence against the accused detainees, “the military panel will be handpicked and will not acquit these detainees.” Redacted e-mails (Ex. 13 at 6, Pet. Rev. Br.).

Respondents’ effort to justify the validity of the charges against Mr. Hicks fares no better. Respondents cite almost no contemporary, or international sources from any time period, to justify their argument that the charges against Mr. Hicks are valid charges under the law of war. They cite nothing to counter the three affidavits Petitioner submitted from acclaimed experts showing that, based on international law conventions and international practices, the charges do not set forth violations of the laws of war. The few long-ago domestic sources they cite are inapposite, and, in any case, ignore that the law of war stems from international law based on universal practice as it exists today.

Respondents also fail to justify the first-ever establishment of military commissions that apply only to non-citizens. They argue that they must provide only a rational justification for trying non-citizens in tribunals far inferior to those used for citizens. But they provide no such justification. Moreover, the cases they cite have nothing to do with discrimination in criminal proceedings. The law is clear that this sort of discrimination is subject to rigorous scrutiny. Respondents also do not justify the lengthy delay in trying Mr. Hicks or show that the military commissions have been lawfully constituted.

Respondents instead primarily argue that this Court should not decide these issues now. But all of Petitioner's challenges are the type of issues that *Hamdan* said that courts should decide before trial. They all involve the question of whether the military commission established by Respondents has the right to try Mr. Hicks at all. The fact that the charges against Mr. Hicks fall outside the jurisdictional limits established by statute, for example, shows that that commissions have no authority to hear these type of charges. Similarly, the structural bias of the commission process invalidates the commissions as a whole, as does the biased nature of the commission process. These are the exact sort of questions evaluated by the Supreme Court in *Ex parte Quirin*, 317 U.S. 1 (1942), the case *Hamdan* relied on as the premise of its abstention rule. In *Quirin*, the Court explicitly evaluated the validity of the charges. It also analyzed whether grand jury rights and jury trial rights adhered in a military commission proceeding. These questions are very similar to those Petitioner has raised here.

As one military prosecutor in these cases candidly admitted, the flaws in the military commissions constitute a "severe threat to the reputation of the Military Justice System and even a fraud on the American people." Redacted e-mails (Ex. 13 at 11, Pet. Rev. Br.). This Court must enjoin the proceedings before these commissions without delay.

I. THERE IS NO JUSTIFICATION FOR ABSTENTION IN THIS CASE.

Respondents' primary contention is that this Court should not resolve Petitioner's challenges now. In light of the D.C. Circuit's decision in *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), it would be manifestly improper for this Court to abstain from ruling on the merits in this case. From the outset, Respondents have vigorously argued, as they did in *Hamdan*, that the federal courts are required to abstain from hearing each of Petitioner's claims. But Respondents *lost* that argument in *Hamdan*, and of the claims that the court of appeals addressed there, the court ruled in virtually every instance *on the merits*. Nevertheless, Respondents continue to insist that *Hamdan* -- and the abstention theories and cases it *rejected* -- requires this Court's abstention from all of Mr. Hicks's claims. Respondents' remarkable position cannot be countenanced.

Respondents' repeated reliance on *Hamdan*, *see* Resp. Rev. Br. at 23-24, 28-30, 35-36, is particularly perplexing in light of the fact that the *Hamdan* court addressed the merits of the very same kinds of claims that Mr. Hicks raises here. Specifically, the court decided *on the merits* petitioner's claim that the military commission was unlawfully constituted in violation of Article I of the Constitution and the separation of powers, *see Hamdan*, 415 F.3d at 37-38; it decided *on the merits* petitioner's claim that he was entitled to all of the procedural protections of a court-martial as a result of Article 102 of the Third Geneva Convention, *id.* at 40-41; it decided *on the merits* petitioner's claim that he was entitled to most of the protections accorded in courts-martial based on the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. §§ 821 and 836, *see Hamdan*, 415 F.3d at 42-43; and it decided *on the merits* petitioner's claim that the commission's make up violates Army Regulation 190-8, *see id.* at 43. Like those challenges, Mr. Hicks challenges the basic structure of the military commissions based on flaws in the orders

establishing them, flaws that will infect every commission proceeding. Respondents' contention that *Hamdan* requires this Court to abstain from addressing the merits of Mr. Hicks's structurally identical claims is therefore utterly indefensible.

In determining that it would not be proper to abstain, the *Hamdan* court relied primarily on the Supreme Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942) as "compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions." *Hamdan*, 415 F.3d at 36. As the court of appeals explained, the petitioners in *Quirin* brought a variety of claims challenging "the lawfulness of the military commission," before trial and without having exhausted their remedies before the commission. *Id.* And, as it further reasoned, because the *Quirin* Court saw no reason to abstain from resolving *on the merits* the petitioners' claims challenging "the lawfulness of the military commission," the *Hamdan* court likewise found no valid reason to abstain from reaching such claims. *Id.*

Moreover, the nature of the particular claims that the Supreme Court heard on the merits in *Quirin* -- i.e., what constituted challenges to "the lawfulness of the military commission" -- is particularly instructive here. Specifically, the Court addressed the merits of the petitioners' challenge that the orders constituting the military commission precluded trial by jury in violation of the Sixth Amendment and Article III of the Constitution, and failed to meet the Fifth Amendment's requirement of presentment and indictment to a Grand Jury. *See Quirin*, 317 U.S. at 38-41. These are directly analogous to Petitioner's arguments that the basic structures of the commissions are not in accord with Due Process and Equal Protection. Likewise, the *Quirin* Court treated as a challenge to the lawfulness of the military commission -- and thus addressed on the merits -- the petitioners' claims that certain of the charges brought against them were not

violations of the law of war and, therefore, lay outside the commission's jurisdiction. *See id.* at 29. Such claims are functionally indistinguishable from Mr. Hicks's current claims.

Respondents repeated invocation of *Schlesinger v. Councilman*, 420 U.S. 738 (1975) does not support their argument. *See* Resp. Rev. Br. at 23-24, 28-30. Respondents also invoked *Councilman* in *Hamdan*, while seeking to minimize the "precedential effect" of *Quirin*. *See Hamdan*, 415 F.3d at 36. In *Hamdan*, however, the court of appeals expressly *rejected* the government's attempt to use *Councilman* to limit the precedential effect of *Quirin*. *See Hamdan*, 415 F.3d at 36. Rather, the court made clear that *Councilman* held "only that civilian courts should not interfere with ongoing court-martial proceedings against citizen servicemen. The cases have little to tell us about the proceedings of military commissions against alien prisoners." *Id.* As the court further explained, *Councilman* was based on the military's unique "respect for duty and discipline" among its members and the concomitant need for "maintaining order and discipline in the armed services." *Id.* The court was thus quick to hold that "[t]hese concerns do not exist in Hamdan's case and we are thus left with nothing to detract from *Quirin*'s precedential value." *Id.* Moreover, the court explained, even under *Councilman*, abstention is not warranted where the petitioner has raised any *substantial* arguments that the military commission has no jurisdiction. *Id.*

Nevertheless, the D.C. Circuit indulged the government's reliance on *Councilman* in two alternative discussions and, even applying *Councilman*, the court found no lawful ground on which to abstain from addressing the merits of the petitioner's claims that the military commission was constituted in violation of Article I of the Constitution and the separation of powers, *see id.* at 37-38, in violation of Article 102 of the Third Geneva Convention, *see id.* at 40-41, in violation of the UCMJ, 10 U.S.C. §§ 821 and 836, *see Hamdan*, 415 F.3d at 42-43, and

in violation of Army Regulation 190-8, *see id.* at 43. Hamdan's challenges were jurisdictional in the relevant sense because, among other things, he contended that the military commission, as presently constituted, had no right to try him "and that any trial must be by court-martial." *Id.* Indeed, the only claim that the court indicated would warrant abstention under *Councilman* was the petitioner's claim that the commission's procedures would violate Common Article 3 of the Geneva Conventions if petitioner were denied the right to be present at his trial and confront the witnesses against him. *Id.* at 42. The court characterized that claim as one going to "how the commission may try" petitioner, rather than one going to the lawfulness of the commission -- i.e., what the court termed jurisdictional, or going to "whether the commission may try him." *Id.* (emphasis in original).

Thus, the only claim on which the court opined that abstention would be proper was one that, by its very nature, turned on an issue that (a) did not raise the question of whether the military commission was a proper forum to evaluate the charges, and (b) could not be fully evaluated in advance, as it would not be known until after trial whether, or the extent to which, the commission in fact had excluded a detainee from the proceedings.¹ By contrast, like the petitioners' claims in *Quirin*, Mr. Hicks's claims here turn instead on the lawfulness of the commission's organic orders and its jurisdiction to hear the crimes charged -- claims that in no way implicate the commission's discretion or *how* it ultimately will try Mr. Hicks. Accordingly, even if *Councilman* were to apply -- and *Hamdan* makes clear that it does not -- *Hamdan* also makes clear that it in no way undermines the precedent set in *Quirin* where the Supreme Court

¹ Pursuant to the commission's enabling regulations, "[t]he Accused may be present at every stage of the trial before the Commission" except under certain circumstances or if Accused engages in disruptive conduct. MCO No. 1 ¶ 5(K). Thus, the question of whether the accused is in fact excluded from proceedings rising to the level of a violation of the Geneva Conventions, typically will only be addressed after trial when it is clear what proceedings he was permitted to attend and those from which he was excluded.

heard the merits of claims structurally identical to Mr. Hicks's claims here. In other words, under no reading of *Hamdan* does *Councilman* require or even permit abstention here, and Respondents' repeated reliance on *Councilman* is fundamentally misplaced.

Moreover, *Councilman*'s "comity-based" abstention doctrine rejected in *Hamdan*, 415 F.3d at 36, was expressly premised on the respect due to court martial proceedings, with judges "completely removed from all military influence or persuasion," and having a "thorough familiarity with military problems," thus justifying the assumption that "the military court system will vindicate servicemen's constitutional rights." *Councilman*, 420 U.S. at 758. None of those premises are valid here. Rather than being completely removed from all military influence, the members of the military commission have been handpicked for this case by the Secretary of Defense and his hand-picked Appointing Authority, as we discuss more fully below, *infra* Part III. As one high-ranking former member of the Department of Defense prosecution team recently alleged, even the Chief Prosecutor has repeatedly stated to his team that "the military panel will be hand picked *and will not acquit these detainees.*" See Redacted e-mails (Ex. 13 at 6, Pet. Rev. Br.) (emphasis added). The impartiality of court-martial panels is manifestly lacking here.

In addition, unlike the court-martial judges who have a "thorough familiarity with military problems," *Councilman*, 420 U.S. at 758, the military commission members have no prior commission experience. Furthermore, Mr. Hicks's constitutional and other claims raise issues within the core competency of the federal courts and outside the narrow expertise of the military commissions. See *Noyd v. Bond*, 395 U.S. 683, 696 & n.8 (1969) (emphasizing that constitutional claims do not require exhaustion of military remedies because military courts lack expertise over such claims, and abstaining from petitioner's claim for relief pending military

appeal only because Court “would be obliged to interpret extremely technical provisions of the [UCMJ] which have no analogs in civilian jurisprudence”). As the D.C. Circuit has explained, where “[t]he issues involved are purely legal, requiring no military discretion or expertise federal courts are in a better position to consider . . . constitutional issues . . . than are the various military bodies.” *Committee for GI Rights v. Callaway*, 518 F.2d 466, 474 (D.C. Cir. 1975); *see also Andrade v. Lauer*, 729 F.2d 1475, 1484 (D.C. Cir. 1984) (quoting *Callaway*, 518 F.2d at 474); *Quirin*, 317 U.S. at 27-28 (recognizing that the Supreme Court has applied the law of war “[f]rom the very beginning of its history” and reaching the merits of petitioners’ law of war claims without requiring exhaustion).

Finally, Respondents invoke the ordinary rule against premature habeas review and potentially avoidable constitutional adjudication. *See* Resp. Rev. Br. at 24 n.33. Yet Respondents do not cite a single military commission case for this proposition, nor could they. As the Supreme Court made clear in *Quirin*, questions of whether a military commission in times of war is properly charging offenses under the law of war and doing so consistent with the nation’s laws and Constitution -- the very issues in this case -- raise countervailing concerns that reverse the presumption against immediate review:

In view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, . . . in our opinion the public interest required that we consider and decide those questions without any avoidable delay.

Quirin, 317 U.S. at 19. Immediate review was proper then, and it is proper now.²

² We address the remainder of Respondents’ claim-specific abstention arguments in the appropriate claim-specific sections that follow.

II. THE MILITARY COMMISSION LACKS JURISDICTION BECAUSE THE CHARGES AGAINST MR. HICKS FALL OUTSIDE THE JURISDICTIONAL LIMITS SET BY ARTICLE 21 OF THE UCMJ.

Abstention is particularly improper with respect to Mr. Hicks's claims that none of the charges against him falls within the jurisdiction of military commissions. This precise type of claim was evaluated in *Quirin*. On the merits of the claim, this Court should enjoin the commission proceedings against Mr. Hicks since none of the charges is among those that Congress has expressly authorized military commissions to adjudicate or are among those that are recognized as crimes under the traditional law of war. Under Article 21 of the UCMJ, military commission jurisdiction extends no further. 10 U.S.C. § 821.

A. This Court Should Decide Mr. Hicks's Article 21 Challenge Now.

Although the argument that the charges against Mr. Hicks fall outside the jurisdiction permitted by statute is indisputably "jurisdictional," Respondents nevertheless contend that this Court should abstain with respect to it. They rely entirely on a single sentence in *Hamdan* in which the D.C. Circuit declined to discuss "Hamdan's remaining contentions." Resp. Rev. Br. at 35-36 (citing *Hamdan*, 415 F.3d at 43). They argue that this sentence applies to Hamdan's three-paragraph argument that the conspiracy charge against him was invalid. Respondents speculate that "[p]erhaps the most logical view is that the D.C. Circuit did not regard Hamdan's challenge as jurisdictional in a sense requiring pre-trial habeas review and chose to abstain from exercising jurisdiction over this type of challenge." *Id.* at 36.

Respondents offer no basis for their speculative reading of *Hamdan*. They merely state that constitutional challenges to a statute are not jurisdictional. But that purported principle, whatever its merits, has no application to an argument that a particular charge (conspiracy) is

outside the jurisdictional limits of military commissions. There is simply no argument that this challenge to the commission's jurisdiction is not jurisdictional.

Thus, Respondents are wrong to suggest that it is most "logical" to view the D.C. Circuit as having abstained on the "conspiracy charge" issue. Indeed a far more "logical" view is that the D.C. Circuit considered Hamdan's challenge to the commission's jurisdiction over conspiracy to have been waived in that case. Hamdan spent virtually no time on the conspiracy issue at the district court and submitted no expert affidavits on the law of war. Judge Robertson did not discuss the issue. At the appellate level, Hamdan raised the challenge in only three paragraphs in his brief, with a single sentence addressing the laws of war, and he did so primarily by referring back to his district court briefs. Hamdan did not even cite to any relevant views of experts or contemporary international practice other than the Geneva Conventions. Under D.C. Circuit precedent, this is precisely the type of argument that is considered waived.³ A decision that Hamdan waived the conspiracy argument would, of course, have no implications for the propriety of abstention in this case.

But there is no need to speculate as to what the D.C. Circuit intended with respect to the conspiracy issue because *Hamdan's* single sentence on "remaining contentions" is not the kind of language that has any precedential effect. There is no way to tell from the face of the opinion

³ See *United States v. West*, 392 F.3d 450, 459 (D.C. Cir. 2004) (holding issue waived where issue was not "fully argued" and noting that court must be particularly wary of deciding an issue where the consequences "are potentially far-reaching"); *SEC v. Banner Fund Int'l*, 211 F.3d 602, 613 (D.C. Cir. 2000) (refusing to "address an asserted but unanalyzed argument"); *Cruz v. American Airlines, Inc.*, 356 F.3d 320, 333 (D.C. Cir. 2004) (noting that in opening brief, litigants must "present, argue, and support" any particular claim) (internal quotation marks omitted); *McBride v. Merrell Dow & Pharm., Inc.*, 800 F.2d 1208, 1210 (D.C. Cir. 1986) (refusing to decide issue not "adequately briefed"). Other courts have adopted similar waiver rules. See, e.g., *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998); *United States v. Bongiorno*, 106 F.3d 1027, 1034 (1st Cir. 1997); *United States v. Layne*, 192 F.3d 556, 566-67 (6th Cir. 1999); *APS Sports Collectibles, Inc. v. Sports Time Inc.*, 299 F.3d 624, 631 (7th Cir. 2002).

that the conspiracy issue was even one that was raised, much less addressed. In other words, no one reviewing the opinion who was not involved in the case would have any idea that the conspiracy issue was part of the case or how it was decided. *See, e.g., EEOC v. Trabucco*, 791 F.2d 1, 2-3 (1st Cir. 1986) (“Although . . . the briefs of [the] parties are sometimes resorted to, our primary resource in helping us decide whether [a particular] decision should constitute a sufficient basis [to decide an issue] are the opinions of the district court and of our own court in that case”); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 617-18 (1976) (Stewart, J., dissenting) (“except in rare instances an analysis of the positions taken by the parties in briefs submitted to this Court should play *no role* in interpreting its written opinions.”).⁴ That is particularly so because, here, even after reviewing the briefs, it is impossible to know what it is that the D.C. Circuit “decided.” *Hamdan*, therefore, does not dictate any particular outcome with respect to Mr. Hicks’s jurisdictional challenges in this case.

Certainly, the speculation that *Hamdan* may have abstained on the conspiracy issue cannot trump what *Hamdan* expressly held -- that, in the words of Respondents, abstention is inappropriate where the federal court challenge “raise[s] substantial arguments regarding the military tribunal’s jurisdiction over the accused, *i.e.*, regarding the right of the military to try the accused at all.” Resp. Rev. Br. at 17. Mr. Hicks’s contention that the charges against him are outside the commission’s jurisdiction is just such an argument.

Hamdan relied on the Supreme Court’s decision in *Quirin* as the basis of its conclusion that abstaining on jurisdictional issues is inappropriate. *Hamdan*, 415 F.3d at 36. *Hamdan* therefore dictates that there should be no abstention over the type of issues raised in *Quirin* itself.

⁴ Justice Stewart was not in the minority on this point. He was joined in his dissent by two Justices, and Chief Justice Burger’s concurrence also was supportive. 428 U.S. at 604 (Burger, J., concurring). Justice Stevens’ contrary opinion (part II of the opinion) was joined only by three other Justices.

Mr. Hicks's challenge to the validity of the charges against him is the exact same type of argument that was decided in *Quirin*. In that case, the Supreme Court was concerned "with the question of whether it is within the constitutional power of the National Government to place petitioners upon trial before a military commission *for the offenses with which they are charged*. We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal..." *Quirin*, 317 U.S. at 29 (emphasis added). Rather than abstaining with respect to that question, the Court then proceeded to examine Charge I, and concluded that it "alleged an offense which the President is authorized to order tried by military commission." *Id.* at 48. This Court must similarly decide whether the Respondents have "alleged an offense which the President is authorized to order tried by military commission." *Id.*

B. The Military Commission Has No Jurisdiction Over the Charges Against Mr. Hicks.

This Court should find that none of the charges against Mr. Hicks is a valid charge within the jurisdiction of military commissions. None is based on the law of war. To the contrary, each charge has been made up for the first time in MCI No. 2 and in the charge sheet against Mr. Hicks. Respondents acknowledge that only crimes that violated the law of war at the time of Mr. Hicks's conduct may fall within the jurisdiction of military commissions and that they cannot simply make up charges after the fact. Resp. Rev. Br. at 37. But the conduct alleged in the charges against Mr. Hicks does not violate the law of war. It amounts to (1) allegations of conduct that occurred when there was no armed conflict to which the laws of war could apply, and (2) bare allegations that Mr. Hicks participated in combat, which is not against the law of war. Mr. Hicks therefore has a clear "right not to be tried" for these supposed offenses.

Analyzed in light of the recognized sources of the law of war, the charges against Mr. Hicks cannot stand. Here, Petitioners submitted affidavits from three acclaimed experts in

the law of war, explaining that Respondents have not alleged any violations of the law of war. Such expert opinion is itself one of the sources of the law of war. Moreover, these experts point to a multitude of contemporary international law sources supporting their view. They explain that war crimes constitute grave breaches of the Geneva Conventions or other serious violations of the laws and customs applicable in international armed conflict. Schmitt Aff. ¶ 2 (Ex. 10, Pet. Rev. Br.). They explain that none of these sources support the view that the charges against Mr. Hicks allege violations of the laws of war.

The Respondents do not point to one convention that supports the charges against Mr. Hicks. They do not, for example, contend that the charges amount to a grave breach of the Geneva Conventions. But it is just such sources to which the Supreme Court has primarily looked in evaluating whether charges violate the law of war. In determining whether a law of war violation was charged against General Yamashita, the Supreme Court determined the substantive criminal acts alleged against General Yamashita were contained in the Hague Conventions, and the theory of liability charged, “command responsibility” was supported by the Tenth Hague Convention and the Geneva Convention of 1929.⁵ In *Eisentrager*, the Supreme Court again relied upon the Hague Convention to support the conclusion that a violation against the laws of war had been alleged.⁶ There is no similar support for the charges against Mr. Hicks.

Nor do Respondents show that the charges constitute serious violations of the laws or customs applicable in international armed conflict. They provide virtually no international sources supporting their contention that they have alleged violations of the international law of war as it exists today. Respondents rely on a few dated sources almost exclusively within the United States that, to the extent they are apposite at all, do not represent the contemporary norms

⁵ *In re Yamashita*, 327 U.S. 1, 14-15 (1946).

⁶ *Johnson v. Eisentrager*, 339 U.S. 763, 787-88 (1950).

of the law of war as it has evolved in the past 60 years. Customary international law requires “the consistent practice of states,” Bassiouni Aff. ¶ 10 (Ex. 11, Pet. Rev. Br.), or, in the words of *Quirin*, “universal agreement.” *Quirin*, 317 U.S. at 30; *see also* Schmitt Aff. ¶ 2 (Ex. 10, Pet. Rev. Br.) (“When such a practice attains a degree of regularity and is accompanied by the general conviction among nations that behavior in conformity with the practice is obligatory, it can be said to have become a rule of customary law.”) (quoting Statute of International Court of Justice, art 38(c)). No such consistent practice exists to establish that the charges against Mr. Hicks amount to violations of the laws of war. In fact, the consistent practice is the opposite.

1. The Military Commission Has No Jurisdiction Over the Conflict With al Qaeda.

Respondents charge Mr. Hicks with war crimes purportedly based on a “war” between the United States and al Qaeda. But under international law, the conflict with al Qaeda does not constitute an armed conflict that would trigger the laws of war. The only conflicts that trigger the laws of war are international conflicts between States, or internal armed conflicts. Pet. Rev. Br. at 14-16; Schmitt Aff. ¶¶ 7-21 (Ex. 10, Pet. Rev. Br.); Cassesse Aff. at 3 (Ex. 11, Pet. Rev. Br.) (“it is impossible for the United States to be involved in an international armed conflict with a non-state entity (such as al-Qaida)”). Thus, the 2005 Judge Advocate General’s handbook explains that “[t]he ‘trigger’ for the law of war to apply is international armed conflict or conflict ‘between two or more of the High Contracting Parties [to the Geneva Conventions], even if the state of war is not recognized between them.’” U.S. Army Judge Advocates General’s Legal Center and School, International and Operational Law Department, *Operational Law Handbook*, 72 n.79 (2005) (internal citation omitted; alteration in original) (“*Operational Law Handbook*”).

For just this reason, *Hamdan* held that the United States was not bound by the laws of war -- as set forth in the Geneva Conventions -- in the conflict with al Qaeda. *Cf.* Resp. Rev. Br.

at 15-16 (noting that *Hamdan* concluded that the conflict with al Qaeda did not constitute a war within the meaning of the Geneva Conventions). There is no twilight zone in the law of war that permits the United States to prosecute its opponents for violating the law of war but exempts the United States from its requirements. Nonetheless, Respondents rely on the law of war in general, and the Geneva Conventions in particular in prosecuting Mr. Hicks, *see* Resp. Rev. Br. at 41 (pointing to the Geneva Conventions to argue that Mr. Hicks is an unprivileged belligerent and therefore a war criminal), while simultaneously arguing that the Geneva Conventions do not limit their own conduct in this conflict, a point upheld in *Hamdan*. If the United States is in an armed conflict where the law of war does not apply to its conduct, there can be no basis for concluding that alleged opponents of the United States can be prosecuted ostensibly for violating that same law. This Court should reject Respondents' impermissible attempt to have it both ways.

Respondents offer no argument that the conflict with al Qaeda constitutes an armed conflict that would make the law of war applicable under international law. Instead, they argue that "whether there exists a state of armed conflict to which the law of war appl[ies] is a political question for the President, not the courts." Resp. Rev. Br. at 38 n.42. That is wrong. While the President may have the power to initiate a conflict, he does not have the power unilaterally to determine that such a conflict meets the definition of an armed conflict within the meaning of international law. *See* Schmitt Aff. ¶ 16 (Ex. 10, Pet. Rev. Br.) (war is an objective term in international law that cannot be established through Executive declarations).⁷ As Respondents acknowledge, when the President established military commissions to prosecute violations of the

⁷ Otherwise, for example, the President could unilaterally determine that a war exists with, for example, an alleged drug cartel, detain alleged members of the group for committing "war crimes" and then try them before military commissions.

laws of war, he referred to a preexisting body of law. Resp. Rev. Br. at 37. But, as explained, that body of law applies only to armed conflicts as defined by the law of war. By attempting to expand the conflicts to which that body of law applies, Respondents are creating new categories of war crime offenses that trigger the very *ex post facto* problems they deny.

2. The Commission Has No Jurisdiction Over the Charge of Aiding the Enemy.

The military commission does not possess jurisdiction to try Mr. Hicks for the charge of aiding the enemy. Congress has limited the jurisdiction of military commissions to charges Congress has expressly authorized commissions to adjudicate and charges that are recognized as crimes under the law of war. Respondents do not even assert that the charge falls into either of these categories, instead asserting that it has been “derived” from existing law -- hardly a legitimate basis for a criminal prosecution, which, under the rule of lenity, must be based on existing law at the time of the offense and strictly construed.

a. Respondents Have Not Charged Mr. Hicks With Violating the UCMJ.

Although aiding the enemy is one of two statutory offenses over which Congress has conferred jurisdiction on military commissions, Respondents admit that Mr. Hicks is not charged with the statutory offense of “aiding the enemy” under Article 104 of the UCMJ. Respondents reference this Article solely as a basis to claim that the offense with which Mr. Hicks is charged has been “*derive[d]* from existing law,” and, in particular, has been “derived from the law of armed conflict.” Resp. Rev. Br. at 42. The Respondents are correct to avoid applying Article 104 to Mr. Hicks as he was not bound to comply with or subject to the UCMJ, which delineates categories of people who are subject to criminal charges, including primarily United States soldiers, prisoners of war, and in some cases persons accompanying U.S. soldiers or persons in

territory controlled by the U.S. military.⁸ The charge does not reference the UCMJ provision, and the elements and definitions of aiding the enemy under MCI No. 2, the basis of the commission charge, are different than that under the UCMJ.

b. Aiding the Enemy Does Not Violate the Law of War.

Respondents also do not show that aiding the enemy violates the laws of war. Indeed, Respondents do not even state that aiding the enemy violates the law of war; instead contending that derivation of the charge from Article 104 of the UCMJ equates to “deriv[ation] from the law of armed conflict.” Resp. Rev. Br. at 42 (quoting MCI No. 2). But the fact that the charge must somehow be “derived” from existing law makes clear that it cannot be the basis of a valid criminal charge. Moreover, the existence of a U.S. domestic crime of aiding the enemy under the UCMJ does not remotely suggest that any crime of aiding the enemy (much less a differently defined crime) exists under the international law of war, which is based on international agreements and universal international practice, not U.S. domestic statutes.

Respondents do not cite a single source for the proposition that aiding the enemy constitutes a violation of the law of war. That is because there are no such sources. From the perspective of the law of war, which attempts to establish neutral rules, there are no enemies. The laws of war are written to apply equally to both sides of a conflict without regard to who is right or wrong. Aiding the enemy has been a U.S. statutory offense aimed at regulating the conduct of persons on the U.S. side or persons within territory controlled by U.S. Forces, not the enemies. Thus, even MCI No. 2 does not list aiding the enemy as a war crime, but rather as an “other offense[] triable by military commissions.” Similarly, even the 1956 Law of Land Warfare Manual recognizes that aiding the enemy is solely a creature of American statute not a

⁸ See Article 2 of the UCMJ, 10 U.S.C. § 802, “Persons subject to this chapter.”

crime under international law.⁹ As Professor Schmitt explains, “there is no prohibition in the law of armed conflict on aiding the enemy.” Schmitt Aff. ¶ 40 (Ex. 10, Pet. Rev. Br.).

c. Aiding the Enemy Requires Allegiance to the United States.

The charge of aiding the enemy does not provide commission jurisdiction for the additional reason that Article 104 of the UCMJ, from which Respondents purport to have derived the charge of aiding the enemy, applies only to those with a duty of allegiance to the United States. Mr. Hicks, an Australian national, owes no such duty.

The Respondents argue that “[a]llegiance to the United States, while perhaps an element to the offense of treason, is not an element of the offense of aiding the enemy.” Resp. Rev. Br. at 43. Military Courts of Review have held otherwise. In *United States v. Olson*,¹⁰ the court considered whether a U.S. serviceman who aided the North Koreans while held as a prisoner could be guilty of the offense of aiding the enemy despite his objection that he had no duty of allegiance to the United States while within the control of a foreign state. The court found that he could be found guilty of aiding the enemy but only because he had a continuing duty of allegiance. The court directly analogized the charge of aiding the enemy to cases of treason: “it has uniformly been held that the existence of an area of permissible obedience to a foreign power is not a license to commit treason. The obligation of allegiance which attaches to citizenship continues to rest upon the shoulders of one so situated.” *United States v. Olson*, 22 C.M.R. 250,

⁹ Dep’t of the Army, Field Manual 27-10, *The Law of Land Warfare* ¶ 79 and ch. 8, sec. 2 (1956) (Ex. B, Resp. Rev. Br.) (“FM 27-10”) (listing “aiding the enemy” in Section I while the manual devotes an entire separate section to “Crimes Under International Law”).

¹⁰ 22 C.M.R. 250, 255 (C.M.A. 1957) (looking to treason cases for the law in the field of Article 104, UCMJ).

255 (C.M.A. 1957). Other cases also analogize aiding the enemy to treason, which requires a duty of allegiance.¹¹

Respondents next attempt to assert that unprivileged belligerents can be prosecuted for aiding the enemy even if they owe no duty of allegiance to the United States. They thereby attempt to bootstrap their own creation -- the offense of unprivileged belligerency -- into the Article 104 concept of aiding the enemy. They provide absolutely no basis for the connection. The language in Article 104 has nothing to do with privileged or unprivileged status. Nor does the basic concept at which Article 104 is aimed. Aiding the enemy, after all, does not require the enemies (or those who aid them) even to be belligerents. Instead, it requires that the individual accused of aiding the enemy have an obligation to be bound to the United States' determination of who its enemy is. Moreover, Respondents' argument depends on the premise that unprivileged belligerency violates the law of war. As discussed below, it does not. Additionally, Respondents' attempt effectively makes their charge of aiding the enemy identical to their charge of unprivileged belligerency. Yet they attempt to subject Mr. Hicks to separate punishment for each.

Respondents recognize the weakness in their argument and attempt to create a duty of Mr. Hicks based upon his Australian citizenship. This half-hearted assertion that Mr. Hicks can be charged with aiding the enemy because he is a citizen of Australia fares no better for all of the reasons Petitioner explained in his initial brief. Pet. Rev. Br. at 20-21. Mr. Hicks's Australian citizenship does not provide a duty of allegiance to the United States. Nor can the United States

¹¹ See *United States v. Fleming*, 23 C.M.R. 7, 23 (C.M.A. 1957); *United States v. Batchelor*, 22 C.M.R. 144, 153 (C.M.R. 1956) (Article 104 is "an offense which is strikingly similar to" treason); *Martin v. Young*, 134 F. Supp. 204, 208-09 (N.D. Cal. 1955) (evaluating the relationship between Article 104 and treason).

prosecute Mr. Hicks for violating a duty of allegiance to Australia -- especially since Australia does not view him as having violated any such duty. *See* Pet. Rev. Br. at 21.

For all of these reasons, it is not surprising that there is no reported case (and Respondents cite none) where a non-U.S. citizen with no duty of allegiance to the United States has been convicted for committing the offense of aiding the enemy. Nor do Respondents cite any other authority for their far-fetched theory other than MCI No. 2 itself a military instruction, not a statute or international law convention, promulgated after Mr. Hicks's alleged actions that gave rise to the charge.

3. The Commission Has No Jurisdiction Over the Charge of Attempted Murder by an Unprivileged Belligerent.

Respondents argue that Mr. Hicks is an unprivileged belligerent and thus is a war criminal. They explain that he is being charged with “unlawful participation in war as an unprivileged belligerent.” Resp. Rev. Br. at 41. Their theory is that “any active participation in combat by [Mr. Hicks] is unlawful per se.” *Id.* at 42. Respondents thereby conflate the distinction between unprivileged status and criminal behavior under the law of war. As Petitioner has explained, the law of war privileges certain belligerents (those who must be treated as prisoners of war) such that they may not be prosecuted under a nation's domestic law. It does not extend such protection from domestic prosecution to other belligerents (those who do not meet the criteria for prisoner of war status). But the law of war does not itself make “any active participation in combat” by unprivileged belligerents a war crime.

The status of the participant is irrelevant in assessing the criminality of the conduct under the law of war. *See generally* Schmitt Aff. ¶¶ 33-39 (Ex. 10, Pet. Rev. Br.). Thus, for example attacks on civilians who are not participating in hostilities violate the laws of war regardless of

who the attacker is,¹² but attacks on those actively participating in hostilities do not -- again regardless of the status of the attacker.¹³ The charge that Mr. Hicks participated in combat against armed forces simply does not state a law of war violation.

Respondents cite Winthrop for the proposition that unprivileged belligerents have traditionally been treated harshly. Resp. Rev. Br. at 41. But that is not surprising, as unprivileged belligerents may be punished under domestic law. Moreover, Winthrop relies entirely on domestic cases during the Civil War. The Third Geneva Convention, which Respondents also cite, merely defines who is entitled to prisoner of war (POW) status. The Fourth Geneva Convention recognized there may be individuals participating in hostilities who are not entitled to POW status.¹⁴ The Fourth Geneva Convention does not equate this with any breach of the conventions or any other violation of the laws of war.¹⁵ Similarly, the Law of Land Warfare manual states only that unprivileged belligerents are “when captured by the injured party, not entitled to be treated as prisoners of war.” Rather, they “may be tried.” FM 27-10 ¶ 80 (Ex. B, Resp. Rev. Br.). The manual does not remotely suggest that such trial will occur under the law of war, rather than domestic law. Indeed, the subsection on unprivileged belligerency is not in the section on crimes under international law at all. And the 2005 version of the Operational Law Handbook, rather than the 1956 manual cited by Respondents, makes explicit that unprivileged belligerents can be prosecuted only under “the *domestic law* of the

¹² 1 Jean-Marie Henckaerts and Louise Doswald-Beck (ICRC), *Customary International Humanitarian Law*, Volume, Rules 1 and 6 (2005); see also ICRC, *Direct Participation in Hostilities under International Humanitarian Law, Part III, Legal Consequences of Participation in Hostilities* (2003), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5TALL8/\\$File/Direct%20participation%20in%20hostilities-Sept%202003.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5TALL8/$File/Direct%20participation%20in%20hostilities-Sept%202003.pdf).

¹³ Henckaerts and Doswald-Beck, *supra*, Rules 1, 6 and 47.

¹⁴ See Article 5 (Derogations) and accompanying commentary of the Fourth Geneva Convention, 12 August 1949. Convention (IV) Relative to the Protections of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. No. 973.

¹⁵ See Article 147 (Grave Breaches) and accompanying commentary of the Fourth Geneva Convention, 12 August 1949. *Id.*

captor.”¹⁶ The consensus of international law experts is in accord. Although civilian combatants may constitute unprivileged belligerents, a summary of a recent expert meeting under the International Committee of the Red Cross explains that “it is *not* a violation of IHL [international humanitarian law] for a civilian to fight for his or her country; the lack of combatant or prisoner of war status implies that civilians directly participating in hostilities may be prosecuted under *domestic law* for their acts regardless of whether or not they violated IHL.”¹⁷

Finally, Respondents’ reliance on *Quirin* cannot support a generalized offense of unprivileged belligerency. *Quirin* held only that the particular acts in question -- spying -- could be prosecuted by military commissions. But that can only be because spying is one of the two statutorily defined offenses over which military commissions have jurisdiction, or, alternatively, because “perfidy,” was involved -- the feigning of a protected status, such as civilian status or injured status, as a means to enable the individual to kill or injure an adversary. *See Quirin*, 317 U.S. at 35 (“By a long course of practical administrative construction by its military authorities, our Government has likewise recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property” can be tried by military commission); *see id.* at 31-32 & n.10 (citing examples of such acts). Perfidy, unlike unprivileged belligerency, is a violation of the laws of war and is a separate offense listed in MCI No. 2.¹⁸ Mr. Hicks, however,

¹⁶ *Operational Law Handbook* at 17.

¹⁷ *See ICRC, Direct Participation in Hostilities*, 31 Dec. 2004, available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5TALL8/\\$File/Direct_participation_in_hostilities_2004_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5TALL8/$File/Direct_participation_in_hostilities_2004_eng.pdf).

¹⁸ Perfidy is rooted in Article 23(b) of the Fourth 1907 Hague Convention’s prohibition “To kill or wound treacherously individuals belonging to the hostile nation or army.” *Laws and Customs of War on Land* (Hague, IV) Oct. 18, 1907, available at <http://www.dannen.com/decision/int-law.html>. The offense of Perfidy is most recently reflected in Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Conflicts (Protocol I), 8 June 1977, available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>. Perfidy prohibits the

has not been charged with that recognized offense, and *Quirin* should not be extended beyond the specific perfidious acts cited as examples in the opinion to create a general crime of unprivileged belligerency. That is particularly so because since *Quirin*, nations have codified much more of the law of war. In doing so, they have not criminalized unprivileged belligerency. There is simply no universal agreement or general practice making unprivileged belligerency a war crime.

That is for good reason. As Petitioner pointed out previously, under Respondents' theory, fighters in the French Resistance or Polish civilians who planned and participated in an attempt to repel the Nazi invasion would have been war criminals. Similarly, Respondents' theory would encompass *everyone* who took part in hostilities in resisting the invasion of Afghanistan by Coalition forces, including not only most Guantanamo detainees but also tens of thousands of Afghan citizens, because the President has determined that no one who opposed the coalition forces in Afghanistan is entitled to prisoner of war status.¹⁹ Similarly, many CIA employees and civilian Defense employees or contractors who participated in the conflict in Afghanistan and Iraq while not wearing a uniform would be war criminals,²⁰ as would many

means of warfare by which an adversary feigns a protected status under the laws of war (civilian, using a flag of truce, or acting as wounded) and uses that protected status to kill or injure an adversary. Respondents have not accused Mr. Hicks of perfidy and could not as there was nothing surreptitious about his actions. And perfidy is the only law of war offense which criminalizes certain conduct by a person who may not be wearing a proper uniform. The status of the actor in the offense of perfidy as a privileged or unprivileged belligerent is irrelevant to determining a law of war violation as this offense is aimed at regulating the conduct of warfare for both sides of the conflict.

¹⁹ See President George W. Bush memorandum of February 7, 2002, available at <http://slate.msn.com/features/whatistorture/pdfs/020207.pdf>

²⁰ See generally Gary C. Schroen, *First In, An Insider's Account of How the CIA Spearheaded the War on Terror in Afghanistan* (2005) (describing CIA officers dressed in L.L. Bean clothing engaged in combat in the conflict in Afghanistan); Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 Chi. J. of Int'l L. 511, 512-18 (2005) (noting that "scope of conflict-related activities which civilians perform today is unprecedented," and "that some of [these civilians'] activities appear indistinguishable from military operations," including guarding convoys and airports).

U.S. soldiers throughout history.²¹ Understandably, Respondents are not willing to label them as such. And the 2004 expert meeting organized by the International Committee of the Red Cross concluded that the use of civilian contractors in armed conflict “certainly did not violate the law of armed conflict.”²² Similarly, Hays Parks, the Law of War Chair at the Office of General Counsel for the Secretary of Defense states that:

Captured US military personnel. . . wearing civilian apparel without a fixed distinctive sign and without visible weapons may be considered spies by their captor. The captor may try them for domestic law violations (for example, spying). Unless they otherwise commit an independent law of war violation (for example, perfidy), history indicates that the acts will not be regarded as a violation of the law of war.²³

But Respondents can provide no basis for differentiating the conduct of these U.S. soldiers and civilians from that of Mr. Hicks under their view that unprivileged belligerency

²¹ In a 2003 article, W. Hays Parks, the Law of War Chair at the Office of the General Counsel for the Secretary of Defense provided an Appendix with many examples of military forces wearing civilian attire, non-standard uniforms and/or enemy uniforms (without anyone considering it to be a war crime). W. Hayes Parks, *Special Forces’ Wear of Non-Standard Uniforms*, 4 Chi. J. Int’l L. 493 (2003). Examples involving the United States include: Office of Strategic Service teams entering Nazi-occupied France and Yugoslavia in 1944 and conducting operations in civilian clothing and German uniforms; the U.S. Naval Group entering China in 1944 and wearing civilian clothing while collecting intelligence and executing direct action missions against the Japanese; Army Rangers dressed as German soldiers penetrating and fighting in Aachen, Germany in 1944; OSS teams in German uniforms conducting Operation Iron Cross to execute subversion missions and capture or kill Nazi officials in Germany in 1945; Military Assistance Command Studies and Operations Group teams wearing non-standard uniforms while operating in denied areas in Vietnam from 1965-1971; Special Forces soldiers fighting in civilian clothing in response to Tet Offensive attacks in Vietnam in 1968; the team for the rescue of U.S. hostages in the American Embassy in Tehran in 1980 wearing non-standard uniforms approved by the Joint Chiefs of Staff and the President, and Special Forces wearing *kaffiyeh/agal* and indigenous coats over their uniforms during operations in Iraq in 1991. *Id.* at 554-60. None of these cases ended in a prosecution under domestic law or the law of war. In fact, in one case, the soldier was awarded a Medal of Honor for his conduct. *See id.*

²² International Committee of the Red Cross and the TMC Asser Institute, *Second Expert Meeting: Direct Participation in Hostilities under International Humanitarian Law* (2004) Part V, at 14, available at [www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5TALL8/\\$File/Direct_participation_in_hostilities_2004_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5TALL8/$File/Direct_participation_in_hostilities_2004_eng.pdf).

²³ Parks, *supra* at 542-44; *see also id.* at 512-13 (“[w]earing a partial uniform, or even civilian clothing,” which Respondents rightly assert makes a combatant an unprivileged belligerent, “is illegal only if it involves perfidy...”).

constitutes a war crime. For just such reasons, the consensus of law of war experts today is that unprivileged belligerency is *not* a war crime. There is no support for it in any international convention, treaty or State practice. It is not a charge over which the military commission has jurisdiction.

4. The Commission Has No Jurisdiction Over the Charge of Conspiracy.

a. Conspiracy is not a crime under the Law of War.

The commission also has no jurisdiction over the charge of conspiracy as there is no such crime under the law of war. Respondents rely almost entirely on 150-year old domestic sources to create an argument that conspiracy is a stand-alone offense that constitutes a violation of the laws of war. These sources reflect only a historical U.S. perspective and are not based on the contemporary law of war. Respondents do not cite a single relevant contemporary source, a single relevant international source, or a single current expert in international law. In contrast, Petitioners submitted declarations from three leading international experts, showing based on current international conventions and practice, that conspiracy is not a violation of the laws of war. That is because the vast majority of countries do not view conspiracy as a crime in their domestic law and thus have not supported its inclusion into the international law of war. Bassiouni Aff. ¶ 10 (Ex. 8, Pet. Rev. Br.). Respondents are simply attempting by fiat to import the U.S. domestic notion of conspiracy into the international law of war, despite the rejection by the international community of previous efforts to do so.

The sources cited by Respondents cannot save the invalid conspiracy charge. Respondents cite 32 C.F.R. §§ 11.6, which is MCI No. 2, a military commission instruction drafted *after* Mr. Hicks's purported crimes that ostensibly reflect the role of conspiracy in the

law of war. But this post hoc instruction drafted by Respondents, cannot serve as an independent source of authority showing what the law of war already prescribed.

Respondents' citation to the 1956 Department of the Army Field Manual does not support a conspiracy charge either. The Field Manual lists conspiracy in the commission of crimes against peace, crimes against humanity, and war crimes as punishable. But it does not say that conspiracy is punishable as a stand-alone crime. Rather, conspiracy was viewed simply as one theory to establish individual responsibility for an actual substantive crime for which the defendant is charged. Indeed, the subsection on conspiracy is followed by a subsection of command responsibility (responsibility for acts of subordinates), clearly a theory of responsibility, not a separate substantive crime. FM 27-10, ¶¶ 500-501. Moreover, the Field Manual is a 50 year-old document from a period when the United States was attempting to convince the international community to accept conspiracy into the international law of war. That effort failed. See Stanislaw Pomorski, *Conspiracy and Criminal Organization, in The Nuremberg Trial and International Law* 213, 217-21 (George Ginsburgs & V.N. Kudriavisev eds., 1990); Schmitt Aff. ¶ 22 (Ex. 10, Pet. Rev. Br.); Cassesse Aff. at 1-2 (Ex. 11, Pet. Rev. Br.)

Respondents also rely on even older sources in an attempt to show the use of conspiracy from the U.S. historical perspective. Respondents cite to Winthrop, Howland, and *Mudd* (Resp. Rev. Pet. at 40) to demonstrate that individuals were tried for some type of conspiracy during the Civil War period. But the Civil War cases likely concerned U.S. domestic prosecutions under the U.S. Articles of War,²⁴ or in some instances, used conspiracy as a theory of individual responsibility. See Pet. Rev. Br. at 33. More fundamentally, in the 1860's, the international laws

²⁴ The U.S. established a code, known as the Lieber Code, in 1863 which promulgated as General Orders No. 100 by President Lincoln, 24 April 1863 for the Union Army, available at <http://www.yale.edu/lawweb/avalon/lieber.htm> not an international agreement on the state of the laws of war.

of war were in their infancy with the codification of the laws of war occurring almost exclusively thereafter.²⁵ It was not until the Nuremburg Tribunal where the first test of the acceptance of U.S. conspiracy law by the international community occurred. It was rejected. *See* Pet. Rev. Br. at 29-34. Thus, while these long-ago commissions offer a historical perspective of U.S. practice during our internal armed conflict, they offer no practical support for a declaration of what the international law of war provides today.

Respondents' citation to *Quirin* is equally unavailing. Resp. Rev. Br. at 38-39. While the petitioners in that case were charged with conspiracy, the Court never addressed whether conspiracy constituted a war crime. The July 31, 1942 *per curiam* decision held that the four charges against the petitioners "allege *an* offense *or* offenses which the President is authorized to order tried before a military commission." 317 U.S. at 18-19, note (*per curiam* order) (emphasis added). Thus, the Court decided only that at least one of the charges alleged an offense triable before a military commission. It did not decide whether each alleged offense separately constituted a violation of the law of war. And in its full opinion, the Court never mentioned conspiracy, suggesting, if anything, that the Court did *not* view conspiracy as a valid charge under the law of war; instead, the Court focused exclusively on spying and perfidy. Even if some limited support for a criminal charge of conspiracy could be drawn from the silence of *Quirin*, however, that tacit support would have been subsequently displaced at Nuremberg where

²⁵ The codification and written development of the international body of the laws of war began in the 19th Century with the Declaration of Paris in 1856 and continues to this day. The 1949 Geneva Conventions, negotiated in the aftermath of the Second World War, represent one peak of these efforts to place legal constraints on warfare. Changes in the nature of warfare during the second half of the 20th Century have led to further changes, as the laws of war have attempted to address the rise in internal armed conflicts, the increasing participation of civilians in hostilities, and the use of modern weapons and military tactics. A compilation of all conventions mentioned and which address the conduct of war is available made available by *The Avalon Project at Yale Law School available at* www.yale.edu/lawweb/avalon/lawofwar/lawwar.htm.

U.S. attempts to define a crime of conspiracy were explicitly rebuffed in a decision followed consistently by the international community thereafter.

In short, Respondents' attempt to rely on older U.S. domestic sources to support their view that conspiracy violates the law of war fails to recognize that the law of war is an international body of law that has evolved significantly over the past 60 years. It has been through the international criminal tribunals, beginning with Nuremberg, where the offenses and theories of liability have been developed that make up international law of war today. As Professor Schmitt explains, "to the extent such an offence [of conspiracy] existed historically, it has long since faded away." Schmitt Aff. ¶ 22 (Ex. 10, Pet. Rev. Br.).

Respondents' limited effort to cite international sources does not show otherwise, as that effort is simply misleading. Contrary to Respondents' claim, Resp. Rev. Br. at 40 n.44, the International Military Tribunal at Nuremberg did reject conspiracy as a valid charge. Despite efforts by the United States to work for inclusion of a conspiracy charge and ambiguous language in the Charter, the Tribunal rejected charges of the offences of conspiracy to commit war crimes and crimes against humanity, stating it would consider charges of conspiracy only with respect to "the common plan to prepare, initiate, and wage aggressive war," distinguishing the latter violation of the laws of peace from violation of the laws of war.²⁶ Respondents are therefore flatly incorrect that consideration of the charge of conspiracy to wage an aggressive war constituted acceptance of a charge of "conspiracy to violate at least some of the law of war." Resp. Rev. Br. at 40 n. 44. The laws of peace, which regulate the lawfulness of the use of force by a state, constitute a separate body of international law from the laws of war, which regulate

²⁶ 1 Trial of the Major War Criminals Before the International Military Tribunal 226, Washington 1947 (quoting Pomorski, *supra*, at 231-32).

participant's conduct during hostilities.²⁷ Moreover, since Nuremberg, "conspiracy has not been charged even with respect to crimes against peace." *Cassese Aff.* at 2 (Ex. 11, Pet. Rev. Br.).

Similarly, Respondents' claim that "[s]everal-law-of-war sources have prohibited and punished the sort of conspiracy with which Hicks is charged" evidences a complete misunderstanding of those sources. *Resp. Rev. Br.* at 40 n.45. The Genocide Convention shows only that international law precludes conspiracies to commit genocide. But the prohibition on genocide in international law is completely separate from the laws of war.²⁸ And even when the scope of analysis is extended beyond the laws of war, the prohibition of conspiracy to commit genocide is virtually unique. Almost no international criminal law conventions make conspiracy a separate crime. *Bassiouni Aff.* ¶ 7 (Ex. 8, Pet. Rev. Br.); *Schmitt Aff.* ¶ 26 (Ex. 10, Pet. Rev. Br.).

As for Respondents' citation of caselaw from the International Criminal Tribunal for the former Yugoslavia (ICTY), *Resp. Rev. Br.* at 40 n.45, that caselaw shows only that joint criminal enterprise can be one basis to establish individual responsibility for particular substantive crimes. Respondents themselves understand that joint criminal enterprise is a theory of individual responsibility. They attempt to use joint criminal enterprise in just that manner when they charge

²⁷ See *Schmitt Aff.* ¶ 22; *Cassese Aff.* at 2 ("the IMT disregarded the charges in count one of the indictment related to conspiracy to commit war crimes and crimes against humanity. The charges were limited to crimes against peace, a different type of crime that occurs prior to and up to initiation of a war."); 1998 Rome Statute International Criminal Court Statute, Art. 5, UN Doc. A/CONF 183/9 * (1998) reprinted in 37 I.L.M. 999 (1998) ("ICC Statute") ("The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression," or waging an aggressive war.), *available at* <http://www.un.org/law/icc/statute/romefra.htm> (Part 2 of the Statute); FM 27-10 ¶¶ 498-499 (Ex. B, *Resp. Rev. Br.*) (distinguishing between crimes against peace, crimes against humanity and war crimes and stating that the latter is "the technical expression for a violation of the law of war.").

²⁸ See generally ICC Statute; Statute of the International Criminal Court of the former Yugoslavia, Statute of the ICTY, S.C. Res. 827. U.N. SCOR, 48th Sess. 3217th mtg. at 2, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1203 ("ICTY Statute") (setting forth violations of the Laws or Customs of War in Article 3 and Genocide in Article 4); *available at* <http://www.un.org/icty/legaldoc-e/index.htm>; *Cassese Aff.* at 3.

Mr. Hicks with attempted murder by an unprivileged belligerent as a “member of an enterprise of persons who shared a common criminal purpose,” (Ex. 7 ¶ 21, Pet. Rev. Br.), a charge that fails for the separate reason that unprivileged belligerency is not a crime, as we show above Respondents could have charged Hicks with other substantive crimes as a member of a joint criminal enterprise if they believed he was guilty of any. But that provides no basis for charging him with a stand alone crime of conspiracy. The ICTY has never held that joint criminal enterprise, much less conspiracy, is an independent violation of the laws of war with which someone can be charged. Bassiouni Aff. ¶¶ 12-13. As Professor Cassesse explains, “While joint criminal enterprise is found within current international criminal law, conspiracy is not. Moreover, there is no crime of ‘joint criminal enterprise with which someone can be charged.’” Cassesse Aff. at 1 (Ex. 11, Pet. Rev. Br.). Indeed, at Nuremberg and in adopting the recent Rome Statute of the International Criminal Court,²⁹ the international community explicitly rejected inclusion of conspiracy.

Thus, “conspiracy” meets none of the acknowledged criteria that even Respondents agree are the prerequisites for a law of war violation. *See, e.g.*, Bassiouni Aff. ¶¶ 7-11 (Ex. 8, Pet. Rev. Br.). There is no universal agreement and practice showing that it violates the laws of war. In fact, the near-universal agreement shows the opposite.

²⁹ While the U.S. did not become a party to the ICC, the U.S. rejection of the ICC was not based on the fact that the offenses listed were not the U.S.’s current view of the internationally recognized war crimes but that there was a “prosecutorial system that is an unchecked power” and the fear of “politically motivated prosecutions”. In fact, “[t]he U.S. brought international law experts to the preparatory commissions and took a leadership role in drafting the elements of crimes and the procedures for the operation of the court.” *See* Remarks of Marc Grossman, Under Secretary for Political Affairs, U.S. Department of State, given to the center of Strategic and International Studies on May 6, 2002, *available at* www.state.gov/p/9949.htm.

b. Respondents have not alleged that Mr. Hicks had the requisite degree of involvement even to invoke any of the theories of individual responsibility under the Law of War.

If it were supportable in this case, Respondents could have charged Mr. Hicks with a substantive crime under the law of war and attempted to use one of the accepted theories of individual responsibility (such as joint criminal enterprise) as a basis to establish his liability. That they did not do so speaks volumes about Mr. Hicks's supposed criminality. Even if they had done so, however, the degree of involvement they allege that Mr. Hicks had in the "conspiracy," is insufficient to form a basis of liability under the law of war. Respondents do not allege that Mr. Hicks had any real involvement in terrorism, or killing of civilians that they allege to be the objects of the conspiracy, much less that he was a leader in formulating such acts. As Petitioner have shown, criminal liability under the theory of joint criminal enterprise has been applied only to leaders of such enterprises -- those with integral involvement in the perpetration of the crime. Bassiouni Aff. ¶ 14. Mr. Hicks is not alleged to have that level of involvement in the commission of any substantive crime.

c. None of the alleged objects of the conspiracy violate the laws of war.

The charge of conspiracy does not confer jurisdiction on a military commission for the additional reason that none of the alleged objects of the conspiracy violate the laws of war. Pet. Rev. Br. at 36. Respondents answer that "al Qaeda's attacks on American civilian targets were obviously law-of-war violations." *Id.* at 39. But Respondents do not allege that Hicks had any involvement whatsoever in these attacks. Moreover, heinous as these attacks were, they were not violations of the laws of war. As noted above, within the meaning of international law, there is no war between the United States and al Qaeda. And terrorism itself does not constitute a

violation of the laws of war, but rather is subject to separate prohibitions. Schmitt Aff. ¶¶ 28-32 (Ex. 10, Pet. Rev. Br.).

The attacks of September 11, 2001 may amount to a crime against humanity. However, crimes against humanity are not law of war violations as they can be committed outside of an armed conflict.³⁰ Such crimes fall outside the statutory limits that Congress has set for military commission jurisdiction. They can only be tried in another forum including, for example, an international criminal tribunal.

III. THE BIASED STRUCTURE OF THE MILITARY COMMISSION VIOLATES THE DUE PROCESS CLAUSE AND REQUIRES INVALIDATION OF THE COMMISSIONS NOW.

Respondents make no effort to defend the merits of the structure they have established for military commissions. They do not contest the biased nature of the process, which their own prosecutors acknowledge practically preordains the result in commission proceedings. Nor do they contest the biased nature of the review process. They do not suggest that such a partial process is compatible with Due Process.

Rather than defending the merits of the commission process, Respondents note that they “have previously pointed out” that non-citizens such as Mr. Hicks with no voluntary connections to the United States cannot invoke the protection of the Constitution. Resp. Rev. Br. at 25. They do not press this point here, however, recognizing that “Judge Green determined. . .that the petitioners in this case, including Hicks, stated valid due process claims. . . .” *Id.* at 26. They note that that issue is on appeal. *Id.* For now, however, they do not dispute that Judge Green’s

³⁰ See ICC Statute, arts. 5-9 and ICTY Statute, arts. 1-5 (delineating crime of genocide, crimes against humanity, war crimes and crimes of aggression).

decision determines the question of Mr. Hicks's right to invoke the protection of the Due Process Clause.³¹

Respondents sole remaining defense against Petitioner's Due Process challenge is thus their argument that this Court should not decide the Due Process issue now. As set forth above, however, *supra* Parts I, II.A, there is no recognized justification for abstaining from Petitioner's claims in this case. That is particularly true with respect to Mr. Hicks's Due Process challenges, and Respondents offer no convincing rationale to the contrary. Specifically, Respondents contend only that this Court should abstain from hearing Mr. Hicks's Due Process challenges, because his Due Process rights can be fully vindicated after his trial. *See* Resp. Rev. Br. at 24. That argument is plainly wrong.

The thrust of Petitioner's Due Process challenge is that, by virtue of the subjective and wholly discretionary process in which the various panel members are appointed per the terms of the commission's organic orders and regulations, the commission was not impartially constituted, is unlawful and, therefore, cannot try Mr. Hicks or any other of the detainees. This challenge is very similar to the challenges considered in *Quirin* concerning the right to a jury trial and grand jury presentment. It is also similar to the arguments considered in *Hamdan*, based on the Geneva Conventions, UCMJ, and army regulations, that the procedural structure of the military commissions, as set forth in the orders establishing them, is flawed and should instead be consistent with court martial proceedings. Such claims go directly to "the lawfulness of the military commission," *Hamdan*, 415 F.3d at 36 (discussing *Quirin*, 317 U.S. 1), and thus are

³¹ Respondents assert that *Hamdan* questioned whether the petitioner could assert a constitutional claim and note that *Hamdan* characterized *Rasul v. Bush*, 124 S. Ct. 2686 (2004), as deciding only the question of whether federal courts have jurisdiction under the habeas statute. Resp. Rev. Br. at 25-26. They ignore the most critical point, however -- the determinative factor underlying the Supreme Court's habeas decision was that Guantanamo lies within the "territorial jurisdiction of the United States," 124 S. Ct. at 2706, a conclusion that also renders the Constitution applicable in Guantanamo, as Judge Green found.

precisely the type of “substantial” challenges to commission jurisdiction on which the Supreme Court and D.C. Circuit have held abstention is not warranted.³²

Moreover, even aside from the “jurisdictional” exception to *Councilman* abstention, and directly contrary to Respondents’ unsupported contentions, both the Supreme Court and the D.C. Circuit have repeatedly held that allegations of decision-maker bias are “irreparable” and *cannot* be vindicated after trial. *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003). As the court held in *Cobell*,

When the relief sought is recusal of a disqualified judicial officer . . . the injury suffered by a party required to complete judicial proceedings overseen by that officer *is by its nature irreparable*. . . . “*The remedy by appeal is inadequate. It comes after the trial and, if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.*”

Id. at 1139 (quoting *Berger v. United States*, 255 U.S. 22, 36 (1921)) (emphasis added). Put another way, where, as here, Petitioner claims that the structure of tribunal ensures that it inherently lacks the requisite impartiality from the outset, and where it in fact has been “rigged” to ensure that the “handpicked” panel “will not acquit these detainees,” Redacted e-mails (Ex. 13 at 6, 10, Pet. Rev. Br.), the challenge is that the tribunal “was unconstitutionally constituted and so did not provide [petitioner] with an adequate administrative remedy requiring exhaustion.”

³² Respondents’ citation to cases in which garden variety Due Process challenges were raised in post-conviction habeas petitions, *see* Resp. Rev. Br. at 24 n.33, is wholly irrelevant. Respondents’ own descriptions of those cases make clear that the Due Process claims at issue there were challenges to specific trial or pre-trial procedures. *Id.* They were not challenges to the make up of the trial court itself. Nor did they arise in the unique context of a military commission proceeding, where the courts must ensure, for the outset, the “lawfulness of the military commission,” *Hamdan*, 415 F.3d at 36, and its consistency with the United States Constitution, *see Quirin*, 317 U.S. at 19, 38-41 (pre-trial merits review of petitioners’ claim that orders establishing military commission violated constitutional guarantees of jury trial and indictment by grand jury).

Gibson v. Berryhill, 411 U.S. 564, 570, 575 (1973) (not requiring exhaustion where challenge is to the impartiality of the very tribunal in which exhaustion otherwise would occur).

Respondents' contention that Mr. Hicks's Due Process rights can be fully vindicated after trial cannot be squared with the law. A violation of Mr. Hicks's Due Process right not to be tried by a biased commission is "irreparable," *Cobell*, 334 F.3d at 1139, and "remedy by appeal is inadequate," *id.* (quoting *Berger*, 255 U.S. at 36). Respondents' argument thus fails of its own logic and provides no justification for abstaining from Mr. Hicks's Due Process claims.

Because Respondents' rely entirely on their abstention argument, summary judgment must be granted in Mr. Hicks's favor. Even military prosecutors are finding it "hard" to write "a motion saying that the process will be full and fair when you don't really believe it." Redacted e-mails (Ex. 13 at 11, Pet. Rev. Br.). It is therefore unsurprising that Respondents have failed to rebut Petitioner's contention that the commission's inherently-biased structure violates Mr. Hicks's established Due Process rights. Indeed, not just impartiality but the mere appearance of it renders the commission unconstitutional. *See In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process. . . . But to perform its high function in the best way 'justice must satisfy the appearance of justice.'") (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)); *ATX, Inc. v. U.S. Dep't of Transp.*, 41 F.3d 1522, 1529 (D.C. Cir. 1994) ("appearance of impartiality" required for Due Process). Against the extraordinary backdrop of acknowledged bias, Mr. Hicks is entitled to summary judgment that the military commission structure is incompatible with Due Process.

IV. THE STRUCTURE OF THE MILITARY COMMISSIONS VIOLATES THE REQUIREMENT OF EQUAL PROTECTION AND REQUIRES INVALIDATION NOW.

Respondents also fail to show that the military commission structure is consistent with Equal Protection. As with Due Process, Respondents' primary argument is that this Court should abstain. That argument fails for reasons similar to its failure with respect to Due Process. On the merits of the Equal Protection argument, Respondents ignore the crucial point that the government's policy discriminates against non-citizens in the context of *trying* and *punishing* them. Respondents' contentions are all inapposite, because they ignore this central fact. Moreover, despite their plea for rational basis scrutiny, Respondents once again fail to provide even a purported basis for this discriminatory system of trials and punishments.

A. There Are No Grounds To Justify Abstaining From Petitioner's Equal Protection Claim.

Respondents' characterization of Mr. Hicks's Equal Protection claim is exactly right: the PMO establishing the commission is unconstitutional and void *ab initio* and, therefore, the commission lacks jurisdiction to try him for any offense. *See* Resp. Rev. Br. at 30; *infra* Part IV.B. That is precisely the type of claim that the Supreme Court heard on the merits in *Quirin* and that the D.C. Circuit heard on the merits in *Hamdan*.³³

Respondents first posit that Mr. Hicks's habeas petition should be governed by the same rules governing interlocutory appeals. According to cases cited by Respondents, these appeals

³³ Here again, Respondents' citation to cases in which garden variety Equal Protection challenges were raised in post-conviction habeas petitions, *see* Resp. Rev. Br. at 28, are wholly irrelevant. Respondents' own descriptions of those cases make clear that the equal protection claims at issue there were challenges to specific trial procedures or to the substantive law that the defendant was alleged to have violated. *Id.* They were not challenges to the organic order establishing the court in which the case was heard. Nor did they arise in the unique context of a military commission proceeding, where the courts must ensure, for the outset, the "lawfulness of the military commission," *Hamdan*, 415 F.3d at 36, and its consistency with the United States Constitution, *see Quirin*, 317 U.S. at 19, 38-41 (pre-trial merits review of petitioners' claim that orders establishing military commission violated constitutional guarantees of jury trial and indictment by grand jury).

typically are permitted only where the defendant has some individualized right not to be tried (i.e., qualified immunity, double jeopardy, or immunity under the Speech and Debate clause), as opposed to merely having a claim requiring that the charges be dismissed. Resp. Rev. Br. at 29-30. The regime governing interlocutory appeals is entirely inapposite here.³⁴

Quirin and *Hamdan* make clear that the question is whether the petitioner's claims challenge the "lawfulness of the military commission." See *Hamdan*, 415 F.3d at 36 (discussing *Quirin*).³⁵ Neither in *Quirin* nor *Hamdan*, nor any other military commission case of which Petitioner is aware, was the threshold question whether the petitioner had an individualized immunity from trial that would warrant an interlocutory appeal. Indeed, were the standard for interlocutory review to have governed in these cases, *none* of the jurisdictional claims that the *Quirin* and *Hamdan* courts addressed on the merits could have been so addressed.³⁶ None of the defendants had any sort of individualized immunity from trial that would have given rise to interlocutory appellate rights; yet all such claims were held to be "jurisdictional" and appropriate for pre-trial merits review in federal court in the military commission context. See, e.g., *Quirin*,

³⁴ Even were it not inapposite, Respondents' contention is a curious one since Petitioner *would* be entitled to interlocutory review as he is requesting an injunction. Denial of a request for an injunction results in a right to interlocutory review. See 28 U.S.C. § 1292(a)(1).

³⁵ And it is in that sense -- the question of whether the commission was lawfully constituted -- that such claims are jurisdictional. If the commission were constituted in violation of applicable constitutional guarantees, such as the right to a jury trial or the presentment and indictment guarantees at issue in *Quirin*, it is unconstitutional and lacks all jurisdiction to try the defendant or anyone else. Cf. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 485 U.S. 50 (1982) (where statute creating U.S. bankruptcy courts was held to be unconstitutional, the courts it created lacked authority to hear any cases).

³⁶ Even Respondents acknowledge that jurisdictional challenges do not warrant abstention under *Hamdan*, but this necessarily means that the interlocutory review standard cannot be applicable. Under that standard, even jurisdictional challenges are not subject to interlocutory review. See generally *Elliott Indus. Ltd. Partnership v. BP America Prod. Co.*, 407 F.3d 1091, 1101 (10th Cir. 2005) (appellate court would refuse to review jurisdictional issue on interlocutory basis); *Texas Health Choice, L.C. v. Office of Personnel Mgmt.*, 400 F.3d 895, 898 (Fed. Cir. 2005) (denial of motion to dismiss for lack of jurisdiction was not appealable interlocutory order); *Petroleos Mexicanos Refinacion v. M/T King A (Ex-Tbilisi)*, 377 F.3d 329, 335 (3d Cir. 2004) (interlocutory orders finding jurisdiction are ordinarily not appealable under collateral order doctrine unless they implicate immunity issues).

317 U.S. at 19 (“[i]n view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, [] in our opinion the public interest required that we consider and decide those questions without any avoidable delay”). That the issues in this case are not governed by the standards for ordinary interlocutory review could not be more evident.

Moreover, Mr. Hicks’s Equal Protection claim is by no stretch of the imagination one challenging *how* Mr. Hicks will actually be tried or the procedures under which he likely will be tried. It is a challenge to the PMO establishing the commissions, and thus goes directly to the legitimacy of the commission to try Mr. Hicks for anything. It thus bears no resemblance to the purely procedural -- or “how” -- claims which could be subject to abstention under *Hamdan*.

Finally, Respondents’ analogy to the D.C. Circuit’s decision in *United States v. Baucum*, 80 F.3d 539 (D.C. Cir. 1996), *see* Resp. Rev. Br. at 30, is absurd. There, the court held that the defendant’s Commerce Clause challenge to a federal sentence enhancement statute was not the type of subject matter jurisdiction challenge that a defendant was free to raise for the first time on appeal. 80 F.3d at 541. The challenge at issue in *Baucum* was to the power of *Congress* to create a statute imposing a penalty enhancement; it did not involve a challenge to the authority of the federal district court to evaluate whether the statute was unconstitutional. In other words, it was not a challenge to the jurisdiction of the federal district court to preside over the case, which arose solely under federal law, let alone a challenge to the organic statute creating the court. As a result, defendant’s claim was the garden variety type of constitutional attack that is waived if not timely raised. In reaching that wholly unremarkable result, the court reasoned that because the penalty statute challenged as unconstitutional did not “reflect upon the power of the

prosecution to *initiate* proceedings,” and because the tribunal at issue was a federal district court clearly “empowered by Congress to hear questions of federal law,” the defendant’s challenge to the constitutionality of the sentence enhancement statute did “not affect the court’s subject-matter jurisdiction.” *Id.* at 542, 544.

Mr. Hicks’s challenge, in contrast, is that the very body that would adjudicate his claim is unconstitutionally constituted. Obviously, under *Quirin* and *Hamdan*, the rule here is that this Court can hear jurisdictional claims going to “the lawfulness of the military commission.” *Hamdan*, 415 F.3d at 36 (discussing *Quirin*). Mr. Hicks’s Equal Protection claim does go directly to the commission’s organic order and, if meritorious, would require a finding that the commission was unlawfully constituted and, thus, lacks authority or jurisdiction to try him -- precisely the kind of claims heard in *Quirin* and *Hamdan*.³⁷

Moreover, unlike in *Baucum*, where “prudential considerations” concerning waiver militated in favor of the court’s ruling, 80 F.3d at 543, prudential considerations here militate against abstention. As noted above, since the “issues involved are purely legal, . . . federal courts are in a better position to consider . . . constitutional issues . . . than are the various military bodies.” *Callaway*, 518 F.2d at 474. Additionally, Mr. Hicks has been unlawfully detained for nearly four years. There is no advantage to subjecting him to trial proceedings likely to last many months before his challenge to the validity of the commission is heard.

B. The Military Commissions Do Not Provide Equal Protection.

Respondents make a limited effort to defend the military commission structure on the merits as compatible with Equal Protection, but that effort fails. First, Respondents contend that

³⁷ Indeed, the *Hamdan* court addressed the merits of claims far less fundamental than Mr. Hicks’s claim here that the commission’s organic orders violate the equal protection clause. *See, e.g., Hamdan*, 415 F.3d at 43 (hearing merits of claim that manner in which commission was created was in violation of Army Regulation 190-8).

military commissions are subject to deference because they constitute an exercise of the President's war powers vis-à-vis alien enemy combatants. But this case is not about alien rights, immigration, or foreign affairs generally. Instead, it is about non-citizens' access to our judicial procedures, and the Government has not offered any cases in which a court has deferred to a government classification subjecting non-citizens to different criminal trial procedures than those available to citizens tried for identical conduct.³⁸ The cases Respondents cite arise in an entirely different context. In *Mathews v. Diaz*, 426 U.S. 67 (1976), for instance, the question was whether Congress may condition an alien's eligibility for participation in a federal medical insurance program on continuous United States residence and admission for permanent residence. That the Court answered in the affirmative in *Diaz* has no bearing on whether this Court should defer to the unequal treatment here, which subjects only non-citizens to trial before military commissions. Indeed, the military's alleged behavior in this very case -- including rigging the commissions to ensure convictions³⁹ and torturing detainees to "soften" them up for interrogation⁴⁰ -- calls into serious question the wisdom of affording the Government deference here.

³⁸ The government offers no serious argument for why the Fifth Amendment's Due Process clause would apply to detainees in Guantanamo, see *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 464 (D.D.C. 2005), but the Equal Protection component of that clause would not. Even were there some question as to whether Judge Green's holding should encompass the Equal Protection component of the Due Process Clause, other cases make clear that Equal Protection requirements extend to aliens within United States territory (including Guantanamo). See *Plyer v. Doe*, 457 U.S. 202, 214 (1982); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); see also *Rasul*, 124 S. Ct. at 2693 (detainees are imprisoned in "territory over which the United States exercises exclusive jurisdiction and control"); *In re Guantanamo*, 355 F. Supp. 2d at 464 ("In light of the Supreme Court's decision in *Rasul*, it is clear that Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply.").

³⁹ See Neil A. Lewis, *2 Prosecutors Faulted Trials for Detainees*, N.Y. Times, Aug. 1, 2005, at A1; see also Redacted e-mails (Ex. 13, Pet. Rev. Br.).

⁴⁰ See Hicks Aff. ¶¶ 5-21 (Ex. 2, Pet. Rev. Br.).

The Government next contends that the PMO is not subject to strict scrutiny, because this is a challenge to federal, rather than state, policy. Once again, Respondents ignore that this is not merely any federal policy that treats aliens and citizens differently, but one that restricts access to judicial procedures on the basis of nationality. The Government's reliance on cases involving government entitlements, *see Mathews*, 426 U.S. at 69, or immigration law, where there may be an inherent need for government to distinguish between citizens and non-citizens, *see, e.g., Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952), is inapposite. These cases do not address access to courts (much less access to judicial procedures in the context of a criminal trial), which is a "basic right" subject to a high level of scrutiny. *See, e.g., Tennessee v. Lane*, 541 U.S. 509, 528 (2004); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896).⁴¹ Thus, while Respondents quote the Supreme Court's observation that "[a]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations," Resp. Rev. Br. at 31 (quoting *Mathews*, 426 U.S. at 67), they ignore *Wong Wing's* conclusion that this cannot justify discrimination against non-citizens in criminal proceedings.

Even if rational basis review were appropriate, the Government's argument still would fail because the Government offers no rational justification for trying non-citizens under procedures inferior to those used for citizens accused of committing the same acts. Respondents vaguely insist that "it cannot seriously be argued" that the PMO "lacks a rational basis." Resp. Rev. Br. at 33. This is not an answer. Rather, it is an attempt to hide the fact that the

⁴¹ It is irrelevant that *Wong Wing* did not employ the language of strict scrutiny. That concept had not yet been born, but the case adopted an even stricter rule, categorical rule that the government may not subject citizens and non-citizens to different procedures when it seeks to punish them for alleged crimes.

Government has no explanation why, for the first time in history, it plans to subject non-citizens to military commissions, while citizens charged with the same crimes are provided an entirely different process. Indeed, the Government's own contention that U.S. citizens can be as dangerous as non-citizens, *see, e.g., Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640-41 (2004) (citing Government's brief), demonstrates that there is *not* a rational basis for creating military commissions that will try only aliens.

The level of review or amount of deference generally applicable to classifications based on citizenship is therefore irrelevant in this case. The Government, to be sure, may treat aliens differently from citizens in some contexts, such as immigration, but not during criminal trials. *See, e.g., Griffin v. Illinois*, 351 U.S. 12, 17 (1956); *Wong Wing*, 163 U.S. at 237. Accordingly, the PMO establishing the military commissions is invalid under the Equal Protection Clause.⁴²

V. THE MILITARY COMMISSION IS INVALIDLY CONSTITUTED.

As set forth in Pet. Rev. Br. at 68-70, the military commission set to try Mr. Hicks is invalidly constituted for several reasons. The contentions set forth are the very sorts of arguments addressed in *Yamashita* and *Milligan*. *See, e.g., In re Yamashita*, 327 U.S. 1, 9 (1946) (considering "whether the present commission was created by lawful military command and, if so, whether authority could thus be conferred on the commission to place petitioner on trial after the cessation of hostilities between the armed forces of the United States."). Respondents

⁴² It is also invalid under 42 U.S.C. § 1981. Relying on 1991 amendments to the statute, the Government contends that 42 U.S.C. § 1981 is inapplicable to the given situation. But the language of statute provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings," 42 U.S.C. § 1981(a), and courts since the 1991 amendments have continued to understand the statute to protect non-citizens against unequal treatment by both federal and state government. *See, e.g., Duane v. GEICO*, 37 F.3d 1036, 1038-44 (4th Cir. 1994); *La Compania Ocho, Inc. v. U.S. Forest Serv.*, 874 F. Supp. 1242, 1251 (D.N.M. 1995).

address only one of these arguments -- that a commission cannot sit in Guantanamo, so we limit our reply to that argument.

A military commission -- even one properly authorized by Congress -- has no jurisdiction except in (1) the zone of an actual armed conflict, (2) in an area within the command of the convening authority, or (3) within the occupied territory in which the convening authority commands. *See Ex parte Milligan*, 71 U.S. 2, 80 (1866); 2 William Winthrop, *Military Law and Precedents* 836 (2d ed. 1895).

Respondents' contention that a commission has jurisdiction because the war against al Qaeda is a global one, Resp. Rev. Br. at 21-22, presumes that the law of armed conflict applies to the conflict with al Qaeda. As we have seen, however, it does not. Even if it did, however, there is no basis to conclude that Guantanamo constitutes part of the zone of an armed conflict.

Respondents' additional contention that *Hamdan* rejected a similar argument about the location of the commission is incorrect. The argument addressed in *Hamdan* concerned whether the location of the commission should matter in assessing whether Congress had authorized the creation of military commissions. In assessing Congress's intent, the D.C. Circuit asked why the location of the commissions should matter. 415 F.3d at 38. But that is a separate question from whether it is constitutionally permissible to establish military commissions. There, a long line of precedent shows that location does matter. *See Ex parte Milligan*, 71 U.S. at 121-27; 2 Winthrop at 836.

Respondents also note that *Hamdan* suggested that past military commissions have sat in locations analogous to Guantanamo. But that factual suggestion was unnecessary to the decision in *Hamdan* and is incorrect. As Petitioner pointed out, it was the Attorney General who argued in *Quirin* that military commissions could be held in Washington D.C. because "that certain area

[the eastern seaboard] was declared to be under the control of the Army.”⁴³ As for *Yamashita*, the jurisdiction of the military commission to sit in the Philippines was based on the fact that the territory was occupied by our military and the commission was appointed by the military commander of that area. That is one of the acceptable bases for a commission location under *Milligan*, 71 U.S. at 121-27. But Guantanamo does not fall within any of the limited locations where military commissions may exercise jurisdiction.

VI. RESPONDENTS HAVE DENIED MR. HICKS HIS RIGHT TO A SPEEDY TRIAL.

Respondents have also denied Mr. Hicks’s right to a speedy trial. As an initial matter, the Court should not abstain from deciding Hicks’s speedy trial arguments. If there were in fact a speedy trial violation, the charges should be dropped and Hicks should be released. The speedy trial issue then goes to the question of whether the military commission can try him at all. *See Hamdan*, 415 F.3d at 42. Furthermore, abstention would just exacerbate the wrong, subjecting Hicks to many more months -- or even years -- of detention. Accordingly, abstention would be inappropriate.

On the merits, Respondents are wrong that the application of Article 10 is affected by *Hamdan*, since Article 10 does *not* specify that its procedures apply to courts-martial, thereby giving rise to the possible negative inference that it does not apply to military commissions. 10 U.S.C. § 810. Article 10 is not one of those provisions in which the UCMJ “takes care to distinguish between ‘courts-martial’ and ‘military commissions’” and apply its rules only to the former. *Hamdan*, 415 F.3d at 42. Rather it applies to “[a]ny person subject to this chapter,” 10 U.S.C. § 810 (emphasis added), which includes Hicks when he was detained at Guantanamo Bay

⁴³ *Nazi Saboteur Military Commission Session 1*, Transcript of Proceedings Before the Military Commission to Try Persons Charges with Offenses Against the Law of War and the Articles of War, at 79 (July 8, 1942), available at http://www.soc.umn.edu/~samaha/nazi_saboteurs/nazi01.htm.

“within an area leased by or otherwise reserved or acquired for the use of the United States.” 10 U.S.C. § 802(a)(12). Furthermore, the UMCJ applies because it governs the treatment and trial of prisoners of war. *See* 10 U.S.C. § 802(a)(9).

Respondents contend that the speedy-trial clock did not begin until the referral of charges in June 2004. That is incorrect. As Petitioner showed, the speedy-trial clock began when Mr. Hicks was detained, or at the very latest when Respondents began contemplation of the filing of charges in spring 2002. *See Trial Balloon Worth Bursting*, Milw. J. & Sentinel, Apr. 25, 2002 at 14. But even if the clock did not begin to run until Respondents designated Hicks eligible for trial, there would be a speedy trial violation. The cases cited by Respondents permitting 337-day and 462-day delays are at the very outer edge of the time frame within which the Government could demonstrate due diligence in bringing the accused to trial; ordinarily far less is acceptable, Resp. Rev. Br. at 47-48. Here, the Government designated Hicks eligible for trial in July 2003, nearly a year before it even charged him.

Respondents have failed to demonstrate a good faith reason for the delay other than generally asserting that conspiracy takes “sufficient time” to investigate and this charge required “painstaking intelligence-gathering and interrogation with respect to hundreds of enemy combatants and suspected members of al Qaeda.” Resp. Rev. Br. at 49. But the length of time to investigate other alleged enemy combatants is irrelevant to the length of time needed to investigate charges against Mr. Hicks. Respondents cannot reasonably have needed over two years (including one year after Hicks had been deemed eligible for trial) to gather evidence. *See United States v. Acireno*, 15 M.J. 570, 572 (A.C.M.R. 1982) (noting Government’s heavy burden in showing diligence in processing charges). The Government’s own documents do not support such a theory. It is clear that the Government had the necessary factual information to present its

case to the President resulting in the President's designation of Hicks in July 2003, based on the Factual Summary from "The Department of Defense Criminal Investigation Task Force dated June 24, 2003." *See* Presidential Designation of Hicks, (Ex. 20, Pet. Rev. Br.).

Respondents suggest there has been no prejudice, but ignore the effects of oppressive pretrial confinement -- including torture and solitary confinement -- invoking anxiety and concern. Moreover, without counsel for nearly two years, Hicks could not adequately exert his own investigative efforts, which makes Respondents' assertion that Hicks's prejudice claims are speculative somewhat laughable. Mr. Hicks has no way of knowing what he could have found if he had been charged and given counsel quickly instead of permitting Respondents to investigate for years while Mr. Hicks languished.

VII. NONE OF THE INDIVIDUAL RESPONDENTS SHOULD BE DISMISSED.

Respondents assert that all respondents other than the Secretary of Defense should be dismissed based on the Supreme Court's holding in *Padilla*. Resp. Rev. Br. at 51. In that case, the Court held that the "immediate custodian" rule precluded the habeas petitioner, an American citizen held within the territorial jurisdiction of a United States district court, from naming any person other than the immediate physical custodian of his person as a respondent. *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2720-22 (2004). Respondents, however, have failed to demonstrate that Secretary Rumsfeld is the only qualifying "custodian" under applicable law.

Respondents say that the immediate custodian is not a proper custodian here, relying on an exception to the "immediate custodian" rule that may be triggered where "an American citizen is detained outside the territorial jurisdiction of any district court." *Padilla*, 124 S. Ct. at 2718 n.9. But the Supreme Court also has held in *Rasul* that the United States District Court for the District of Columbia had jurisdiction to entertain the habeas petition of a non-resident alien

detained at Guantanamo Bay. *See Rasul v. Bush*, 124 S. Ct. 2686, 2698 (2004). As Judge Bates determined, these two holdings suggest that in circumstances such as these, “the petitioner may name as respondents any of his custodians (not just the immediate custodians).” *Abu-Ali v. Ashcroft*, 350 F. Supp. 2d 28, 44 (D.D.C. 2004) (citing *Gherebi v. Bush*, 338 F. Supp. 2d 91, 95 (D.D.C. 2004)). Respondents have not shown, either as a factual matter or as a matter of law, that each of the other respondents cannot qualify as “any of [Mr. Hicks’] custodians.” *Id.*

The Respondents, both those serving as Mr. Hicks’s immediate custodian and all other Respondents, *including but not limited to*, Secretary Rumsfeld, all maintain constructive custody of his person and are responsible for significant restraints on his liberty. *See Hensley v. Municipal Court, San Jose-Milpitas Judicial Dist.*, 411 U.S. 345, 351 (1973) (“The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty”). Absent an unequivocal demonstration by Respondents that Secretary Rumsfeld -- and only Secretary Rumsfeld -- qualifies as a custodian under applicable law, the remaining Respondents should not be dismissed.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner’s motion for partial summary judgment, determine now that the commission proceedings against Mr. Hicks are illegal, and enjoin those proceedings.

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Washington, D.C.

Respectfully submitted,
DAVID M. HICKS

By: /s/ Marc A. Goldman
One of His Attorneys

Marc A. Goldman
District Bar No. 449230
Michael B. DeSanctis
Eric Berger
Jenner & Block LLP
601 Thirteenth Street, N.W.
Suite 1200 South
Washington, DC 20005-3823
(202) 639-6087

Andrew A. Jacobson
David E. Walters
Hillary A. Victor
Andrew W. Vail
(pro hac vice)
Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

Leon Friedman
District Bar No. NY0028
148 East 78th Street
New York, NY 10021
(212) 737-0400

Major Michel D. Mori, U.S. Marine Corps
(pro hac vice)
Office of Military Commissions
Office of the Chief Defense Counsel
1931 Jefferson Davis Highway, Suite 103
Arlington, VA 22202
(703) 607-1521, ext. 193

Joshua L. Dratel
Attorney Registration No. 1795954
Joshua L. Dratel, P.C.
Civilian Defense Counsel
14 Wall Street, 28th Floor
New York, NY 10005
(212) 732-0707
Attorneys for Petitioner David M. Hicks