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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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

Petitioner,

v.

DONALD H. RUMSFELD, United States
Secretary of Defense; JOHN D.
ALTENBURG, Jr., Appointing Authority for
Military Commissions, Department of
Defense; Brigadier General THOMAS L.
HEMINGWAY, Legal Advisor to the
Appointing Authority for Military
Commissions; Brigadier General JAY HOOD,
Commander Joint Task Force, Guantanamo,
Camp Echo, Guantanamo Bay, Cuba;
GEORGE W. BUSH, President of the United
States,

Respondents.

NO. C04-0777RSL

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

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

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

1 argument as the Court may entertain.

2 DATED this 6th day of August, 2004.

3 Respectfully submitted,

4 JOHN McKAY
5 United States Attorney

6 DAVID B. SALMONS
7 JONATHAN L. MARCUS
8 Assistants to the Solicitor General
9 Office of the Solicitor General
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19 Attorneys for Respondents

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

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

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

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

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

1 Petitioner's claims lack merit in any event. Military commissions have a long historical
2 pedigree, and the Supreme Court has repeatedly approved their use for wartime trials of
3 enemy combatants such as Hamdan. See Ex parte Quirin, 317 U.S. 1 (1942); Yamashita v.
4 Styer, 327 U.S. 1 (1946). Petitioner's claims – regardless of how they are styled¹ – must
5 therefore be dismissed.

6 STATEMENT OF FACTS

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

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

23
24 ¹ "Mandamus relief is only available to compel an officer of the United States to perform
25 a duty if (1) the plaintiff's claim is clear and certain; (2) the duty of the officer is ministerial
26 and so plainly prescribed as to be free from doubt * * * ; and (3) no other adequate remedy is
27 available." Fallini v. Hodel, 783 F.2d 1343, 1345 (9th Cir. 1986)." As we demonstrate
28 below, none of petitioner's legal claims has any merit, so respondents have no duty to release
Hamdan from custody pursuant to the military commission proceedings or from his
confinement as an enemy combatant. Hamdan likewise is not entitled to a writ of habeas
corpus, because he is not in custody "in violation of the Constitution or laws or treaties of the
United States." 28 U.S.C. § 2241(c)(3).

1 September 11, 2001." Authorization for Use of Military Force, Pub. L. No. 107-40, 115
2 Stat. 224 (2001) (AUMF). Congress emphasized that the forces responsible for the September
3 11 attacks "continue to pose an unusual and extraordinary threat to the national security," and
4 that "the President has authority under the Constitution to take action to deter and prevent acts
5 of international terrorism against the United States." Ibid.

6 The President ordered the armed forces of the United States to Afghanistan to subdue
7 the al Qaida terrorist network and the Taliban regime that supported it. In the course of those
8 ongoing operations, United States and coalition forces have removed the Taliban from power,
9 have eliminated the "primary source of support to the terrorists who viciously attacked our
10 Nation on September 11, 2001," and have "seriously degraded" al Qaida's training
11 capabilities. Office of the White House Press Secretary, Letter from the President to the
12 Speaker of the House of Representatives and the President Pro Tempore of the Senate (Sept.
13 19, 2003) (< www.whitehouse.gov/news/releases/2003/09/20030919-1.html>). Al Qaida
14 and the Taliban nonetheless remain a significant threat to United States and coalition forces.
15 Moreover, Usama bin Laden has continued his call to al Qaida and its supporters to maintain
16 their war against the United States, and the United States and other nations have been subject
17 to attacks throughout the world. See, e.g., Tape urges Muslim fight against U.S. (Feb. 2,
18 2003) (< [www.cnn.com/2003/ ALLPOLITICS/02/11/powell.binladen/index.html](http://www.cnn.com/2003/ALLPOLITICS/02/11/powell.binladen/index.html)>). See
19 also Qaeda Tapes Taunt U.S., France (Feb. 24, 2004)
20 (< www.cbsnews.com/stories/2004/01/04/terror/main591217.shtml>).

21 2. In the context of both the removal of the Taliban from power and in the broader
22 efforts to dismantle the al Qaida terrorist network and its supporters, the United States,
23 consistent with the Nation's settled historical practice in times of war, has seized and detained
24 numerous persons fighting for and associated with the enemy during the course of the ongoing
25 military campaign. Individuals taken into U. S. control in connection with the ongoing
26 hostilities undergo a multi-step screening process to determine if their detention is necessary.
27 Only a small fraction of those captured in connection with the current conflict and subjected to
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1 the screening process have been designated for detention at Guantanamo. Upon their arrival
2 at Guantanamo, detainees are subject to an additional assessment by military commanders
3 regarding the need for their detention. The military is currently detaining approximately 600
4 aliens at Guantanamo.

5 3. Equally consistent with historical practice, the President has ordered the
6 establishment of military commissions to try a subset of those detainees for violations of the
7 laws of war and other applicable laws. In doing so, the President expressly relied on “the
8 authority vested in me * * * as Commander in Chief of the Armed Forces of the United States
9 by the Constitution and the laws of the United States of America, including the [AUMF] and
10 sections 821² and 836³ of title 10, United States Code.” Detention, Treatment, and Trial of
11 Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001)
12 (hereinafter “Military Order”).

13 The President made several findings that undergird the Military Order. He found,
14 inter alia, that “[i]nternational terrorists, including members of al Qaida, have carried out
15 attacks on United States diplomatic and military personnel and facilities abroad and on citizens
16

17 ² That section provides:

18 **Art. 21. Jurisdiction of courts-martial not exclusive**

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

23 ³ That section provides, in relevant part:

24 **Art. 36. President may prescribe rules**

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

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

1 and property within the United States on a scale that has created a state of armed conflict that
2 requires the use of the United States Armed Forces,” §1(a); that such terrorists “possess both
3 the capability and the intention to undertake further terrorist attacks against the United States
4 that, if not detected and prevented, will cause mass deaths, mass injuries, and massive
5 destruction of property, and may place at risk the continuity of the operations of the United
6 States Government,” § 1(c); that, in order “to protect the United States and its citizens, and
7 for the effective conduct of military operations and prevention of terrorist attacks, it is
8 necessary for individuals subject to” the Military Order to “be detained, and, when tried, * *
9 * be tried for violations of the laws of war and other applicable laws by military tribunals,” §
10 1(e); and that “[g]iven the danger to the safety of the United States and the nature of
11 international terrorism * * * it is not practicable to apply in military commissions under this
12 order the principles of law and the rules of evidence generally recognized in the trial of
13 criminal cases in the United States district courts,” § 1(f).

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

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

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

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

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

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

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

19 The Secretary of Defense has directed the commissions to provide for a “full and fair
20 trial”; to “[p]roceed impartially and expeditiously”; and to “[h]old open proceedings except
21 where otherwise decided by the Appointing Authority or the Presiding Officer[.]” Id.
22 §§ 9.6(b)(1),(2),(3). Proceedings may be closed in order to (1) protect classified information;
23 (2) prevent unauthorized disclosure of protected information; (3) protect the physical safety of
24 participants, including witnesses; and (4) protect intelligence and law enforcement sources and
25 methods. Id. § 9.6(b)(3). In no circumstance, however, may the detailed defense counsel be
26 excluded from a proceeding, ibid., and in no circumstance may the Commission admit into
27 evidence information not presented to detailed defense counsel, id. § 9.6(d)(5)(ii)(C).

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

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

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

27 ⁵ These officers may include civilians commissioned pursuant to 10 U.S.C. § 603.
28

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

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

18 6. On July 9, 2004, the prosecutor charged Hamdan with conspiring with Usama
19 Bin Laden, Dr. Ayman al Zawahari (a/k/a "the Doctor"), and others members and associates
20 of al Qaida from on or about February 1996 to on or about November 24, 2001, to commit
21 offenses triable by military commission – namely, attacking civilians, attacking civilian
22 objects, murder by an unprivileged belligerent, destruction of property by an unprivileged
23 belligerent, and terrorism. Charge ¶ 12 (attached as Exhibit A); see 32 C.F.R. §§ 11.6(a)(2),
24 (a)(3), (b)(2), (b)(3), (b)(4). The charge alleges that "[b]etween 1989 and 2001, al Qaida
25 established training camps, guest houses, and business operations in Afghanistan, Pakistan and
26 other countries for the purpose of supporting violent attacks against property and nationals
27 (both military and civilian) of the United States and other countries." Id. ¶ 7. It also alleges
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1 that “[i]n February of 1998, Usama Bin Laden, Ayman al Zawahiri and others under the
2 banner of the ‘International Islamic Front for Jihad on the Jews and Crusaders,’ issued a fatwa
3 (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether
4 civilian or military – anywhere they can be found and to ‘plunder their money.’” Id. ¶ 9. It
5 further alleges that “[s]ince 1989, members and associates of al Qaida * * * have carried out
6 numerous terrorist attacks, including, but not limited to: the attacks against the American
7 Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in
8 October 2000; and the attacks on the United States on September 11, 2001.” Id. ¶ 11.

9 As for Hamdan’s role in the conspiracy, the charge asserts that “[i]n 1996, Hamdan
10 met with Usama bin Laden in Qandahar, Afghanistan, and ultimately became a bodyguard and
11 personal driver for Usama bin Laden,” serving in that capacity “until his capture in November
12 of 2001.” Id. ¶ 13(a). The charge further alleges that, in furtherance of al Qaida’s objectives,
13 Hamdan from 1996 through 2001 “delivered weapons, ammunition or other supplies to al
14 Qaida members and associates,” id. ¶ 13(a); “picked up weapons at Taliban warehouses for
15 al Qaida use and delivered them directly to Saif al Adel, the head of al Qaida’s security
16 committee, in Qandahar, Afghanistan,” id. ¶ 13(b)(1); “purchased or ensured that Toyota
17 Hi Lux trucks were available for use by the Usama bin Laden bodyguard unit tasked with
18 protecting and providing physical security” for bin Laden, id. ¶ 13(b)(2); “served as a driver
19 in a convoy of three to nine vehicles in which Usama bin Laden and others were transported
20 to various areas in Afghanistan” at the time of the 1998 embassy attacks and the September 11
21 attacks, id. ¶ 13(b)(4); “drove or accompanied Usama bin Laden to various al Qaida-
22 sponsored training camps, press conferences, or lectures,” id. ¶ 13(c); and “received training
23 on rifles, handguns and machine guns at the al Qaida-sponsored al Farouq camp in
24 Afghanistan,” id. ¶ 13(d).

25 The Appointing Authority approved and referred the charge to a Military Commission
26 on July 13, 2004. See Exhibit B. The charge is noncapital, so Hamdan faces a maximum
27 sentence of life imprisonment. Both the government and Hamdan have proposed that his
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1 Commission trial begin in December. Hamdan is scheduled to appear before the Commission
2 on August 23, 2004, for preliminary matters.⁶

3 ARGUMENT

4 Since the founding of this nation, the military has used military commissions during
5 wartime to try violations against the laws of war. Nearly ninety years ago, Congress
6 recognized this historic practice and approved its continuing use. And nearly sixty years ago,
7 the Supreme Court upheld the use of military commissions during World War II against a
8 series of challenges, including cases involving a presumed American citizen, captured in the
9 United States, Ex parte Quirin, 317 U.S. 1 (1942); the Japanese military governor of the
10 Phillipines, Yamashita v. Styer, 327 U.S. 1 (1946); German nationals who alleged that they
11 worked for civilian agencies of the German government in China, Johnson v. Eisentrager,
12 339 U.S. 763 (1950); and the spouse of a serviceman posted in occupied Germany, Madsen v.
13 Kinsella, 343 U.S. 341 (1952). Despite the fact that both Congress and the Judiciary have
14 blessed the Executive's use of military commissions during wartime, despite the fact that the
15 statutory framework today is identical in all material respects to that which existed during the
16 prior legal challenges, and despite the fact that the President has inherent power as
17 Commander in Chief to establish military commissions in the war against al Qaida and the
18 Taliban, petitioner contends that Hamdan's detention pursuant to the Military Order violates
19 federal statutes, the Constitution, and the Geneva Conventions. As discussed in more detail
20 below, these claims cannot be heard at this time and lack merit in any event.⁷

21
22 ⁶ Before his trial, Hamdan will have the opportunity to challenge his status as an enemy
23 combatant before a Combatant Status Review Tribunal. See July 7, 2004 Order Establishing
24 Combatant Status Review Tribunal, available at
25 www.defenselink.mil/news/Jul/2004/d20040707review.pdf. That Tribunal will only confirm
whether Hamdan is properly classified as an enemy combatant, not whether he committed the
offense approved and referred for trial by the Military Commission.

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

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

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

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

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

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

6 The Court further explained that principles of abstention and exhaustion have special
7 salience in the military context: As the Court observed, “there is here something more that,
8 in our view, counsels strongly against the exercise of equity power even where, under the
9 administrative exhaustion rule, intervention might be appropriate.” Ibid (emphasis added).

10 The Court identified that “something” as “the unique military exigencies” that set the military
11 apart from civilian society and that relate to its “primary business * * * to fight or be ready to
12 fight wars should the occasion arise.” Ibid. Based on these “strong considerations,” id. at
13 761, the Court held that “when a serviceman charged with crimes by military authorities can
14 show no harm other than that attendant to resolution of his case in the military court system,
15 the federal district courts must refrain from intervention, by way of injunction or otherwise.”
16 Id. at 758.

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

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

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16 ⁸ As discussed in greater detail below, the Supreme Court has repeatedly held that one of
17 the provisions that President Bush expressly invoked in establishing the military commissions,
18 10 U.S.C. § 821, constitutes congressional authorization for the President to convene military
19 commissions during wartime to try violations of the laws of war. And the Supreme Court
20 recently made clear in Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) (plurality opinion);
21 id. at 2679 (Thomas, J., dissenting), that the AUMF triggered the exercise of the President’s
22 traditional war powers, including, under 10 U.S.C. § 821, the power to convene military
23 commissions.

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

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

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

10 Moreover, even assuming that he had, the Councilman rule still calls for abstaining
11 until the military process runs its course. 420 U.S. at 757. Indeed, federal courts have
12 rejected the contention that alleged speedy trial violations cause irreparable harm that justifies
13 pre-trial intervention by a reviewing court. In Carden v. Montana, 626 F.2d 82 (9th Cir.
14 1980), for example, the Ninth Circuit held that an alleged speedy trial violation in state court
15 did not constitute “the type of ‘special circumstances’ which warrant federal intervention” on
16 habeas. Id. at 84. The court noted that the Supreme Court has identified the limited
17 circumstances in which departure from the abstention doctrine is appropriate, namely, “in
18 cases of proven harassment or prosecutions undertaken by state officials in bad faith without
19 hope of obtaining a valid conviction and perhaps in other extraordinary circumstances were
20 irreparable injury can be shown.” Ibid. (quoting Perez v. Ledesma, 401 U.S. 82, 85 (1971)).
21 The Ninth Circuit went on to rule that the petitioners had not shown irreparable injury,
22 because their right to a speedy trial could be vindicated after the trial, via dismissal of the
23 charges. Ibid.

24 The Supreme Court’s holding in United States v. MacDonald, 435 U.S. 850 (1978),
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26 ¹⁰ Petitioner states (Mem. 19) that “many of the issues presented here have already been
27 decided by the Appointing Authority,” but the record shows that the only claim he has
28 presented to the Appointing Authority is Count One of this petition (denial of speedy trial
under 10 U.S.C. § 810).

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

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

19 As for the remaining claims in the petition, Hamdan has raised none in the military
20 system. He offers several reasons why this Court should create an exception to the
21 Councilman abstention and exhaustion rule in this case, none of which has merit. First,
22 Hamdan cites Reid v. Covert, 354 U.S. 1 (1957) (plurality opinion), and United States ex rel.
23 Toth v. Quarles, 350 U.S. 11 (1955), for the proposition that the Supreme Court has not
24 always required exhaustion of military remedies before considering challenges to the
25 jurisdiction of military courts to proceed against particular persons. Hamdan’s reliance on
26 these cases, however, is misplaced because those cases involved challenges by U.S.-citizens
27 who were undisputedly civilians and were charged with offenses unrelated to warfare. See
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1 United States v. Verdugo-Urquidez, 494 U.S. 259, 270 (1990) (“Since respondent is not a
2 United States citizen, he can derive no comfort from the Reid holding.”). The Court was
3 concerned in those cases about “the disruption caused to petitioners’ civilian lives” by the
4 “deprivation of liberty.” Councilman, 420 U.S. at 759.

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

14 Petitioner cannot point to any authority for the proposition that the federal courts must
15 determine the correctness of the military’s determination that captured individuals are enemy
16 fighters before the military courts can exercise jurisdiction over those persons. In fact, in
17 Eisentrager, the Court observed that “the ‘power of the military to exercise jurisdiction over
18 members of the armed forces, those directly connected with such forces, or enemy
19 belligerents, prisoners of war, or others charged with violating the laws of war,’” is “‘well-
20 established.’” 339 U.S. at 786 (quoting Duncan v. Kahanamoku, 327 U.S. 304, 312-314
21 (1946) (emphasis added)); ibid. (“[T]he Military Commission is a lawful tribunal to adjudge
22 enemy offenses against the laws of war.”). And on the related question regarding the exercise
23 of jurisdiction over a detained enemy combatant for the duration of the armed conflict, five
24 members of the Supreme Court recently indicated that the military can make that jurisdictional

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

11 In any event, there is no doubt that the Military Commission has jurisdiction over
12 Hamdan’s person. Military Commission Order No. 1 provides that the military commissions
13 “shall have jurisdiction over only an individual * * * (1) subject to the President’s Military
14 Order and (2) alleged to have committed an offense in a charge that has been referred to the
15 Commission by the Appointing Authority. 32 C.F.R. § 9.3(a). Because the President has
16 determined that Hamdan is subject to the Order, and because Hamdan is alleged to have
17 committed an offense in a charge that has been referred to (and approved by) the Appointing
18 Authority, petitioner’s claim (Mem. 69-71) that the Military Commission lacks jurisdiction
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20 ¹¹ Hamdi makes clear that petitioner’s analogy (Pet.’s Mem. 70) to the alien enemy
21 doctrine is inapt. Regardless of the respective competence of the courts and the military in
22 determining whether an individual is a citizen, the question whether an individual captured
23 during wartime is an enemy combatant is a quintessentially military judgment. Indeed, while
24 courts have reviewed the “jurisdictional fact” of whether the petitioner is in fact the citizen of
25 a hostile power and therefore subject to the President’s authority under the Alien Enemy Act,
26 see, e.g., United States ex rel. Schwarzkopf v. Uhl, 137 F.2d 898, 900 (2d Cir. 1943), they
27 will not review the President’s determination that the alien is dangerous and should be
28 removed. See Ludecke v. Watkins, 335 U.S. 160, 164, 170 (1948). The determination
whether an individual is an enemy combatant is much more akin to the latter determination
than the former.

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

1 over Hamdan is meritless.

2 Petitioner argues nevertheless (Mem. 21 n.5) that there is an even greater justification
3 for federal court intervention here than in Reid and Toth, because the military courts there
4 “had jurisdiction pursuant to acts of Congress,” whereas the military commissions here were
5 “established by a brief Executive Order.” This argument lacks merit because its premise –
6 that Congress has not authorized the Military Commission to which Hamdan is subject – has
7 been rejected by the Supreme Court numerous times. See Ex parte Quirin, 317 U.S. 1
8 (1942); Yamashita v. Styer, 327 U.S. 1 (1946) (discussed in Part V, infra).

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

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

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

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

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

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

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

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

20 Petitioner argues (Mem. 29-31) that because the UCMJ extends courts-martial
21 jurisdiction over "persons within an area leased by * * * the United States," 10 U.S.C.
22 § 802(a)(12), it follows that all of the substantive and procedural rules set out in the UCMJ,
23 including Article 10, are automatically applicable to him. There is a crucial flaw in his logic.
24 The rules set out in the UCMJ apply to courts-martial, not commissions. Pursuant to the
25 Military Order, the President designated Hamdan as eligible for trial before a military
26 commission. See Order § 2(b). While the UCMJ recognizes the jurisdiction of military
27 commissions to try violations of the laws of war, see Article 21 ("The provisions of this
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1 chapter conferring jurisdiction upon courts-martial do not deprive military commissions * * *
2 of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of
3 war may be tried by military commissions”), it does not purport to subject such commissions
4 to its comprehensive set of rules governing courts-martial. Indeed, the Supreme Court has
5 repeatedly recognized that while Congress has prescribed in detailed fashion the jurisdiction
6 and procedures governing courts-martial, it has taken a hands-off approach with respect to
7 wartime military commissions, by recognizing and approving their use but not regulating their
8 procedures.

9 In Yamashita v. Styer, 327 U.S. 1 (1946), the Supreme Court expressly rejected the
10 contention that a military commission convened to try General Yamashita, an enemy
11 combatant, was subject to the procedures in the Articles of War (the precursor to the UCMJ)
12 governing courts-martial. The Court explained that, by Article 15 of the Articles of War
13 (now Article 21 of the UCMJ), Congress “recogniz[ed] military commissions in order to
14 preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles,” and
15 “gave sanction * * * to any use of the military commission contemplated by the common law
16 of war.” Id. at 19. Although the Court relied in part on the fact that General Yamashita did
17 not fall within the categories of persons made subject to the jurisdiction of courts-martial by
18 the Articles of War, the Court also based its holding on the fact that “the military commission
19 before which he was tried, though sanctioned, and its jurisdiction saved, by Article 15, was
20 not convened by virtue of the Articles of War, but pursuant to the common law of war,” Ibid.
21 (emphasis added). Moreover, the Court in Madsen v. Kinsella, 343 U.S. 341 (1952),
22 subsequently rejected any suggestion that the Articles of War would apply to the trial by
23 commission of a person subject to court-martial, upholding the trial by military commission of
24 a U.S. citizen subject to the jurisdiction of courts-martial, notwithstanding that the commission
25 trial was not conducted in strict accordance with the specific Articles of War governing
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1 courts-martial.¹⁴

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

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

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

21 When the President established military commissions to try unlawful combatants in the
22 ongoing armed conflict with al Qaida and the Taliban and set out the procedures that will
23 govern them, he exercised the very discretion that the Madsen Court held was implicit in his
24 powers as Commander in Chief and was left unrestricted by Congress. See 32 C.F.R. Parts
25 9-17 (2004). Because, as Madsen explained, Congress did not purport to apply the numerous

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

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

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

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24 ¹⁵ Even assuming that Article 10 does apply to the military commissions, Hamdan cannot
25 claim its protection, at least insofar as he seeks release from his present confinement. That is
26 because the military has determined that Hamdan is an enemy combatant. As such, he may be
27 detained for the duration of hostilities. Hamdi, 124 S. Ct. at 2641 (plurality opinion); id. at
28 2679 (Thomas, J. dissenting) (suggesting enemy combatant can be detained past cessation of
formal hostilities). In light of his combatant status, Hamdan has no legal right to seek release
from a particular form of confinement based on the length of time he has been held without a
trial, even assuming that the speedy trial standards applied and that the military was not
complying with them.

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

3 Even assuming speedy trial concepts under Article 10 applied to Hamdan's
4 confinement, petitioner has not established any violation. In order to prevail on an Article 10
5 claim, petitioner must establish that the government has failed to proceed against Hamdan with
6 "reasonable diligence." United States v. Cooper, 58 M.J. 54, 58 (C.A.A.F. 2003). All that
7 petitioner states on this score is that "the Government did not need over two years to gather
8 evidence." Pet.'s Mem. 32. That conclusory statement is patently insufficient. To begin
9 with, to the extent there is any relevant time period for an individual lawfully detained as an
10 enemy combatant, the Article 10 clock would not begin to run until the detainee is "ordered
11 into arrest or confinement" pursuant to a charge. 10 U.S.C. § 810; see Cooper, 58 M.J. at
12 58 (Article 10 triggered "when a servicemember is placed in pretrial confinement"). Thus,
13 any speedy trial clock here would not have begun to run until December 2003, when Hamdan
14 was placed in Camp Echo to facilitate his ability to meet with counsel in connection with the
15 impending charges.

16 Moreover, the amount of time that has elapsed, standing alone, does not suggest, much
17 less establish, the absence of reasonable diligence. As the military courts have made clear,
18 "[t]here is no 'magic number' of days in pretrial confinement which would give rise to a
19 presumption of an Article 10, UCMJ, speedy trial violation." United States v. Goode, 54
20 M.J. 836 (N-M Ct. Crim. App. 2001); United States v. Kossman, 38 M.J. 258 (C.M.A.
21 1993) ("Pointedly, however, the drafters of Article 10 made no provision as to hours or days
22 in which a case must be prosecuted because there are perfectly reasonable exigencies that arise
23 in individual cases which just do not fit under a set time limit.") (internal quotation marks
24 omitted). In the Goode case, the court held that a defendant who spent 337 days in pretrial
25 confinement failed to make out an Article 10 or constitutional speedy trial violation. Id. at
26 838-840. Here, the government has charged Hamdan with participating in a foreign-based,
27 far-reaching conspiracy spanning five and a half years. See Charge ¶¶ 12-13 (Exhibit A). The
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1 breadth and complexity of the charge as well as the fact that it was brought during the ongoing
2 war against al Qaida and its supporters refutes petitioner's unsupported assertion that the
3 government is engaged in "foot dragging." Mem. 32. See Barker v. Wingo, 407 U.S. 514,
4 531 (1972) ("[T]he delay that can be tolerated for an ordinary street crime is considerably less
5 than for a serious, complex conspiracy charge.").

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

21 III. HAMDAN'S CONFINEMENT PRIOR TO TRIAL DOES NOT VIOLATE 22 THE GENEVA CONVENTIONS

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

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

1 of War (GPW), 6 U.S.T. 3316 (1955),¹⁷ and Common Article 3¹⁸ of the same treaty. Because
2 the Geneva Conventions (1) are not self-executing, (2) do not apply to this conflict, and (3) do
3 not afford a basis for relief even if they were self-executing and applied to this conflict,
4 petitioner's claim lacks merit.

5 A. The Geneva Conventions Are Not Self-Executing.

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

12 _____
13 ¹⁷ That Article provides, in relevant part:

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

20 GPW art. 103.

21 ¹⁸ That Article provides, in relevant part:

22 In the case of armed conflict not of an international character occurring in the territory
23 of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a
24 minimum, the following provisions:

25 1. Persons taking no active part in the hostilities, including members of armed forces who
26 have laid down their arms and those placed hors de combat by sickness, wounds, detention, or
27 any other cause, shall in all circumstances be treated humanely, without any adverse
28 distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar
29 criteria.

30 To this end the following acts are and shall remain prohibited at any time and in any place
31 whatsoever with respect to the above-mentioned persons:

32 (d) The passing of sentences and the carrying out of executions without previous judgment
33 pronounced by a regularly constituted court affording all the judicial guarantees which are
34 recognized as indispensable by civilized peoples.

35 GPW art. 3.

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

10 *Hamdi v. Rumsfeld*, 316 F.3d 450, 468-469 (4th Cir. 2003), vacated on other grounds,
11 124 S. Ct. 2686 (2004); *see also Al Odah v. United States*, 321 F.3d 1134, 1147 (D.C. Cir.
12 2003) (Randolph, J., concurring), overruled on other grounds, *Rasul v. Bush*, 124 S. Ct. 2686
13 (2004); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-810 (D.C. Cir. 1984) (Bork,
14 J., concurring); *Handel v. Artukovic*, 601 F. Supp. 1421, 1424-1426 (C.D. Cal. 1985).¹⁹

15 _____
16 ¹⁹ Article 11 provides in full:

17 In cases where they deem it advisable in the interest of protected persons, particularly
18 in cases of disagreement between the Parties to the conflict as to the application or
19 interpretation of the provisions of the present Convention, the Protecting Powers shall lend
their good offices with a view to settling the disagreement.

20 For this purpose, each of the Protecting Powers may, either at the invitation of one
21 Party or on its own initiative, propose to the Parties to the conflict a meeting of their
22 representatives, and in particular of the authorities responsible for prisoners of war, possibly
23 on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to
the proposals made to them for this purpose. The Protecting Powers may, if necessary,
propose for approval by the Parties to the conflict a person belonging to a neutral Power, or
delegated by the International Committee of the Red Cross, who shall be invited to take part in
such a meeting.

24 Article 132 provides in full:

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

1 The Fourth Circuit alluded to the fact that there was one area in which the contracting parties
2 sought to go beyond diplomacy to enforce violations of the treaty: “grave breaches,” which
3 the parties pledged to punish themselves by enacting domestic criminal legislation.
4 See Article 129 (GPW) (“The High Contracting Parties undertake to enact any legislation
5 necessary to provide effective penal sanctions for persons committing, or ordering to be
6 committed, any of the grave breaches of the present Convention defined in [Article 130].”);
7 Article 130 (“Grave breaches to which the preceding Article relates shall be those involving
8 any of the following acts, if committed against person or property protected by the
9 Convention: * * * wilfully depriving a prisoner of war of the rights of fair and regular trial
10 prescribed in this Convention.”).²⁰ Congress responded by enacting the War Crimes Act of
11 1996, 18 U.S.C. § 2441. That Act provides a means for remedying grave breaches, but
12 obviously does not create any privately enforceable rights. The Executive Branch, through its
13 ability to bring prosecutions, remains responsible for ensuring adherence to the treaty. In
14 light of this clear textual framework for enforcing the treaty, there is no sound basis on which
15 to conclude that the treaty provided prisoners of war, let alone unlawful combatants such as
16 Hamdan, with private rights of action.

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

22
23 ²⁰ The other Articles of the GPW governing execution of the Convention reinforce the
24 conclusion that the treaty is not self-executing. They call for the contracting parties to permit
25 representatives of the Protecting Powers (neutral nations) and the International Committee of
26 the Red Cross to visit prisoners of war (Art. 126); to inculcate the principles of the
27 Convention in their countries’ populace (Art. 127); and to communicate with one another
28 “through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the
official translations of the present Convention, as well as the laws and regulations which they
may adopt to ensure the application thereof,” (Art. 128) (emphasis added). See also Art. 8
 (“The present Convention shall be applied with the cooperation and under the scrutiny of the
Protecting Powers [neutral nations] whose duty it is to safeguard the interests of the Parties to
the conflict.”).

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

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

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

11 Id. at 789 & n. 14. The Senate that ratified the 1949 GPW was operating against the
12 backdrop of Eisentrager, yet in discussing the “advance[s]” over the 1929 treaty, it never so
13 much as suggested that alleged violations of the updated GPW could be enforced through
14 private actions. To the contrary, the one “advance” contemplated and remarked upon was the
15 enactment of criminal legislation to address “grave breaches.” S. Exec. Rep. No. 84-9
16 (1955), at 7, 27 (“the grave breaches provisions cannot be regarded as self-executing”).
17 Moreover, in addressing how future compliance with the treaty would be achieved, the Senate
18 Report did not mention legal claims or judicial machinery, but instead observed that “the
19 weight of world opinion,” would “exercise a salutary restraint on otherwise unbridled
20 actions.” Id. at 32.

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

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

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

11 The Geneva Conventions do not apply to every conceivable armed conflict. Article 2
12 of the GPW provides for only three circumstances in which the Geneva Conventions "apply":
13 (a) in "all cases of declared war or of any other armed conflict which may arise between two
14 or more of the High Contracting Parties," art. 2(1); (b) in "all cases of partial or total
15 occupation of the territory of a High Contracting Party," art.2(2); or (c) when a non-signatory
16 "Power[] in conflict" "accepts and applies the provisions [of GC]," art.2(3). Because the
17 armed conflict between the United States and al Qaida satisfies none of these situations, the
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19 ²¹ Petitioner's reliance on United States v. Noriega, 808 F. Supp. 791 (S.D. Fla. 1992),
20 United States v. Lindh, 212 F. Supp.2d 541 (E.D. Va. 2002), and Padilla ex rel. Newman v.
21 Bush, 233 F. Supp.2d 564 (S.D.N.Y. 2002), rev'd in part, 352 F.3d 695 (2d Cir. 2003),
22 rev'd sub nom. Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004), is likewise misplaced. Padilla
23 did not address whether the GPW authorizes private rights of action, see id. at 590. Lindh
24 permitted the assertion of the GPW "as a defense to criminal prosecution"; however, the
25 Fourth Circuit in Hamdi subsequently held the GPW to be non-self-executing. Hamdi, 316
26 F.3d at 468. As for Noriega, the district court discussed the GPW in an advisory opinion.
27 808 F. Supp. at 793, 799 (acknowledging that issue was not presented "in the context of a live
28 controversy"). Moreover, Noriega's discussion does not apply to GPW Articles 3 and 103,
the two provisions on which petitioner relies. That is because the court viewed the GPW
Articles at issue as self-executing on the theory that the "grave breaches" cited in the GPW
and expressly requiring implementing legislation did not refer to those Articles. Id. at 797
n.8. In contrast, violations of Articles 3 and 103, if proven, would constitute grave breaches
of the GPW, see Art. 130 (willful deprivation of POW's right to fair trial), which under the
plain terms of the treaty cannot be enforced without implementing legislation, and which, as
contemplated by the Treaty, are to be remedied by the possibility of criminal sanction, not
private rights of action.

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

2 The President has found that the armed conflict between the United States and al Qaida
3 does not come within Article 2 of the GPW. See Memorandum for the Vice President, et al.
4 From President, Re: Humane Treatment of al Qaeda and Taliban Detainees at 1 (Feb. 7,
5 2002), available at www.library.law.pace.edu/government/detainee_memos.html. The
6 President's determination is undoubtedly correct as a matter of law. The U.S.-al Qaida armed
7 conflict is not one "between two or more of the High Contracting Parties" within the meaning
8 of article 2(1). Al Qaida has not signed or ratified the GPW. Nor could it. Al Qaida is not a
9 State. Rather, it is a terrorist organization composed of members from many nations, with
10 ongoing military operations in many nations. As a non-State entity, it cannot be a "High
11 Contracting Party" to the Convention. In addition, the U.S.-al Qaida armed conflict has not
12 resulted in the "occupation of the territory of a High Contracting Party" within the meaning of
13 article 2(2). As a non-State actor, al Qaida has no territory that could be occupied within the
14 meaning of article 2(2). Nor is it a "Power in conflict" that can "accept[] and appl[y]" the
15 Convention within the meaning of article 2(3). See, e.g., G.I.A.D. Draper, The Red Cross
16 Conventions 16 (1958) (arguing that "in the context of Article 2, para. 3, 'Powers' means
17 States capable then and there of becoming Contracting Parties to these Conventions either by
18 ratification or by accession"); 2B Final Record of the Diplomatic Conference of Geneva of
19 1949, at 108 (explaining that article 2(3) would impose an "obligation to recognize that the
20 Convention be applied to the non-Contracting adverse State, in so far as the latter accepted
21 and applied the provisions thereof" (emphasis added) ("Final Record"); 4 Pictet,
22 Commentary, at 23 (using "non-Contracting State" interchangeably with "non-Contracting
23 Power" and "non-Contracting Party"). In any event, far from embracing the Convention or
24 any other provision of the law of armed conflict, al Qaida has consistently acted in flagrant
25 defiance of the law of armed conflict.

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

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

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

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

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

12 GPW art. 103 (emphasis added). The problem for Hamdan is that he is not a “prisoner of
13 war” eligible for Article 103's protection. GPW Article 4 makes clear that prisoners of war
14 “carry[] arms openly” and “conduct[] their operations in accordance with the laws and
15 customs of war.” Those, like Hamdan, who fail to adhere to those conditions are not entitled
16 to prisoner of war status and its attendant benefits when captured. See S. Exec. Rep. No. 84-
17 9, at 5 (“extension of [the treaty’s] protection to ‘partisans’ does not embrace that type of
18 partisan who performs the role of farmer by day, guerilla by night”). The President has
19 determined that Hamdan is subject to the Military Order. See Ex. A to 4/5/04 Swift Decl.
20 As a member of al Qaida or otherwise involved in terrorism against the United States,
21 Hamdan by definition does not observe the criteria necessary to qualify as a prisoner of war.
22 See Padilla, 233 F. Supp.2d at 593 (citing the “obvious conclusion” that “when the President
23 designated Padilla an ‘enemy combatant,’ he necessarily meant that Padilla was an unlawful
24 combatant, acting as an associate of a terrorist organization whose operations do not meet the
25 * * * criteria necessary to confer lawful combatant status on its members and adherents”).

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

1 face of this doubt, GPW Article 5²² and various United States military regulations require that
2 he receive full prisoner of war protection until a competent tribunal has determined his status.
3 Pet.'s Mem. 34 (citing GPW, 6 U.S.T. at 3324 (art. 5); Army Regulation 190-8 § 1-6(A)
4 (1997), at 70; Dep't of the Navy, NWP 1-14M 11.7 (1995), at 77). But petitioner never
5 explains why doubt has arisen as to his status. He acknowledges that he was closely affiliated
6 with Usama bin Laden for a lengthy period of time, and he does not claim, much less present
7 evidence, that he followed a responsible commander, bore a fixed, distinctive sign, carried
8 arms openly, or observed the laws of war. See GPW art. 4(A)(2). Because both the
9 President and a federal court, see Padilla, supra, have determined that al Qaida is not entitled
10 to protection as prisoners of war, there can be no doubt about his unlawful combatant status.

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

23 _____
24 ²² That provision provides in relevant part that

25 Should any doubt arise as to whether persons, having committed a belligerent act and
26 having fallen into the hands of the enemy, belong to any of the categories enumerated in
27 Article 4, such persons shall enjoy the protection of the present Convention until such time as
28 their status has been determined by a competent tribunal.

GPW art. 5.

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

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

15 | Moreover, Hamdan’s confinement pending his military trial does not constitute the
16 | “passing of [a] sentence[] * * * without previous judgment.” GPW Art. 3(1)(d). Hamdan is
17 | not being confined in Camp Echo as a punishment for the offense he is alleged to have
18 | committed. Rather, by virtue of being designated as eligible for trial before a military
19 | commission, Hamdan was assigned petitioner as his counsel to assist him with the legal
20 | proceedings. In order to facilitate contacts between the military commission designees and
21 | their counsel without jeopardizing security at Guantanamo, the military established a separate
22 | facility at Camp Echo to house Hamdan and the other designees. Confining Hamdan for
23 | substantial security reasons to facilitate his access to counsel pending his wartime trial does
24 | not constitute “punishment.” To the contrary, it is well established that the wartime detention
25 | of an enemy combatant is a legitimate war measure, not punishment. Hamdi, 124 S. Ct. at
26 | 2640 (“The purpose of detention is to prevent captured individuals from returning to the field
27 | of battle and taking up arms once again.”) (plurality opinion).

1 IV. PETITIONER'S EQUAL PROTECTION CLAIMS ARE MERITLESS

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

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

19 As a non-resident alien with no voluntary contacts with the United States, Hamdan
20 cannot invoke the Constitution of the United States. In fact, the Supreme Court has already
21 expressly rejected the claim that the equal protection component of the Fifth Amendment
22 applies to non-resident aliens such as Hamdan. In United States v. Verdugo-Urquidez, a
23 nonresident alien whose Mexican residence was searched by federal agents, contended not
24 only that the search violated his Fourth Amendment rights, but also that it violated the equal
25 protection component of the Fifth Amendment by treating him differently from citizens with
26 respect to the Fourth Amendment. 494 U.S. at 273. The Court flatly rejected this contention,
27 explaining that “[n]ot only are history and case law against [Verdugo-Urquidez], but as
28

1 pointed out in Johnson v. Eisentrager, 339 U.S. 763 * * * (1950), the result of accepting this
2 claim would have significant and deleterious consequences for the United States in conducting
3 activities beyond its boundaries.” Verdugo-Urquidez, 494 U.S. at 273. The Court also
4 rejected Verdugo-Urquidez’s reliance on a series of cases, including Plyler v. Doe, 457 U.S.
5 202 (1982), extending some constitutional protection to aliens. Verdugo-Urquidez, 494 U.S.
6 at 271. The Court explained that those cases “establish only that aliens receive constitutional
7 protections when they have come within the territory of the United States and developed
8 substantial connections with this country.” Ibid. Because Verdugo-Urquidez “is an alien who
9 has had no previous significant voluntary connection with the United States,” the Court held
10 that those cases “avail him not.” Ibid.

11 Petitioner’s equal protection argument does not cite or discuss Verdugo-Urquidez or
12 Eisentrager. But those decisions make clear that Hamdan, as a non-resident alien with no
13 voluntary, substantial contacts with the United States, see ibid. (“lawful but involuntary”
14 presence does not constitute “substantial connection”), cannot assert an equal protection
15 claim. Verdugo-Urquidez reiterated Eisentrager’s “emphatic” rejection of the extension of
16 Fifth Amendment protections to nonresident aliens such as Hamdan. 494 U.S. at 269. The
17 Eisentrager defendants, like Hamdan, challenged their trial before a military commission on
18 Fifth Amendment grounds. The Fifth Amendment, the Court explained, does not “confer[]
19 rights upon all persons, whatever their nationality, wherever they are located and whatever
20 their offenses[.]” Id. at 783. If it were otherwise “enemy elements * * * could require the
21 American judiciary to assure them freedoms of speech, press, and assembly as in the First
22 Amendment, right to bear arms as in the Second, security against ‘unreasonable searches and
23 seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments.”
24 Id. at 784. Had the Bill of Rights been meant to apply so broadly, the Court explained, “it
25 could scarcely have failed to excite contemporary comment,” yet “[n]ot one word can be
26 cited,” and “[n]o decision of th[e] Court supports such a view.” Id. at 784-785; see Zadvydas
27 v. Davis, 533 U.S. 678, 693 (2001) (deeming it “well established” that due process
28

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

6
7 B. Even If Hamdan Could Invoke The Fifth Amendment, His Claim Lacks
8 Merit.

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

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

18 ²³ See also Harbury v. Deutsch 233 F.3d 596, 602-604 (D.C. Cir. 2000) (Guatemalan
19 citizen has no Fifth Amendment rights); Cuban American Bar Ass’n v. Christopher, 43 F.3d
20 1412, 1428 (11th Cir. 1995) (alien migrants at Guantanamo Bay have no constitutional rights);
Kamrin v. United States, 725 F.2d 1225, 1228 (9th Cir. 1984) (“[I]t has long been settled that
21 United States due process rights cannot be extended extraterritorially.”).

22 ²⁴ The Court’s recent decision in Rasul v. Bush, 124 S. Ct. 2686 (2004), in no way affects
23 Eisentrager’s and Verdugo-Urquidez’s rulings that non-resident aliens are not entitled to Fifth
24 Amendment protections. Rasul only decided the question whether U.S. courts have statutory
25 jurisdiction over petitions for writs of habeas corpus filed by aliens located outside U.S.
26 territory. See 124 S. Ct. at 2695 (“Eisentrager plainly does not preclude the exercise of §
27 2241 jurisdiction over petitioners’ claims.”). Rasul said nothing about the possession of
28 constitutional rights by non-resident aliens. Its footnote stating that “petitioners’ allegations *
* * * unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the
United States,’” id. at 2698 n.15, is dictum which cannot be construed to overrule prior
holdings of the Court and which, in any event, does not specify that the allegations make out a
constitutional violation, as opposed to some other form of violation. In any event, to the
extent non-resident aliens held in Guantanamo enjoy any constitutional rights, they clearly
would enjoy less rights than citizens detained under similar circumstances. Cf. The Insular
Cases (discussed in Verdugo-Urquidez, 494 U.S. at 268).

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

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

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

9 Petitioner asserts (Mem. 62-63) that aliens are a suspect class, citing In re Griffiths,
10 413 U.S. 717, 721-722 (1973), and Graham v. Richardson, 403 U.S. 365, 372 (1971), for
11 this proposition. Those cases, however, stand for a substantially narrower point: that lawful,
12 resident aliens are a suspect class for equal protection purposes, and that policies that
13 differentiate between that group and other similarly situated persons are subject to “close
14 judicial scrutiny.” Graham, 403 U.S. at 372. Nothing in either case suggests that the
15 Supreme Court meant to include aliens differently situated from Griffiths and Richardson, who
16 were lawfully admitted resident aliens. See, e.g., Griffiths, 413 U.S. at 722 (according
17 protection to resident aliens on the premise that “like citizens, [they] pay taxes, support the
18 economy, serve in the Armed Forces, and contribute in myriad other ways to our society”);
19 Verdugo-Urquidez, 494 U.S. at 273 (rejecting nonresident alien’s reliance on Graham).

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

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

8 Moreover, courts have only applied heightened scrutiny to policies regarding aliens that
9 are promulgated by states, as opposed to the federal government. Griffiths and Graham, the
10 two cases on which petitioner principally relies, dealt respectively with Connecticut’s bar
11 admission rules and Arizona and Pennsylvania’s distribution of welfare benefits. In these and
12 other cases involving state action, the Court has made it clear that federal policies regarding
13 aliens are entitled to a much higher degree of deference. See, e.g., Graham, 413 U.S. at 379-
14 80; Plyler, 457 U.S. at 225.

15 Indeed, cases considering federal policies that differentiate against aliens are marked by
16 the Court’s extreme deference towards the political branches. In Mathews v. Diaz, 426 U.S.
17 67 (1976), the Court expressly distinguished state and federal actions for purposes of equal
18 protection doctrine relating to aliens, id. at 84-85, explaining that the relationship between the
19 United States and aliens “has been committed to the political branches of the Federal
20 Government,” id. at 81. The Court went on to apply great deference in upholding a federal
21 law that differentiated against aliens for purposes of determining eligibility for Medicare
22 benefits. A host of other cases echo Mathews’s judicial deference toward federal policies
23 governing aliens. See, e.g., Fiallo v. Bell, 430 U.S. 787, 792 (1977); Shaughnessy v. United
24 States ex rel. Mezei, 345 U.S. 206, 210 (1953); Harisiades v. Shaughnessy, 342 U.S. 580,
25 588-589 (1952). The concern motivating the Court’s deference – that regulation of aliens is
26 committed to the political branches of the federal government – is magnified in this case,
27 where the President’s Military Order not only regulates aliens, but does so in order to
28

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

6
7 2. The Military Order Does Not Discriminate In The Allocation Of
8 Fundamental Rights.

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

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

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

1 every federal court of appeals that has considered the issue since the law was amended has
2 held that federal actions cannot give rise to claims under Section 1981. See Davis-Warren
3 Auctioneers, J.V. v. F.D.I.C., 215 F.3d 1159, 1161 (10th Cir. 2000); Davis v. United States
4 Dep't of Justice, 204 F.3d 723, 725-726 (7th Cir. 2000); Lee v. Hughes, 145 F.3d 1272, 1277
5 (11th Cir. 1998). Petitioner cites a single post-amendment district court case to the contrary,
6 La Compania Ocho, Inc. v. United States Forest Serv., 874 F. Supp. 1242 (D. N.M. 1995),
7 but that case was overruled by Davis-Warren.

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

14
15 V. THE MILITARY COMMISSION THAT WILL TRY HAMDAN DOES NOT VIOLATE SEPARATION OF POWERS

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

27 Not only has Congress authorized the President generally to exercise his war powers
28

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

7 Congress' longstanding decision both to recognize and approve the exercise of the
8 President's wartime authority to convene military commissions to try violations of the laws of
9 war reflects Congress' understanding that military exigencies require providing the President
10 flexibility rather than detailed procedures in dealing with enemy fighters. That decision is
11 entitled to just as much deference as Congress' decision to legislate detailed rules for the
12 military's use of courts-martial. As Justice Jackson has explained, "[w]hen the President acts
13 pursuant to an express or implied authorization of Congress, his authority is at its maximum,
14 for it includes all that he possesses in his own right plus all that Congress can delegate."
15 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-636 (1952) (Jackson, J.,
16 concurring). In these circumstances, the President's action is "supported by the strongest
17 presumptions and the widest latitude of judicial interpretation, and the burden of persuasion
18 would rest heavily upon any who might attack it." Dames & Moore v. Regan, 453 U.S. 654,
19 674 (1981) (quoting Youngstown, 343 U.S. at 637 (Jackson, J., concurring)). Hamdan could
20 not possibly meet his burden, because he does not have any constitutional rights and even if he
21 did, the Supreme Court has already squarely rejected the arguments he advances here.

22 A. Hamdan Cannot Invoke Structural Protections Of Our Constitution.

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

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

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

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

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

1 congressional recognition and approval of the common-law role military commissions play
2 during wartime in punishing violations of the laws of war.²⁶ In Ex Parte Quirin, 317 U.S. 1
3 (1942), the Court expressly held that Article 15 – whose language is identical to today’s
4 Section 821 – “authorized trial of offenses against the laws of war before such commissions.”
5 Id. at 29 (emphasis added); id. at 28 (“By the Articles of War, and especially Article 15,
6 Congress has explicitly provided, so far as it may constitutionally do so, that military
7 commissions shall have jurisdiction to try offenders or offenses against the law of war * * *”).
8 The Quirin Court held not only that Congress had authorized the President to use military
9 commissions, but also that Congress did not purport to codify violations of the laws of war
10 over which the commissions could exercise jurisdiction. Rather, “Congress has incorporated
11 by reference, as within the jurisdiction of military commissions, all offenses which are defined
12 as such by the laws of war.” Id. at 30; id. at 35 (relying on the “long course of practical
13 administrative construction by [the] military authorities”). Applying these principles, the
14 Court approved the military commission’s exercise of jurisdiction over the Nazi saboteurs for
15 alleged offenses against the common law of war.

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

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

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

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

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

9 Id. at 30 (citation omitted).

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

25 _____
26 petitioner misreads Quirin.

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

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

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

17 Respondents’ reading of Quirin is confirmed by Yamashita v. Styer, 327 U.S. 1
18 (1946), which is not discussed in petitioner’s separation-of-powers argument. In Yamashita,
19 the Court characterized Quirin as holding that

20 [Congress] had not attempted to codify the law of war or to mark its precise
21 boundaries. Instead, by Article 15 it had incorporated, by reference, as within the
22 preexisting jurisdiction of military commissions created by appropriate military
23 command, all offenses which are defined as such by the law of war, and which may
24 constitutionally be included within that jurisdiction. It thus adopted the system of
25 military common law applied by military tribunals so far as it should be recognized and
26 deemed applicable by the courts, and as further defined and supplemented by the Hague
27 Convention, to which the United States and the Axis powers were parties.

28 327 U.S. at 11 (emphasis added). Petitioner’s revisionist take on Quirin thus cannot be
reconciled with the Yamashita Court’s own interpretation and application of Quirin four years
later.

1 Under Quirin, there can be no doubt that Hamdan is charged with an offense that
2 alleges a violation of the laws of war. He is charged with conspiring with an international
3 terrorist organization that has carried out numerous attacks – including the September 11
4 attacks – that violate every precept of the laws of war.²⁹ Indeed, those attacks targeted
5 civilians and were carried out by enemy forces disguised as civilians who did not carry arms
6 openly. See id. at 34. And the particular offenses Hamdan is charged with conspiring to
7 commit – attacking civilians, attacking civilian objects, murder by an unprivileged
8 belligerent, destruction of property by an unprivileged belligerent, and terrorism – implicate
9 the most basic protections of the laws of war. See 32 C.F.R. §§ 11.6(a)(2) and (a)(3);
10 §§11.6(b)(2), (b)(3), and (b)(4); Yamashita, 327 U.S. at 17 (“Obviously charges of violations
11 of the law of war triable before a military tribunal need not be stated with the precision of a
12 common law indictment.”).

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

24
25 ²⁹ The President, the Congress, and NATO have all recognized al Qaida’s attacks as an
26 act of war. See Military Order, § 1(a); AUMF, 115 Stat. 224; and Statement of NATO Secy.
27 Gen. (Oct. 2, 2001) (available at <http://usinfo.-state.gov.topical/pol/terror/01100205.htm>). In
28 any event, whether there exists a state of armed conflict to which the laws of war apply is a
political question for the President, not the courts. See The Prize Cases, 67 U.S. (2 Black)
635, 670 (1862); Eisentrager, 339 U.S. at 789; Ludecke v. Watkins, 335 U.S. 160, 170
(1948).

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

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

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

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

16 The absence of a formal declaration of war is likewise immaterial to application of the
17 substantive prohibitions of the UCMJ. It is well settled that the UCMJ applies to armed
18 conflicts that the United States has prosecuted without a formal declaration of war.
19 See, e.g., United States v. Anderson, 38 C.M.R. 386, 386 (C.M.A. 1968) (“The current
20 military involvement of the United States in Vietnam undoubtedly constitutes a ‘time of war’
21

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

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

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

9 Finally, contrary to petitioner’s contention, Quirin has not been eroded by subsequent
10 legal developments. Hamdi reconfirms Quirin. 124 S. Ct. at 2643 (plurality opinion); id. at
11 2682 (Thomas, J., dissenting). Petitioner cites the codification of the UCMJ, but Congress
12 expressly stated that the codification preserved the holding of Quirin. See S. Rep. No. 486,
13 81st Cong, 1st Sess. 13 (1949); H.R. Rep. No. 491, 81st Cong, 1st Sess. 17 (1949). As for the
14 Geneva Conventions, as discussed above in Part III, they are not self-executing, do not apply,
15 and, in any event, approve the military trial of unlawful combatants, see, e.g., S. Exec. Rep.
16 No. 84-9, at 5 (“guerilla[s] * * * remain subject to trial and punishment as unlawful
17 belligerents”). And the War Crimes Act of 1996 and Expanded War Crimes Act of 1997
18 were intended to supplement rather than replace the jurisdiction of military commissions over
19 war crimes. Indeed, Congress could not have been clearer on this score. The War Crimes Act
20 itself says nothing about altering the traditional jurisdiction of military commissions. That is
21 not surprising, given that “[t]he enactment of H.R. 3680 [the War Crimes Act of 1996] is not
22 intended to affect in any way the jurisdiction of any court-martial, military commission, or
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1 other military tribunal under any article of the Uniform Code of Military Justice or under the
2 law of war or the law of nations.” H. Rep. No. 698, 104th Cong. 2d Sess. 12 (1996).³³
3 Because Congress clearly did not intend to “occup[y] the field” (Pet.’s Mem. 72) previously
4 occupied by military commissions, the subject matter jurisdiction of those commissions today
5 is no narrower than it was during World War II. To the contrary, that jurisdiction remains
6 broad enough to cover violations of the laws of armed conflict as defined by both historical
7 and contemporary standards.³⁴

8
9 C. The President Has The Inherent Authority To Create Military
10 Commissions.

11 Even if the legislative provisions the President expressly invoked did not constitute the
12 congressional authorization that the Supreme Court has held they constitute, see Hamdi
13 (construing AUMF), supra; Quirin (construing precursor to 10 U.S.C. § 821), the military
14 commissions would still be constitutional. That is because the President’s authority to create
15 military commissions is inherent in his position as Commander-in-Chief. U.S. Const. Art. II
16 § 2.

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

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

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

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

11 The Executive Branch’s unilateral authority to create military commissions not only
12 necessarily inheres in the powers granted the President by the Constitution, but is also borne
13 out by historical practice. In 1780, during the Revolutionary War, General Washington as
14 Commander in Chief of the Continental Army appointed a “Board of General Officers” to try
15 the British Major Andre as a spy, see Quirin, 317 U.S. at 31 n.9, when there was no court-
16 martial authority to try him. See George B. Davis, A Treatise on the Military Law of the
17 United States 308 n.1 (1913). General Andrew Jackson similarly convened military trials in
18 1818 to try two English subjects for inciting the Creek Indians to war with the United States.
19 See William Winthrop, Military Law and Precedents 464, 832 (2d ed. 1920). In the Mexican
20 American War, General Winfield Scott appointed tribunals called “council[s] of war” to try
21 offenses under the laws of war and tribunals called “military commission[s]” to serve
22 essentially as occupation courts administering justice for occupied territory. See id. at 832-33;
23 Davis, supra at 308. And after the outbreak of the Civil War, military commissions were
24 convened to try offenses against the laws of war, see Davis, supra, at 308 n.2; Winthrop,
25 supra at 833.

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

1 **CONCLUSION**

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

5 DATED this 6th day of August, 2004.

6 Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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

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

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Dated this 6th day of August, 2004.

s/ Laurie A. Gausta

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