No. _____

IN THE
# Supreme Court of the United States

SALIM AHMED HAMDAN,
*Petitioner,*

**v.**

DONALD H. RUMSFELD, ET AL.,
*Respondents.*

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**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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Date: August 8, 2005

## QUESTIONS PRESENTED

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

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

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

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

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

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

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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Mr. Salim Hamdan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

## OPINION BELOW

The opinion of the court of appeals (App. 1a-18a) is reported at 2005 WL 1653046. The opinion of the district court (App. 20a-49a) is reported at 344 F. Supp. 2d 152.

## JURISDICTION

The judgment of the court of appeals was entered on July 15, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL, STATUTORY, AND INTERNATIONAL LAW PROVISIONS

The relevant constitutional, statutory, and international law provisions involved are set forth in Appendix D, *infra*.

## STATEMENT

In the immediate wake of the treacherous violence committed against the United States, Congress authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." 115 Stat. 224 (Sept. 18, 2001) (AUMF). Under the AUMF, the United States commenced armed conflict in Afghanistan in October, 2001.

The next month, despite the limited scope of the AUMF, the President issued a Military Order to authorize military commission trials. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). Commission rules are starkly different than the fundamental protections mandated by Congress in the Uniform Code of Military Justice (UCMJ). *See, e.g.,* Military Order No.1, 68 Fed. Reg. 39374-01 (July 1, 2003). They allow the accused to be excluded from portions of his trial, *id.* § 6(B)(3); permit the admission of unsworn

statements in lieu of testimony, *id.* § 6(D); and vest the Secretary of Defense with the judicial power to rule in matters that terminate the proceedings, *id.* § 6 (H)(1)-(6). The rules even state that the limited protections provided to defendants, such as not being forced to testify and the presumption of innocence, are not "right[s]" that are in any way "enforceable", *id.* § 10, and warn that these protections, such as they are, can be withdrawn at any time. *Id.* § 11.

1. Almost four years ago, Petitioner Hamdan was captured by indigenous forces while attempting to flee Afghanistan and return his family to Yemen. After being turned over to American forces, he was taken in June 2002 to Guantanamo Bay Naval Base, where he was placed with the general detainee population at Camp Delta. App. 78a. In July 2003, the President found that Petitioner was eligible for trial by commission. Accordingly, he was placed in solitary confinement from December 2003 until late October 2004 (four days before this case was argued in the District Court).

2. In December 2003, pursuant to a request by the Prosecutor that defense counsel be appointed for the limited purpose of negotiating a plea, Lieutenant Commander Swift was detailed to serve as Mr. Hamdan's military counsel. Mr. Hamdan first met Swift on January 30, 2004. Twelve days later, Mr. Hamdan filed a demand for charges and a speedy trial under UCMJ Article 10. That demand was rejected in a legal opinion claiming that Petitioner was not protected by the UCMJ. In July, 2004, eight months after the start of his solitary detention, he was charged with a single count of conspiracy that allegedly began in 1995. App. 63a-67a.

3. On April 6, 2004, a Petition for Mandamus or, in the Alternative, Habeas Corpus, was filed in the United States District Court for the Western District of Washington. In light of the Court's decision in *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004), the case was transferred to the United States District Court for the District of Columbia in August, 2004.

On November 8, 2004, following oral argument, the district court (Robertson, J.) granted the petition in part and denied Respondents' motion to dismiss. The court rejected

Respondents' argument to abstain from the merits until after the trial. Abstention was not appropriate because Mr. Hamdan had "'raised substantial arguments denying the right of the military to try [him] at all.'" App. 24a (citing *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975)).

The district court then ruled that commissions may be used only to hear offenses that are triable under the laws of war, including the Geneva Conventions; that the Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 (1949) (GPW) is judicially enforceable; and that, as long as his prisoner-of-war (POW) status is in doubt, Petitioner must be tried by court-martial. *Id.* 25a-37a. The court found that the Military Order did not satisfy either the GPW or the UCMJ, particularly as it deprived Petitioner of the right to attend his trial and hear the evidence presented against him. *Id.* 37a-47a. For the President to stray from the UCMJ placed him in the zone where his power is at "its lowest ebb" under *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). App. 28a.

4. On November 16, 2004, the government filed a notice of appeal and a Motion for Expedited Appeal. The court of appeals expedited the case the next day.[1]

5. On July 15, 2005, following oral argument, the court of appeals reversed the district court in an opinion written by Judge Randolph and joined by Judge Roberts (in full) and Judge Williams (in part).[2] It first rejected Respondents' claim that abstention was appropriate, finding that *Ex parte Quirin*, 317 U.S. 1 (1942) "provides a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions." App. 3a. Rationales for *Councilman* abstention, comity and

[1] On November 22, 2004, Mr. Hamdan filed a petition for certiorari before judgment. *Hamdan v. Rumsfeld*, No. 04-702. The Court denied the Petition on January 18, 2005.

[2] Twenty amicus briefs were filed in Mr. Hamdan's case, including briefs from retired American Generals and Admirals, hundreds of European and U.K. Parliament members, dozens of law-of-war experts, and several nongovernmental organizations. These briefs are available at http://www.law.georgetown.edu/faculty/nkk/publications.html#h.

speed, "do not exist in Hamdan's case and we are thus left with nothing to detract from *Quirin*'s precedential value." *Id*.

The court also held that Petitioner's challenges fell within an abstention exception because "setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction. *See Abney v. United States*, 431 U.S. 651, 662 (1977)." App. 4a. Because Mr. Hamdan "contend[s] that a military commission has no jurisdiction over him and that any trial must be by court-martial," the court did not abstain and fully reached the merits of his claims. *Id.*

The court then held that Congress authorized commissions in the AUMF. It found further authorization in 10 U.S.C. 821, which states that the UCMJ does not "deprive military commissions . . . of concurrent jurisdiction" to try war crimes, and 10 U.S.C. 836, which permits the President to prescribe some procedures for military trials. *Id.* 5a-7a.

The court of appeals next rejected the district court's holding that the Geneva Conventions constrain Hamdan's trial. It found that *Johnson v. Eisentrager*, 339 U.S. 763 (1950) precluded the GPW's judicial enforcement. Acknowledging that *Eisentrager* involved only the 1929 Convention and that it reached the question in an "alternative holding," the court opined that the GPW is not substantively different. *Id.* 7a-9a.

With respect to Common Article 3 of the Convention, which prohibits "the passing of sentences . . . without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as essential by a civilized people," the court deferred to the President's interpretation that the conflict with al Qaeda is international and therefore exempt. *Id.* 12a.

The court rejected the district court's conclusion that provisions in the UCMJ, such as 10 U.S.C. 839, which requires an accused's presence at all stages of his trial, apply.

Judge Williams concurred, disagreeing with the court's treatment of Common Article 3 because "the Convention's language and structure compel the view that Common Article 3 covers the conflict with al Qaeda." App. 16a-18a.

## REASONS FOR GRANTING THE PETITION

Two Terms ago, a plurality of this Court warned that "a state of war is not a blank check for the President." *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004). The court of appeals, by rejecting longstanding constitutional, international-law, and statutory constraints on military commissions, has given the President that power in tribunals that impose life imprisonment and death. Its decision vests the President with the ability to circumvent the federal courts and time-tested limits on the Executive. No decision, by any court, in the wake of the September 11, 2001 attacks has gone this far.

This Court has always closely scrutinized the Executive's use of commissions, recognizing that any encroachment on the jurisdiction of civilian courts by military tribunals poses momentous questions in a Republic committed to the rule of law and to separation of powers. As *Ex parte Milligan* put it, "Had this tribunal the *legal* power and authority to try and punish this man? No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people." 71 U.S. (4 Wall.) 2, 118-19 (1866). That this case involves the first commission since World War II, and the first since the enactment of the UCMJ and the GPW, makes certiorari particularly appropriate.

Despite these intervening statutes and treaties, the court of appeals largely based its ruling on this Court's *Eisentrager* decision, accepting the President's claim of power to convene a commission to try most any offense, against any offender (including a United States citizen or nationals of any country in the world), in any place (including the United States). The President was allowed that power not for a fixed time, such as a war declared against a specific nation-state, but rather for perpetuity against an amorphous enemy that could include nationals of every country in the world. In these tribunals, the President was given the power to disregard not only American common-law and military law, but international law--despite the fact that the *raison d'être* of commissions is to enforce international law.

The decision below expands the powers of the President beyond those recognized in *Ex parte Quirin*, 317 U.S. 1 (1942). Unlike that World War II case, whose parameters were fixed by the Court's declaration that its opinion was limited "only" to the "particular acts" of the saboteurs and "the conceded facts," *id.*, at 46, the court of appeals' decision has no limits at all. Canonical cases that restrict presidential action, including *Ex parte Milligan*, *supra*, and *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), the latter decided *after Quirin*, went completely *unmentioned* by the court below.

The ruling below enables hundreds of terrorism cases prosecuted by the Justice Department to be tried by commission. It is not plausible to think that the AUMF handed such sweeping power to the President by permitting *force*. Force includes authorization to *detain* prospectively, but does not by itself comprise adjudication to look *retrospectively* at questions of guilt and innocence. *Hamdi*, 124 S. Ct. at 2682 (Thomas, J., dissenting) ("[T]he Court referred frequently and pervasively to the criminal nature of the proceedings instituted against Milligan….[T]he punishment-nonpunishment distinction harmonizes all of the precedent").

To interpret "force" more broadly, the court of appeals not only had to resuscitate two precedents of this Court that have not been invoked to conduct commissions in a half-century, *Quirin* and *Eisentrager*; the court also had to extend them radically. In those cases, Congress had declared a war against a fixed enemy with a definite end in sight. And the commission rules in place did not depart from fundamental principles of military law and the laws of war, and were employed against admitted unlawful combatants.

None of those limits exist under the court of appeals' sweeping holding in this case. As the district court held, an emblematic example of the break with our country's traditions is the denial of Mr. Hamdan's right to be present at his own trial. Respondents have offered *no* instance, either civilian or military, in our nation's 229-year history where trial procedures were specifically engineered to force a non-disruptive defendant to be excluded from his trial. This is

not speculative; petitioner has already been excluded from his trial. Despite weighty state secrets at issue in *Quirin*, the saboteurs were always present at their trial. In Iraq, under rules written by the U.S. Department of Defense, Saddam Hussein and his henchmen will be present, despite much classified material in play there. As the district court found, the right to be present is universal, echoed in pronouncements of the Court, international law, and UCMJ.

Indeed, while claiming that commissions are "commonlaw war courts," App. 15a, the court failed to apply *any* common-law constraints, not even the longstanding guarantee of confrontation, which is "founded on natural justice." *Crawford v. Washington*, 541 U.S. 36, 49 (2004) (quoting *State v. Webb*, 2 N.C. 103, 104 (1794)).

The court also misread *Eisentrager* to strip Article III courts of their constitutional and statutory power and duty to use the Great Writ. Its decision is in deep tension with other circuits, several of which have enforced treaty-based rights under the habeas corpus statute. The case for enforcement in this case is even stronger since 10 U.S.C. 821 expressly requires that commissions act in conformity with the laws of war. That statute, like 10 U.S.C. 836, must be read consistently with international law, for "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains," *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

In the end, the court of appeals held that the President has the power to decide how a detainee is classified (as protected by the GPW or not), how he is treated, what criminal process he will face, what rights he will have, who will judge him, how he will be judged, upon what crimes he will be sentenced, and how the sentence will be carried out. The President is entitled to "pas[s] sentences and…carr[y] out…executions" through commissions, even if they do not "affor[d] all the judicial guarantees which are recognized as indispensable by a civilized people." GPW Art. 3. Under the panel's ruling, the determination that the President made to disregard this GPW provision is *unreviewable* by courts.

This reversal of the district court cannot be correct. The Revolution was fought to ensure that no man, or branch of government, could be so powerful. In a system of checks and balances, there can never be a time when the rule of law does not circumscribe power as fundamental as adjudicating culpability and punishment. Our forefathers paid a heavy price in blood to establish these principles, and it is our duty to defend them from all threats, foreign or domestic.

Limited precedents like *Quirin* and *Eisentrager* simply cannot serve as full frameworks for the legal war on terror, yet the Solicitor General routinely cites them as such.[3] As the past four years have shown, too many doubts–both international and domestic–have been generated by excessive reliance on these decisions.

Petitioner asks simply for a trial that comports with this nation's traditions, Constitution, and commitment to the laws of war, such as a court-martial under 10 U.S.C. 818 (authorizing courts martial to try law-of-war violations).

It will be some years before another military commission challenge reaches this Court again, and significant damage to the fabric of American law will ensue in the interim if the court of appeals' ruling is left undisturbed.

## I. THE COURT OF APPEALS' DECISION FULLY RESOLVED SEVERAL ISSUES, EACH OF WHICH IS APPROPRIATE FOR CERTIORARI, AND ITS RESOLUTION IS INCONSISTENT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

The court of appeals vastly expanded Presidential power. Far from the battlefield–however broadly defined–and remote from any military occupation, the President convened commissions without explicit statutory authority,

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[3] *See, e.g.,* Petr. Br., *Rumsfeld v. Padilla*, No. 03-1027, at 6; Resp. Br., *Hamdi v. Rumsfeld*, No. 03-6696, at 6; Resp. Br., *Rasul v. Bush and Al Odah v. Bush*, Nos. 03-334 and 03-343, at 4; Petr., *Bush v. Gherebi*, No. 03-1245, at 12; Br. Opp., *Hamdan v. Rumsfeld*, No. 04-702, at 10; Resp. Br., *Loving v. United States*, No. 94-1966, at *16; U.S.Br., *United States v. Moussaoui*, No. 03-4792, 2003 WL 22519704 at *25 (4th Cir. 2003); Appellee Br., *Boumediene v. Bush*, Nos. 05-5062, 05-5063, 2005 WL 1387147 (D.C. Cir. 2005), at 15; Appellant Br., *Padilla v. Hanft*, No. 05-6396, 2005 WL 1656804 (4th Cir. 2005).

justified not as ancillary to the invasion of Iraq but rather by the far more amorphous rubric of the "war" on terrorism. That "war" manifestly is not a war in any sense of that term against any nation or well-defined enemy, nor is it a war with any definable geographic arena of conflict, nor a war in which one can pinpoint a date when hostilities end, and it most assuredly is not a war ever declared by Congress. In an undeclared war, unbounded by time, place or the identity of the enemy, the court of appeals radically extended legal precedents set during conventional wars.

The application of conventional-war concepts to a war on terrorism (where terrorism is an identifiable *method*, rather than an identifiable *enemy*) raises profound legal issues with which this Court in due course will grapple. Many of these questions, including those surrounding the President's use of troops and armaments, are not presented here. This case challenges (1) a commission without explicit Congressional authorization, (2) in a place far removed from hostilities, (3) to try an offense unknown to the laws of war, (4) under procedures that flout basic tenets of military justice, (5) against a civilian who contests his unlawful combatancy.

The court of appeals gave the President the authority and power to launch a commission in each circumstance. That any one of them, by itself, might merit certiorari, due to the departure from norms of Article III and court-martial adjudication, is incontrovertible. Taken together, they present questions of enormous importance on which the Court's guidance is needed, just as it was in *Quirin*, where the Court sat in Special Term despite the exigencies of war:

> In view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay, we directed that petitioners' applications be set down for full oral argument at a special term of this Court.

317 U.S. at 19. The Court did not wait until the defendants were convicted, echoing the dispatch it applied in other

cases involving separation of powers challenges even when life imprisonment and the death penalty were not at stake.[4] *See also Eisentrager, supra* (certiorari from military commission); *In re Yamashita*, 327 U.S. 1 (1946); *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864). Indeed, the flurry of legislative activity preceding William McCardle's pretrial commission challenges suggests the way the Court has handled them in the past. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869); *Ex parte McCardle*, 73 U.S. (6 Wall.) 318 (1868).

For the reasons that follow, "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). The decision below also is inconsistent with those of other courts of appeal in multiple ways.

### A. The Court of Appeals Erroneously Decided that the AUMF and UCMJ Authorize this Military Commission

1. *Petitioner's military commission violates the separation of powers.* The court of appeals' decision conflicts deeply with the fundamental principles set forth in this Court's landmark *Milligan* opinion. "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction," for the Constitution "is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." 71 U.S. at 120-21, 127.

Today, the President's unilateral creation of commissions, his single-handed definition of the offenses and persons subject to their jurisdiction, and his promulgation of the

[4] *E.g., Dames & Moore v. Regan*, 453 U.S. 654 (1981) (certiorari before judgment granted); *United States v. Nixon*, 417 U.S. 927 (1974); *Wilson v. Girard*, 354 U.S. 524, 526 (1957); *Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. Krueger*, 351 U.S. 470, 473 (1956); *Youngstown*, 343 U.S. at 588-89; *cf. Mistretta v. United States*, 488 U.S. 361, 371 (1989).

rules of procedure combine to violate separation of powers. Yet the court of appeals did not even mention *Milligan*.

This disregard of *Milligan* might be explained by the subsequent *Quirin* case. But see *Duncan*, 327 U.S. at 322-24 (relying on *Milligan*).[5] Without this Court's direction, *Quirin* quite simply is too unstable an edifice on which to build further expansions of presidential power. See *Hamdi*, 124 S. Ct. at 2670 n.4 (Scalia, J., dissenting) ("The plurality's assertion that *Quirin* somehow 'clarifies' *Milligan* is simply false…[T]he *Quirin* Court propounded a mistaken understanding of *Milligan*; but nonetheless its holding was limited to 'the case presented by the present record,' and to 'the *conceded facts*,' and thus avoided conflict with the earlier case.") (internal citations omitted); *id.* at 2682 (Thomas, J., dissenting); P. O'Donnell, *In Time of War* 255 (2005) (stating that, in writing *Quirin,* Chief Justice Stone thought stripping JAG review and other aspects "probably conflict[ed]" with the Articles of War but the men had been executed); *id.* 265 (describing criticisms of Frankfurter, J., Douglas, J., and others); Danelski, *The Saboteurs' Case*, J. S. Ct. Hist. 61 (1996).

If *Quirin* is to have such unbounded vitality sixty years later to subject people to death and life imprisonment, in the wake of much criticism from members of the Court (including those in the *Quirin* majority) and elsewhere, its resurrection–and an overruling of *Milligan*'s core-must come from the Court, in a case squarely presenting the issue.

2. *The AUMF does not authorize military commissions*. The

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[5][The Founders] were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws….We have always been especially concerned about the potential evils of summary criminal trials…*see Milligan*. Legislatures and courts are not merely cherished American institutions; they are indispensable to our Government.

. . . [T]he only [other] time this Court had ever discussed the supplanting of courts by military tribunals in a situation other than …recently occupied enemy territory, it had emphatically declared that "civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish." *Milligan*.

*Duncan*, 327 U.S. at 322-24; see *Reid,* 354 U.S. at 30 (plurality) (describing *Milligan* as "one of the great landmarks in this Court's history").

panel analogized the AUMF to the Declaration of War in World War II, finding that in authorizing "force," Congress also implicitly authorized commissions. The AUMF is conspicuously silent on the subject. While "force" implies the power to detain those captured in battle, it does not imply a power to set up judicial tribunals far removed from zones of combat or military occupation. "Such a latitudinarian interpretation…would be at war with the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority." *Reid v. Covert*, 354 U.S. 1, 30 (1957) (plurality).

The court of appeals broadly read *Hamdi v. Rumsfeld*, *supra*, to suggest that military commissions may try U.S. citizens. App. 6a.[6] But *Hamdi* dealt only with detention, not trial.[7] While the law on detention has changed somewhat since World War II, the law of military trial has changed dramatically. Moreover, Mr. Hamdi faced detention because he bore arms against U.S. forces on the Afghani battlefield. Here, Respondents do not rest upon the Afghani conflict, but rather upon Petitioner's purported status as a member of al Qaeda. And there are deep questions as to whether the procedure relied upon by the court of appeals to say that

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[6] *Hamdi* expressly declined to rule on the scope of the President's authority. 124 S. Ct. at 2639 (plurality). It emphasized that the AUMF only authorized continuing detention of individuals who were confirmed enemy combatants, whose status had to be determined "in a proceeding that comports with due process." *Id.* at 2643. And it repeatedly looked to the GPW to outline government powers. *Id.* at 2641 (citing Art. 118 and article mentioning Arts. 85, 99, 119, 129); *id.* (stating that "our understanding is based on longstanding law-of-war principles").

[7] *Hamdi*'s historical description is not in dispute: "The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.' *Ex parte Quirin,* 317 U.S. at 28." 124 S. Ct. at 2640. But even this does not answer the question of what type of tribunal can try such combatants. *See also id.* (referring to "mere detention"); *id.* at 2643 (stating that *Quirin* is "the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances").

Justice Thomas' opinion in *Hamdi*, which Respondents relied upon to suggest a fifth vote for the lawfulness of commissions, was carefully circumscribed to detention, mentioning the term (or derivations of the term such as "detain") over forty times. *Id.* at 2674, 2677-85. Justice Thomas acknowledged that *punishment* stands on an entirely different footing than detention, specifically isolating the *Milligan* case. *Id.* at 2682.

Hamdan is an "enemy combatant" subject to a commission meets the requirements of *Hamdi*. To avoid confusion about the reach of *Hamdi* is ample reason itself for certiorari.

Moreover, the court of appeals' conflation of the AUMF with a Declaration of War creates a circuit split. The Court of Appeals for the Armed Forces has precluded military jurisdiction over civilians because, under the UCMJ, the "words 'in time of war' mean …a war formally declared by Congress" and "a strict and literal construction of the phrase 'in time of war' should" confine jurisdiction. *United States v. Averette*, 19 C.M.A. 363, 365 (1970); *see Zamora v. Woodson*, 19 C.M.A. 403 (1970) (holding that "in time of war" means "a war formally declared by Congress," and that Vietnam did not qualify); *Robb v. U.S.*, 456 F.2d 768 (Ct. Cl. 1972) (similar).[8]

3. *There is a substantial question as to whether the laws of war permit commission trial of Petitioner*. In other recent authorizations of force, such as those for Iraq and Vietnam, the United States has not used military commissions. The AUMF lacks even the traditional tether of an authorization confined to a specific nation-state or a specific conflict; it permits force when "terrorism" is at issue. That the President can exercise power over armaments and troops to fight terrorism anywhere is unquestionable under domestic law; but the AUMF does not give the President the further ability to redefine the laws of war. And this Court has never found that the laws of war authorize commissions, and their attendant supplanting of open civil and military courts, in circumstances where only "force" was authorized.

In the World War II cases relied upon by the court of appeals, commissions tried crimes in a war between nation-states. There was no question as to whether the conflict implicated the laws of war. Equally there was no serious

[8] Additional circuit conflict exists regarding the need for explicit authorization. *Compare El Shifa Pharm. Indus. v. United States* 378 F.3d 1346, 1362 (Fed. Cir. 2004) (not requiring explicit statutory authority under *Quirin*) *with Padilla v. Hanft*, 2005 U.S. Dist. LEXIS 2921, *24 (D.S.C. Feb. 28, 2005) (requiring specific authorization) (currently on appeal); *Padilla v. Rumsfeld*, 352 F.3d 695, 716 (2d Cir. 2003) (requiring "clear congressional authorization" under *Quirin*), *rev'd on other grounds*, 542 U.S. 426 (2004).

factual question as to whether the defendants fell within the jurisdiction of commissions. The question was answered in all but the case of the American citizen in *Quirin* by the fact that the accused was a citizen of a country with which we were at war and therefore an enemy.[9] *E.g.*, *Eisentrager*, 339 U.S., at 772-73 ("when two states are at war, the citizens of each state regard in war, the subjects of each country were enemies to each other, and bound to regard and treat each other as such") (citations omitted). Al Qaeda, however, is not a nation state. An accused's enemy status cannot be determined simply by citizenship. The facts are not undisputed as to whether the accused is in fact an enemy within the laws of war. This case more closely resembles the Civil War cases, where the nature of the conflict and the status of detained individuals were both open to question.

The Court determined when the civil war began by looking to the "common law" test of whether "the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open[.]" *The Prize Cases*, 67 U.S. 635, 667 (1862); *id.*, at 682 (returning certain seized property because the war had not yet begun). *Milligan* followed that test, examining whether the courts were "open." 71 U.S., at 121. It did so, notably, even though the Government told the Court that Lambdin Milligan was an unlawful combatant who "plotted to seize" arsenals and "conspired with and armed others." *Id.* at 17.

Yet here, the court of appeals has pointed to no source of law showing that a specific act in this conflict or this specific offender is prosecutable by a commission. The question of whether the AUMF makes this case more like *Quirin* or *Milligan* cannot be dealt with *sub silentio*; there must be some showing that the laws of war permit such commissions.

Such a showing is particularly important because the

[9] *Quirin* found that notwithstanding Haupt's U.S. citizenship the undisputed fact that he had joined the German military made him an enemy under "the Hague Convention and the law of war." 317 U.S. at 38. Haupt's relatives on the other hand were properly tried by civilian courts because they had not joined the German military and therefore could not be considered enemies under those laws of war.

panel found that the conflict was neither an international armed conflict covered by the Geneva Conventions, nor an internal armed conflict covered by Common Article 3. App. 10a-13a. If the laws of war do not recognize this conflict, however, commissions cannot proceed, for their jurisdiction is set by "the common law of war." *Vallandigham*, 68 U.S. at 249; 15a. The law of war is a body of international law "established by the usage of the world." *Dooley v. United States*, 182 U.S. 222, 231 (1901); see also Manual for Courts-Martial, Part I, Preamble. As Colin Powell warned, a finding that the Geneva Conventions do not apply "undermines the President's Military Order by removing an important legal basis for trying the detainees before Military Commissions." Secretary of State Memorandum, Jan. 26, 2002, http://msnbc.msn.com/id/4999363/site/newsweek.

Indeed, when Congress defined war crimes in 18 U.S.C. 2441, it defined them as violations of the Geneva Conventions, Common Article 3, and the Hague Convention and Mining Protocol. If these sources of law do not apply, a common-law commission has no offense to try. *See Quirin,* 317 U.S. at 29-31 (examining whether charge violates the laws of war and looking to Congress and common-law). Nothing in the AUMF suggests that Congress enabled the President to try charges that stray from the laws of war. If the panel correctly determined that this conflict falls outside of the GPW, then commissions lack authority to operate.

The essence of the court of appeals' contrary position is that while Petitioner has no rights under the Constitution, treaties, common-law, and statutes, he is subject to the penalties and pains of each. This Court has always rejected such claims. *See Milligan*, 71 U.S. at 131 ("If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?"). The court of appeals' complete disregard of *Milligan* raises more questions than it answers.

It might be thought, as the court below suggested, that Petitioner, an alien, has no rights (unlike Milligan). App. 4a-5a (citing cases). That claim, however, militates in favor of

certiorari, for it appears to ignore *Rasul v. Bush* and other decisions of this Court.[10] Indeed, the Second Circuit, Fifth Circuit, Federal Circuit, and U.S. Court for Berlin have all declined to follow the D.C. Circuit on this question.[11] But the Ninth Circuit has followed it. *United States v. Davis*, 905 F.2d 245 (9th Cir. 1990). Certiorari is appropriate to resolve the basic question of whether those facing trials at Guantanamo can assert *any* constitutional protection.[12] To convene trials without an answer to that basic question when the courts are in such flux is to countenance human experimentation.

4. *The UCMJ does not authorize this military commission*. The court of appeals relied on 10 U.S.C. 821 as authorization for commissions, but failed to acknowledge the limits on jurisdiction established by that very statute.[13] It lacks any

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[10] 124 S. Ct. 2686, 2698 n.15 (2004) ("Petitioners' allegations …unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. 2241(c)(3). *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring), and cases cited therein"); *id.* at 2700 (Kennedy, J., concurring) ("Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities"). It is separately in tension with *Zschernig v. Miller*, 389 U.S. 429 (1968), and *Asahi Metal v. Superior Court*, 480 U.S. 102 (1987), which permit nonresident aliens to raise constitutional objections.

[11] *See Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 762 (2d Cir. 1998) (permitting Libya to assert that Foreign Sovereign Immunities Act "unconstitutionally delegate[d] legislative power"); *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992) (applying due process clause to Guantanamo), *vacated as moot sub nom. Sale v. Haitian Ctrs. Council*, 509 U.S. 918 (1993); *Canal Zone v. Scott*, 502 F.2d 566, 569 (5th Cir. 1974) (applying Sixth Amendment); *United States v. Tiede*, 86 F.R. D. 227, 242, 249, 259 (U.S. Ct. Berlin 1979)("there has never been a time when United States authorities exercised governmental powers in any geographical area--whether at war or in times of peace--without regard for their own Constitution. *Ex parte Milligan*….[T]he *Insular Cases* do not apply when the United States is acting as prosecutor in its own court" finding *Milligan* a chief restraint on military tribunals); *El Shifa*, 378 F.3d at 1352 ("[W]e decline to hold, as the government asks, that the Takings Clause does not protect the interests of nonresident aliens").

[12] Indeed, one district court has held that Guantanamo detainees are entitled to constitutional rights, and another has disagreed. *Compare In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 464 (D.D.C. 2005) ("In light of the Supreme Court's decision in *Rasul*, it is clear that Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply.") *with Khalid v. Bush*, 355 F. Supp. 2d 311, 321 (D.D.C. 2005). Both decisions are on appeal.

[13] 10 U.S.C. 821 provides: "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with

affirmative statement of jurisdiction. Neal Katyal & Laurence Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1280-93 (2002). And Respondents point to no law that identifies Petitioner as an "offender" or conspiracy as a triable "offense" under it. Indeed, their reading transforms the statute into an unconstitutional delegation of power. *Id.*, at 1290.[14]

Far from authorizing the commission trying Mr. Hamdan, Congress forbade it. 10 U.S.C. 3037(c) provides:

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

"The Judge Advocate General adds integrity to the system of military justice by serving as a reviewing authority." Louis Fisher, *Military Tribunals and Presidential Power* 124 (2005). But the Military Order cuts the JAG, who is presidentially appointed and Senate confirmed, entirely out of the process.

Moreover, Congress has forbidden two-track justice whereby a non-citizen is "subject to…different punishments, pains, or penalties, on account of such person being an alien." 18 U.S.C. 242.[15] By its very terms, the Military Order funnels non-citizens, and only non-citizens, through this separate and unequal system. No commission has taken such a step; past ones, including the one in *Quirin*, applied to

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respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals."

Congress has not had occasion to modify 10 U.S.C. 821 since commissions have not been used since World War II. Congress' silence suggests little, since a bicameral supermajority is needed to correct a court interpretation of a statute that gives the President unintended authority. See U.S. Const. art. I, § 7, cl. 2 (veto override clause); White House, Statement of Policy, July 21, 2005 (stating that AUMF should not be altered and recommending veto of bill to govern detention and trial of enemy combatants).

[14] *See Clinton v. City of New York*, 524 U.S. 417, 449-53 (1998) (Kennedy, J., concurring); *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 545 (1981) (Rehnquist, J., dissenting); *Cal. Bankers Ass'n v. Schultz*, 416 U.S. 21, 91-93 (1974) (Brennan, J., dissenting); *Panama Refining. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry v. United States*, 295 U.S. 495 (1935).

[15] See also 42 U.S.C. 1981 ("[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons.")

citizens and aliens alike. Today's two-track system means, in effect, that it is difficult for the legislature to modify statutes that have been read to authorize commissions. "[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Ry. Express v. N.Y.*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

The Military Order therefore wanders far beyond the "zone of twilight" of concurrent authority. The court of appeals' effort to squeeze every drop of meaning from the AUMF and other statutes cannot authorize *this* system of tribunals. Here, the President's powers are at their "lowest ebb." *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring). To sustain the commission in this case, when Respondents have ignored statutory constraints on its jurisdiction, procedures, and composition, jeopardizes the "equilibrium established by our constitutional system." *Id.*[16] Congress, after all, is vested with the power to "define and punish . . . Offenses against the Law of Nations." U.S. Const. art. I. § 8, cl. 10.

5. *The court of appeals erroneously decided that the UCMJ does not require the presence of the accused at all stages of his trial.* The court of appeals found the commission authorized by 10 U.S.C. 836, which provides that procedures prescribed by the President for commissions "may not be contrary to or inconsistent with" the UCMJ. But that very statute forbids Petitioner's commission. As the district court put it, while

[16] For example, the court of appeals' decision would apparently permit hundreds of terrorism cases to be transferred out of civilian courts to commissions, supplanting the careful jurisprudence and procedures of Article III courts and courts-martial. See Danny Hakim, *After Convictions, the Undoing of a Terror Prosecution*, N.Y. Times, Oct. 7, 2004, at A1 (describing Article III oversight of prosecutorial abuse, particularly access to exculpatory information, in Detroit terrorism cases); U.S. Dept. of Justice, United States Attorneys' Annual Statistical Report, FY 2003, at 21 (572 terrorism cases against 786 defendants filed in FY2003); U.S. Dept. of Justice, United States Attorneys' Annual Statistical Report, FY 2002, at 21 (1046 terrorism cases filed against 1112 defendants).

"the language of Article 36 does not require rigid adherence to all of the UCMJ's rules for courts-martial…I cannot stretch the meaning of the Military Commission's rule enough to find it consistent with the UCMJ's right to be present." App. 42a, 46a. The court also found support for the right to be present in *Crawford*, 124 S. Ct. at 1363, where the Court recognized the right as ancient, "founded on natural justice."

*Quirin* and its progeny never authorized a commission to violate basic precepts of military justice, such as the right to be present. Yet as the district court held, Hamdan's commission has *already* violated that right. For what very well may be the first time since the Founding, a nondisruptive criminal defendant has been ejected from his own trial. This did not happen in *Quirin*, despite the most highly classified and damaging state secrets at issue in the trial, nor will it happen in Iraq or American courts-martial.[17] And there is absolutely no legal basis for it to happen here, at least in the absence of a statute authorizing such a dramatic departure from our traditions.

Hamdan is being tried by the first commission ever in which the UCMJ applies.[18] Even before the UCMJ, of course, fundamental rights from courts-martial extended to

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[17] *See* Amicus Br. of Noah Feldman, *Hamdan v. Rumsfeld*, D.C. Cir., http://www.law.georgetown.edu/faculty/nkk/documents/feldman.pdf.

[18] The UCMJ, unlike the predecessor Articles of War, extends its protections to leased territories, like Guantanamo, controlled by the Secretary of Defense. *Compare Yamashita,* 327 U.S. at 20 (stating that Yamashita was "not a person made subject to the Articles of War by Article 2") *and Quirin*, 317 U.S. at 47, *with* 10 U.S.C. 802(12) (expanding those "subject to this chapter" to "persons within an area leased by" the U.S. and subject to defense secretary control).

The court of appeals' narrow reading of 836 fails to give effect to its plain language, which requires that commission procedures not be contrary to or inconsistent with "this chapter," i.e., with the UCMJ, not just a handful of provisions in the UCMJ where the words "military commissions" appear. Under its reading, the President is constrained by UCMJ 849(d), governing deposition transcripts being read into evidence, but not by the UCMJ's fundamental requirement, in 839, that the accused be present for all stages of his own trial. If concerns for fundamental fairness in commission proceedings prompted Congress to regulate details like the introduction of deposition testimony, then it seems highly likely that Congress also intended the right to be present to be guaranteed. Indeed, there is no support for the court of appeals' narrow reading of 836 in any applicable military law or precedent of this Court.

commissions. Colonel Winthrop, "the Blackstone of Military Law," *Reid*, 354 U.S. at 19 n.38, recognized the "general rule, that military commissions are constituted and composed, and their proceedings are conducted, similarly to general courts-martial…Where essential, indeed, to a full investigation or to the doing of justice, these rules and principles will be liberally construed and applied." Winthrop, *Military Law and Precedents* 835 n.81, 842 (2d ed. 1920) (citations omitted); Act of July 2, 1864, 13 Stat. 356 (extending court-martial provisions to commissions).

The right to be present is universal, echoed in pronouncements of this Court, e.g., *Lewis v. United States*, 146 U.S. 370, 372, 375 (1892); common law; international law; and the UCMJ, 10 U.S.C. 839. In the Civil War, the JAG exercised his review, a power stripped in today's commissions, to invalidate a conviction for denying presence:

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

Neely, *The Fate of Liberty* 162 (1991) (quoting Holt's opinion).

While the court of appeals recognized that commissions are "commonlaw war courts," App. 15a, it failed to apply longstanding guarantees of presence and confrontation. The result is to break from every commission precedent. *Quirin* and *Eisentrager* do not permit such a result.

### B. The Court of Appeals' Erroneous Failure to Enforce the Geneva Conventions Conflicts With Other Circuits

1. *The court of appeals mischaracterized the issue*. Mr. Hamdan's habeas claim asserts that his detention is illegal under the 1949 GPW. The fatal flaw in the court of appeals' analysis of that claim is its conclusion, based on *Eisentrager,* that "the 1949 Geneva Convention does not confer upon

Hamdan a right to enforce its provisions in court." App. 11a. The court stated that international agreements "do not create private rights or provide a private cause of action." *Id.* 8a. But this misapprehends the central issue, which, under the habeas statute, is the legality of detention, not one's standing to assert a private right of action. The former inquiry properly focuses on the conduct of the detaining authority, where attention should be in a habeas action, while the latter often, as here, poses vexing and often unnecessary questions of constitutional and international law. The district court cut through that Gordian knot by observing that "Hamdan has not asserted a 'private right of action' under the Third Geneva Convention." App. 34a. Rather, he alleges that he is being held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2241(c)(3).

Moreover, quite apart from the habeas aspect of this case, "it is axiomatic that, while treaties are compacts between nations, 'a treaty may also contain provisions which confer certain rights upon…subjects of one of the nations…which are capable of enforcement as between private parties in the courts of the country.'" *Medellin v. Dretke*, 125 S. Ct. 2088, 2099-2100 (2005) (O'Connor, J., dissenting, joined by Justices Stevens, Souter, and Breyer) (quoting *Head Money Cases*, 112 U.S. 580, 598 (1884)). The panel lost sight of this fact, as its truncated quotation from *Head Money Cases* reveals. App. 7a.

The court of appeals also lost sight of the fact that "[t]his Court has repeatedly enforced treaty-based rights of individual foreigners, allowing them to assert claims arising from various treaties. These treaties…do not share any special magic words. Their rights-conferring language is arguably no clearer than the Vienna Convention's is, and they do not specify judicial enforcement." *Medellin*, 125 S. Ct. at 2104 (O'Connor, J., dissenting) (citing cases).

2. *The court of appeals misread Eisentrager.* The court of appeals based its holding primarily on *dicta* in *Eisentrager* concerning a different treaty, the 1929 Geneva Convention. *Eisentrager* held that alien enemy combatants did not have habeas rights. That portion of *Eisentrager* is no longer good

law after *Rasul* held that such combatants could file such petitions. After deciding the habeas issue, *Eisentrager* stated that the 1929 Convention did not protect the defendants. It further stated, in what three Justices criticized as "gratuitous" *dicta*, 339 U.S. at 794 (Black, J., dissenting, joined by Douglas, J., and Burton, J.)) that "responsibility for observance and enforcement of these rights is upon political and military authorities." *Id.* at 789 n.14.

From this *dicta*, the court of appeals erroneously concluded that Hamdan could not enforce the GPW. But the *Eisentrager* Court considered a different issue than that raised by Hamdan—whether, separate from the habeas petition (a right denied by that opinion), an alien enemy combatant had an independent cause of action under the 1929 Convention. *Eisentrager* had to have considered this claim as a cause of action independent from the habeas petition or the first part of the opinion would have wholly foreclosed its consideration. Unlike petitioners in *Eisentrager*, Hamdan claims in a habeas petition (his right being confirmed under *Rasul*), that his detention is inconsistent with the laws and treaties of the United States, including the 1949 GPW. Were habeas law as found by the court of appeals below, no habeas petitioner could assert a valid claim unless the statute or treaty invoked expressly conferred a cause of action or judicially enforceable private rights. Because few treaties or statutes contain such express provisions, such a holding would largely eviscerate habeas rights in all but the most limited of circumstances.

The court of appeals' interpretation of the 1949 GPW, based on some phrases in a footnote about the 1929 Convention, is unpersuasive. This Court has repeatedly enforced treaty-based rights for the benefit of individuals who invoke them, even where those treaties had diplomatic enforcement provisions. *See, e.g.*, *Chew Heong v. United States*, 112 U.S. 536 (1884); *Kolovrat v. Oregon*, 366 U.S. 187, 198 (1961); *Jordan v. Tashiro*, 278 U.S. 123, 130 (1928); *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924).

The very first Article of the GPW requires the Parties "to

respect and to ensure respect for the present Convention in all circumstances." In this country, an essential part of the legal structure that ensures such compliance is the power of Article III courts to interpret and enforce treaties under the Judiciary and Supremacy Clauses, U.S. Const. art. III, § 2, cl. 1; art. VI, § 2, and under the habeas statute. The court of appeals would abdicate this responsibility, yielding to a demand for deference from the President. But this Court, not an intermediate court, must settle the question:

> The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import . . . must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one SUPREME TRIBUNAL.

FEDERALIST No. 22, at 150 (Hamilton) (Rossiter ed. 1961).

Finally, even if the court of appeals had read *Eisentrager* properly, certiorari would still be appropriate to allow this Court to consider the vitality of *Eisentrager* in the aftermath of *Rasul* and the half-century of other developments in national and international law. *See, e.g.*, *Medellin*, 125 S. Ct. at 2105 ("In the past the Court has revisited its interpretation of a treaty when new international law has come to light") (O'Connor, J., dissenting).

The case for reevaluation here is particularly compelling, since the specific treaty provisions at issue in *Eisentrager* have been reversed. In words ignored by the panel below, *Eisentrager* found that, under the 1929 Convention, the individual-rights provisions invoked by the Petitioners *did not* "appl[y] to a trial for war crimes." 339 U.S. at 789.[19] GPW Article 85 was written to *reverse* that interpretation, which originally came from *Yamashita*, 327 U.S. at 22. Yet the panel wrongly insisted, citing anachronistic passages from *Eisentrager*, that the 1929 Convention "protects individual rights." App. 10a. In Eisentrager's time, it didn't. Now the GPW does. By characterizing the 1929 Convention as protecting Eisentrager's rights, the panel erroneously

[19] GPW Arts. 85 and 102 and Art. 146 of the Fourth Convention specifically broke from these limitations and revolutionized the protection of individual rights in war. See, e.g., Geoffrey Best, *War and Law Since 1945* 80-114 (1994).

sidestepped the Court's many precedents, such as the *Head Money Cases*, 112 U.S. at 598, which require enforcement when treaty-based individual rights are at issue.[20]

3. *The court of appeals created a circuit split*. At least two circuits have recently emphasized the distinction between a treaty's creation of a private cause of action and a treaty's creation of rights enforceable through *otherwise available* causes of action, such as the habeas statute. *See Wang v. Ashcroft*, 320 F.3d 130, 141 (2d Cir. 2003) (emphasizing that serious constitutional questions might arise were aliens not entitled to bring habeas claims asserting rights under the Convention Against Torture, CAT, a non-self-executing treaty); *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 218-20 & n.22 (3d Cir. 2003). *See also Auguste v. Ridge*, 395 F.3d 123, 137 (3d Cir. 2005); *Cadet v. Bulger*, 377 F.3d 1173, 1181-82 (11th Cir. 2004); *Singh v. Ashcroft*, 351 F.3d 435, 441-42 (9th Cir. 2003); *Saint Fort v. Ashcroft*, 329 F.3d 191, 202 (1st Cir. 2003). Notably, decisions such as *Wang* and *Ogbudimkpa* enforced rights conferred by a non-self executing treaty despite explicit language in the statute executing the treaty to deny federal jurisdiction. *See* Foreign Affairs Reform and Restructuring Act §2242 (1998), 8 U.S.C. 1231 n. ("[N]othing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under" CAT). The courts held that *INS v. St. Cyr*, 533 U.S. 289 (2001), required that habeas review be preserved and afforded to the petitioners, because Congress had not made the clear, unambiguous statement necessary to preclude such review

In contrast, the panel in this case was of the view that hardly any treaty-based rights are capable of judicial enforcement. That broad statement not only conflicts with

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[20] In addition, *Eisentrager* did not involve the provision of the habeas statute at issue here, 28 U.S.C. 2241(c)(3). Eisentrager asserted only one type of habeas jurisdiction, that for "being a citizen of a foreign state and domiciled therein…in custody for an act done or omitted under any alleged…sanction of any foreign state…the validity and effect of which depend upon the law of nations." 28 U.S.C. 2241(c)(4); Br. for Resp't, *Johnson v. Eisentrager*, at 2, 24-26. The Court in *Eisentrager* had no cause to answer the question of whether 2241(c)(3) makes the Geneva Convention, either of 1929 or 1949, enforceable.

this Court's longstanding recognition of habeas as a remedy for treaty violations, *Mali v. Keeper of the Common Jail,* 120 U.S. 1 (1887); taken to its logical extreme, it also reads out of the plain-text of 2241(c)(3) a guarantee that habeas is available for violations of "treaties of the United States."

The case for Hamdan's protection under the Geneva Conventions is far stronger than that presented in the other Circuits, since the court below read two statutes, 10 U.S.C. 821, 836, to authorize commissions. Those statutes must be interpreted consistently with international law, for "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," *The Charming Betsy*, 6 U.S. at 118; U.S. Petr. Br., No. 04-1084, *Gonzales v. O Centro Espirita Etc.*, at 41-47 (relying heavily on *Charming Betsy* to interpret RFRA); *Reid*, 354 U.S., at 18 n.34 ("By the constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation…(I)f the two are inconsistent, the one last in date will control") (internal citations omitted) (plurality); *Cook v. United States*, 288 U.S. 102 (1933). Even if Hamdan is not protected by 2241(c)(3)'s reference to "treaties," he is thus protected by its reference to "custody in violation of the … laws…"

Finally, even if the GPW does not allow the courts any role in its enforcement, the court of appeals' reliance on *Eisentrager* predates Army Reg. 190-8, §1-6(a), which implements the GPW, as recognized by Souter, J., concurring in the judgment in *Hamdi*, 124 S. Ct. at 2658. It is well-settled that such regulations are judicially enforceable. *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959); *Service v. Dulles*, 354 U.S. 363, 388 (1957). The panel's claim that the President is "competent authority" to make a status determination of Petitioner, a determination essential to providing a commission with jurisdiction, is questionable, and raises conflicts with *Hamdi*.

It may be that this Court will ultimately conclude that the court below reached the right result regarding the 1949 Conventions. But our nation's most important trials in the wake of September 11 simply cannot rest on one sentence of *dicta* in a footnote of a 55-year old case.

4. *The court of appeals misinterpreted the GPW*. Under GPW Article 5, if any doubt exists as to whether an individual is entitled to its protections, that person must be afforded all protections "until such time as their status has been determined by a competent tribunal."

GPW Art. 102 provides that persons "can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power." The district court duly held that a commission "is not such a court. Its procedures are not such procedures." App. 29a.

The court of appeals, however, vested the President with the ability to declare entire conflicts and groups not eligible for the above protections. As the district court recognized, such a decision not only imperils relationships with other nations, it also threatens the ability of our Government to demand compliance with the Geneva Conventions when American troops are captured. App. 34a.[21]

The court also claimed that the GPW does not apply to Petitioner because he is a member of al Qaeda. Not only is the factual premise in doubt, Respondents' interpretation is also refuted by the language and structure of the Convention itself. That language applies in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." GPW, Art. 2. Petitioner was captured in Afghanistan, and Afghanistan and the United States are High Contracting Parties.

The court of appeals suggested that Mr. Hamdan did not meet the criteria for a POW in GPW Art. 4(a)(2). Apart from the problem that Mr. Hamdan denies being part of al Qaeda,

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[21] During World War II, when Japanese Judge-Advocates tried our soldiers in a military commission that, *inter alia*, deprived American soldiers of the right to participate and violated Japanese rules for courts-martial, America responded by prosecuting the Japanese attorneys in our own commissions, despite Japan's claim that unlawful combatants have no rights. *United States v. Uchiyama* Tr., Case 35-36, War Crimes Branch, JAG Records, at 20 (Prosecution's opening statement: "[The accused] applied to them a special type of summary procedure which failed to afford them the minimal safeguards for the guarantee of their fundamental rights which were given them both by the written and customary laws of war."). See Jess Bravin, *Will Old Rulings Play a Role in Terror Cases?*, Wall St. J., Apr. 7, 2005, at B1 (providing other examples of American military commissions prosecuting Japanese JAGs for not providing Geneva Convention and other protections to our captured troops in Japanese war-crimes trials); App. 81a-95a.

his claim for POW status has always rested on other provisions, including GPW Art. 4(a)(1) and (4), as well as Common Article 3. The four requirements mentioned by the court below are not at issue.

Respondents wrongly claim that the Executive's interpretation of a treaty is conclusive and unreviewable. *See, e.g.*, *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933). The district court correctly applied the longstanding canon that "where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred." *United States v. Stuart*, 489 U.S. 353, 368 (1989) (internal citation omitted).

5. *This court should grant certiorari to resolve the split in authority about Common Article 3*. The divided court below held that Mr. Hamdan is not protected by this Article. It agreed with Respondents that the conflict against al Qaeda was "separate" from the Taliban (who controlled Afghanistan), and that the Article does not extend to armed conflicts against non-state entities. This holding directly conflicts with *Kadic v. Karadzic*, where the Second Circuit held that "all 'parties' to a conflict–which includes insurgent military groups–are obliged to adhere to these most fundamental requirements of the law of war." 70 F.3d 232, 243 (2d Cir. 1995); *see also Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1351 n.39 (N.D. Ga. 2002).

The circuit court conflict regarding Common Article 3 is replicated in this very case, as Judge Williams stated:

> [T]he logical reading of 'international character' is one that matches the basic derivation of the word 'international,' i.e., *between nations*. Thus, I think the context compels the view that a conflict between a signatory and a non-state actor is a conflict 'not of an international character.' In such a conflict, the signatory is bound to Common Article 3's modest requirements.

App. 16a-18a (Williams, J., concurring). To not apply Article 3, moreover, would remove any basis for commissions to exist or to try offenses. See pp.14-16, *supra*. "[A]s a matter of law, there can be no wars in which one side has all the rights and the other has none." Intl. Comte. Red Cross, *International Humanitarian Law*, at 19 (2003) http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5XRDCC/$File/IHLcontemp_armedconflicts_FINAL_ANG.pdf.

**C. The Court Should Hear this Case Now**

1. Mr. Hamdan faces the first commission since the ratification of the Geneva Conventions and the enactment of the UCMJ. The court of appeals, lacking modern guidance from this Court, had to rely on precedent that predated these developments. But 1942 law, even clear 1942 law, is simply not good enough to decide a case of such gravity.

This case squarely and robustly presents the issues on which the Court's guidance is needed. Petitioner did not receive an Article 5 hearing under the GPW or under AR 190-8 before his criminal trial began; he is being prosecuted in the name of the laws of war, and the President has invoked 10 U.S.C. 821, 836. He receives different protections than all others who face courts-martial under the UCMJ, and his right to be present has already been taken away.

As the court of appeals held, Mr. Hamdan challenges the legitimacy and jurisdiction of the commission, so "setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction." App. 4a (citing *Abney*, 431 U.S. at 662); *Gilliam v. Foster*, 75 F.3d 881 (4th Cir. 1996) (en banc). To force Hamdan to endure a trial whose legitimacy is not finally resolved will also preview his trial defense for the prosecution, vitiating his rights.[22] This point is particularly salient in the wake of reports that the commission's own prosecutors stated that "the chief prosecutor had told his subordinates that the members of the military commission that would try the first four defendants [which include Hamdan] would be 'handpicked' to ensure that all would be convicted." Neil Lewis, *Two Prosecutors Faulted Trials for Detainees*, N.Y. Times, Aug. 1, 2005, at A1; App 96a-102a.

[22] *See Rafeedie v. INS*, 880 F.2d 506, 517 (D.C. Cir. 1989) (holding that, even in immigration context, a "substantial practical litigation advantage" is lost by forcing someone to go through a summary proceeding because "if he presents his defense in [the summary] proceeding, and a court later finds that section inapplicable to him, the INS will nevertheless know his defense in advance of any [plenary] proceeding; if, however, he does not present his factual defense now, he risks foresaking his only opportunity to present a factual defense").

2. Even hefty appreciation for the passive virtues requires a point at which some guidance *ex ante* is appropriate. Like *Quirin*, this is that point. The court of appeals has said that in this new war, there are virtually no ground rules. If that is to be the law, such a statement must come from this Court.

If the Court were to decline certiorari, it may not have occasion to reach these weighty issues again for many years. In an ordinary trial, dispatch is inherent in speedy-trial guarantees and other time-tested limits. Notably, Respondents have claimed that, unlike any other American civilian or military trials, no speedy-trial rights exist here. A conviction may not happen for many months, if not years. After that, the case is submitted to a Review Panel, and then to the Secretary of Defense or President. There are no time limits on this latter review. Bearing in mind that Petitioner was detained for nearly three years before he was charged, and only received charges after this lawsuit was filed and *Rasul* decided, further delays should be expected.

Once the trial, Review Panel, and President/Secretary determination is made regarding Mr. Hamdan's fate, another multi-year delay is likely. Unlike state courts and courts-martial, no direct appeal exists from the commission process to this Court. Even if Mr. Hamdan received a President/Secretary determination tomorrow, and filed a collateral district court lawsuit that day, the pace of litigation in the D.C. Circuit for even *expedited* cases suggests that it would be October Term 2007 at the earliest before his case would reach the Petition stage. *See, e.g., Rasul*, 124 S. Ct. 2686 (decided June, 2004, scheduled on expedited appeal for argument in D.C. Circuit next month). This two-year schedule is derived from purely federal cases, not ones that also require the discovery, pretrial, and trial procedures of a commission. If the Court does not grant certiorari, the sweeping authority given to the President may be his for several years before the Court has another opportunity to clarify even the most basic ground rules for commissions.

Of course, this Court ordinarily does not sit to clarify rules at the outset of criminal trials. But as Respondents and

the court below have stated, this is not an ordinary trial. The Questions Presented go to the heart of the integrity of our judicial system. Just as wars, once started, cannot be undone, so, too, it is with commission trials. They are not regular courts applying established rules and routines. Rather, they are proceedings where not a single right is guaranteed to the defense, making trial strategy impossible, particularly when they hover under a cloud of legal uncertainty, however much temporarily dissipated by the court of appeals.

In similar cases, such as *Quirin* and *Reid*, certiorari *before* judgment was granted. The propriety of certiorari here is even greater, given the broad lower court decision, the interests at stake, and questions surrounding this Court's precedent. This Court's review of the panel's conclusions, no matter what the outcome, will provide authoritative guidance to the Executive, Congress, bench, bar, and world.

3. Due to the consolidation of all commission litigation in Washington, *Padilla*, 124 S. Ct. at 2725 n.16, the court below has crafted a national holding that affords unprecedented deference to the Executive. No "percolation" is possible, and the Court should decide this case now, before the delicate issue of undoing criminal convictions presents itself.

If commissions are worth conducting, they are worth conducting lawfully and being perceived as so conducted. Deploying them under far-reaching intermediate court decisions or in jurisdictionally dubious contexts can only work a disservice to their potential utility when conducted under legally appropriate ground rules. Before embarking on a dangerous experiment to break not only from common-law and international law, but also from our traditions of military justice, Americans and the rest of the world should rest assured that these principles will not be abandoned without at least review by the highest Court in the land.

## CONCLUSION

The petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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