[Oral Argument Scheduled for May 3, 2012]
No. 11-1257

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

SALIM AHMED HAMDAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Appeal From The Court Of Military Commission Review
(Case No. CMCR-09-0002)

REPLY BRIEF OF PETITIONER SALIM AHMED HAMDAN

Adam Thurschwell
Jahn Olson, USMC
OFFICE OF THE CHIEF DEFENSE
COUNSEL MILITARY COMMISSIONS
1099 14th Street NW
Box 37 (Ste. 2000E)
Washington, D.C. 20006
Telephone: 202.588.0437

Attorneys for Petitioner-Appellant
SALIM AHMED HAMDAN

Harry H. Schneider, Jr.
Joseph M. McMillan
Charles C. Sipos
Rebecca S. Engrav
Angela R. Martinez
Abha Khanna
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: 206.359.8000

Attorneys for Petitioner-Appellant
SALIM AHMED HAMDAN

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The Certificate as to Parties, Rulings, and Related Cases is set forth in Petitioner-Appellant Salim Ahmed Hamdan's Principal Brief filed on November 15, 2011, and is hereby incorporated by reference.

DATED: March 8, 2012

By: /s/ *Charles C. Sipos*
One of the attorneys for Salim Ahmed Hamdan

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GLOSSARY OF TERMS

App. ..... Appendix Submitted with Petitioner's Principal Brief

CIL ..... Customary International Law

CMCR ..... Court of Military Commission Review

DoD ..... Department of Defense

Gov't. Br. ..... Principal Brief of Government

MCA ..... Military Commissions Act, Pub. L. No. 109-366 (2006)

MST ..... Material Support for Terrorism

Pet. Br. ..... Principal Brief of Petitioner Salim Ahmed Hamdan

SUMMARY OF ARGUMENT

The Government now admits that the crime of which Petitioner was convicted, Providing Material Support for Terrorism ("MST"), is not an offense against the "Law of Nations." Under the Define and Punish Clause, U.S. Const. art. I, § 8, cl. 10, Congress's power to punish offenses by military commission is limited to law of war offenses, a subset of international law, i.e., the "Law of Nations." The Government's belated concession—after insisting for five years that MST is a war crime—establishes that the military commission that convicted Petitioner was without subject matter jurisdiction over the offense of MST.

The Government tries to avoid the consequences of its admission by arguing that Congress's general war powers allow it to expand military commission jurisdiction over offenses purportedly recognized by an invented body of law it calls the "U.S. common law of war." It contends that MST is such an offense. Alternatively, it claims that the Necessary and Proper Clause can supplement the Define and Punish Clause to allow a non law of war offense like MST to be tried by

military commission. Neither argument has merit. Unambiguous Supreme Court precedent anchors Congress's power to establish law of war military commissions to the Define and Punish Clause, and rejects reliance on the Necessary and Proper Clause to expand the jurisdiction of military commissions. Likewise, the "U.S. common law of war" is a fiction that has no basis in law and is barred by longstanding precedent repudiating federal common law crimes. Adopting either of these arguments would dangerously expand the jurisdiction of military commissions, encroaching on a core judicial function of Article III courts in violation of separation of powers.

Next, the Government contends Petitioner's conviction did not violate ex post facto, based on its reasoning by analogy that crimes other than MST provided "fair notice" MST could be criminalized as well. But MST was not "defined" by Congress until five years after the charged conduct; the Government's attempts to justify retroactive application of that criminal sanction are unpersuasive.

Finally, the Government responds to Petitioner's equal protection argument by maintaining that Constitutional due process does not

apply at Guantanamo. This argument cannot be squared with *Boumediene v. Bush*, 553 U.S. 723 (2008), which renders those constitutional protections applicable here.

ARGUMENT

I. MST IS NOT TRIABLE BY MILITARY COMMISSION

The first issue presented is whether Congress may, consistent with the Constitution, confer subject matter jurisdiction on a military commission for prosecution of the offense of MST. To date, the premise of this litigation has been that that issue turns on whether MST is an "Offense[ ] . . . Against the Law of Nations" within the meaning of the Define and Punish Clause, U.S. Const. art. I, § 8, cl. 10. That was the issue argued before the Court of Military Commission Review ("CMCR"); that was the issue decided by the CMCR;[1] and that is the issue argued by Petitioner here. *See* Brief of Petitioner Salim Hamdan ("Pet. Br.") 11-48.

[1] *See United States v. Hamdan*, 801 F. Supp. 2d 1247, 1312 (C.M.C.R. 2011) ("Congress exercised authority derived from the Constitution to define and punish offenses against the law of nations by codifying an existing law of war violation into a clear and comprehensively defined offense of providing material support to terrorism.").

Surprisingly, the Government now concedes that MST is not an offense against "the Law of Nations." Brief of the United States ("Gov't. Brief") 48 ("the offense of providing material support to terrorism . . . has not attained international recognition at this time as a violation of customary international law"); 55-56 (same); 61 (same). Having abandoned the CMCR's basis for decision and its own earlier position, the Government raises two new grounds for affirmance.

First, it argues that, although not an offense against the "Law of Nations," MST is nevertheless a crime triable by military commission because it is a crime under the "U.S. common law of war," a domestic law of war distinct from the international law of war. Gov't. Br. 22, 23-47.

Second, because it no longer contends that MST is an "Offense . . . against the Law of Nations," the Government does not argue that the Define and Punish Clause directly authorizes MST to be tried by military commission. Instead, it argues that the Define and Punish Clause, "in tandem with the Necessary and Proper Clause," Gov't. Br. 48, allows Congress to punish MST as a war crime because it is

"necessary and proper" to implementing the United States' treaty obligations to criminalize terrorism. Gov't. Br. 47-65.

Neither claim has merit.

A. There Is No "U.S. Common Law of War"

The Government's primary argument is that MST is a crime under the "U.S. common law of war," and that such domestic law of war crimes are triable by military commission. Gov't. Br. 23-47.

1. A "U.S. common law of war" is barred by *United States v. Hudson*

The Supreme Court long ago held that there are no federal common law crimes. *United States v. Hudson & Goodwin*, 11 U.S. 32 (1812). The concept of a "U.S. common law of war" is fundamentally inconsistent with that principle.

The Government argues that, prior to the enactment of the MCA, there was a *domestic* common law war crime of "providing material support for terrorism" that Congress codified in the 2006 act, 10 U.S.C. § 950v(b)(25). Its theory is that both the putative domestic law of war generally, and the common law MST crime specifically, are punishable

under Congress's general war-making powers. Gov't. Br. 21-25. That argument is precluded by *Hudson*. As the Supreme Court explained:

> If [an implied power to preserve its own existence and promote the end and object of its creation] may communicate certain implied powers to the general Government, it would not follow that the Courts of that Government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offense.
>
> * * *
>
> [O]ur Courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases we are of the opinion is not within their implied powers.

Hudson, 11 U.S. at 34.

Under *Hudson*, there is no more a "U.S. common law of war" than there is a "U.S. common law" of any other federal crime. To adopt the Government's contention to the contrary would overturn fundamental and settled principles of law. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001) ("[U]nder our constitutional system . . . federal crimes are defined by statute rather than by common

law . . . .") (citing *Hudson*, 11 U.S. at 34). Neither the Supreme Court or any other court has recognized a federal "law of war" exception to *Hudson*. This Court should not create such an exception here.

2. Neither the federal courts nor the United States military recognize a "U.S. common law of war"

Were this Court to adopt the Government's notion of a "U.S. common law of war," it would be the first federal court to do so. The expression does not appear in any federal case in Westlaw, nor do "United States common law of war," "domestic common law of war," "domestic law of war," or "American law of war."[2] Indeed, the Supreme Court has used the expression "common law of war" in only nine cases,

[2] The phrase "American common law of war" appears once in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the only case in which it appears at all. *Id.* at 613 ("The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the 'rules and precepts of the law of nations . . . .'") (citation omitted). The Court does not use this expression again, nor does anything else in the opinion lend it significance. This sole, cryptic reference provides no support for the existence of a "United States common law of war."

and never in reference to *domestic* law of war offenses.[3] The "U.S. common law of war" is thus a novel concept in search of a precedent.

The notion of a "United States common law of war" is also foreign to military law. Only two military cases appearing in Westlaw mention the term "common law of war." Neither case uses the expression in the Government's sense of a domestic "common law of war." *See United States v. Schultz*, 4 C.M.R. 104, 114 (C.M.A. 1952) ("[T]he common law of war has its source in the principles, customs, and usages of civilized nations."); *United States v. Fleming*, 2 C.M.R. 312, 316 (A.B.R. 1951) ("Under the law of war, a military commander enforces through military tribunals a so-called 'common law of war' as a substitute for the displaced criminal law of the enemy."). Rather, in military courts, the "law of war" means the customary *international* law of war – that is, the "law of war" that the Government has repudiated as basis of its position. *See. e.g.*, *United States v. Curtis*, 32 M.J. 252, 266 (C.M.A.

[3] *Hamdan*, 548 U.S. at 613; *Madsen v. Kinsella*, 343 U.S. 341, 354 (1952); *In re Yamashita*, 327 U.S. 1, 20 (1946); *Ex parte Quirin*, 317 U.S. 1, 34 (1942); *Ford v. Surget*, 97 U.S. 594, 613 (1878); *Williams v. Bruffy*, 96 U.S. 176, 191 (1877); *Ex parte Vallandigham*, 68 U.S. 243, 249 (1863); *The Amy Warwick*, 67 U.S. 635, 557 (1862); *Luther v. Borden*, 48 U.S. 1, 85 (1840) (Woodbury, J., dissenting).

1991) ("The law of war . . . is part of the 'Law of Nations' within the meaning of Article I, § 8, cl. 10 of the Constitution . . . .").

Consistent with the usage of the federal and military courts, authoritative military publications define "law of war" as customary international law. For example, the *Department of Defense Dictionary of Military and Associated Terms* defines "law of war" as "[t]hat part of international law that regulates the conduct of armed hostilities."[4] *Id.* at 194. To the same effect, the law of war "encompasses all international law for the conduct of hostilities binding on the United States . . ., including treaties . . . and applicable customary international law."[5] Similarly, Army Field Manual 27-10 is the military's authoritative guide to the law of war and its implementation by the armed forces. It states that the law of war has two sources: treaties and conventions, and customary international law (that "body of unwritten or customary law . . . firmly established by the custom of nations"). *Id.* at 4, ¶ 4(b). Consistent with that definition, "war crimes"

[4] Joint Publ'n 1-2, *Department of Defense Dictionary of Military and Associated Terms* (2010, as amended through Jan. 15, 2012).
[5] DoD Law of War Program, Department of Defense Directive 2311.01E (May 9, 2006, current as of Feb. 22, 2011) at ¶ 3.1.

are defined as a type of "crime under international law." *Id.* at 178, ¶ 498.

The military's reference guides for Judge Advocates are to the same effect. The *Law of War Handbook*[6] states that "the law of war is a part of the broader body of law known as public international law." *Id.* at 2; *see also id.* at 20 (two sources of Law of War are "customary international law" and "conventional international law"). The related *Law of War Deskbook* is consistent.[7]

In short, the notion of a "U.S. common law of war" is utterly without precedent in law or military practice.

B. Congress's General War Powers Do Not Authorize It to Punish a "U.S. Common Law War Crime"

The Government argues that "the primary constitutional powers that provide Congress with the authority to identify crimes subject to trial and punishment by military commission [are] Congress's extensive

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[6] Int'l & Operational Law Dep't. The Judge Advocate General's Legal Ctr. & Sch., *Law of War Handbook* ii (Major Keith E. Puls ed., 2005).
[7] Int'l & Operational Law Dep't, The Judge Advocate General's Legal Ctr. & Sch., *Law of War Deskbook* (Major Gregory S. Musselman ed., 2011). *See, e.g.*, *id.* at 184-92 (listing sources of war crimes and including only customary international law, treaties and conventions, and international criminal courts).

war-making powers under Article I." Gov't. Br. 24. This argument is inconsistent with the many authorities recognizing the Define and Punish Clause as the source of authority for law-of-war military commissions and, accordingly, the provision that determines their jurisdictional boundaries. It also raises constitutional separation of powers concerns of enormous magnitude, by ceding unprecedented areas of Article III jurisdiction to military tribunals.[8]

1. The Define and Punish Clause, not Congress's general war powers, determines the scope of military commission jurisdiction over war crimes

The military commission that tried Petitioner was a law-of-war commission. *See Hamdan*, 548 U.S. at 597. Historically, there has been consensus among all Branches of government that the source of military commission jurisdiction over war crimes is found in the Define and Punish Clause, not in Congress's general war powers. The Supreme Court has held that to be the case on multiple occasions. *Id.* at 601;

[8] The Government again argues that Congress is entitled to great deference in its specification of war crimes. Gov't. Br. 23-24. In fact, Congress is entitled to no deference with respect to the question of whether conduct violates the law of war. Plain and unambiguous precedent is required to establish an international law offense. Pet. Br. 12-24.

Quirin, 317 U.S. 1, 28 (1942);[9] *In re Yamashita*, 327 U.S. 1, 7 (1946).[10] Congress has likewise indicated that the Define and Punish Clause is its source of authority to establish military commission jurisdiction. *See* War Crimes Act of 1996, H.R. Rep. No. 104-698, at 7 (1996) (citing

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[9] *Quirin* left no doubt that the Define and Punish Clause is the source of Congress's authority to establish military commissions for the punishment of war crimes:

> Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.

Quirin, 317 U.S. at 28.

[10] *In re Yamashita*, 327 U.S. at 7:

> In *Ex parte Quirin*, . . . we had occasion to consider at length the sources and nature of the authority to create military commissions for the trial of enemy combatants for offenses against the law of war. We there pointed out that Congress, in the exercise of the power conferred upon it by Article I, § 8, Cl. 10 of the Constitution to 'define and punish * * * Offenses against the Law of Nations * * *,' of which the law of war is a part, had by the Articles of War . . . recognized the 'military commission' appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war.

Yamashita and *Quirin* for the proposition that "[t]he constitutional authority to enact federal criminal laws relating to the commission of war crimes is undoubtedly the same as the authority to create military commissions," i.e., the Define and Punish Clause, as *Yamashita* and *Quirin* held). The Executive Branch has taken the same position. Military Commissions, 11 Op. Att'y. Gen. 297, 298-99 (1865) (identifying the Define and Punish Clause as the source of power "conferred by the Constitution upon Congress or the military under which [law-of-war] tribunals may be created in time of war"), at App. 121.[11]

Thus, on the question of whether Congress has the power under the Constitution to authorize the prosecution of MST by a military commission, these authorities establish unequivocally that such power,

[11] In the same opinion, the Attorney General clearly stated the provenance of the laws of war and the constraints imposed by the Define and Punish Clause: "[T]he laws of war constitute a part of the law of nations, and . . . those laws have been prescribed with tolerable accuracy. . . . When war is declared, it must be, under the Constitution, carried on according to the known laws and usages of war amongst civilized nations. Under the power to define those laws, Congress cannot abrogate them or authorize their infraction. The Constitution does not permit this Government to prosecute a war as an uncivilized and barbarous people." App. 121.

if it exists at all with respect to that particular offense, must be found under the Define and Punish Clause.

The Government cites Winthrop for the proposition that Congress's general war powers authorize the trial of domestic "common law war crimes" by military commission, quoting him to the effect that the military commission "derives its original sanction" from Congress's powers to declare war and raise armies. Gov't. Br. 26 (quoting William Winthrop, MILITARY LAW AND PRECEDENTS 831 (2d ed. 1920) ("Winthrop")). But Winthrop's statement in this regard is not supported by citation to any legal authority, and appears to be nothing more than his considered opinion on the subject. But that opinion was not adopted by the Supreme Court, which spoke directly to the issue in *Quirin* and *Yamashita*, as described above. Thus, the Government's reliance on Winthrop is misplaced.

2. The Government's historical evidence does not establish that MST is a common law war crime

The Government adduces some of the same historical evidence cited by the CMCR, now repackaged as evidence of a domestic "common law war crime" rather than a crime under CIL. Petitioner responded to

this historical evidence in his original brief. Pet. Br. 37-43. Two points bear mention in response to the Government's historical argument.

First, the Government's position confuses the three types of military commissions identified by the Supreme Court in *Hamdan*, and ignores the Supreme Court's warning against reliance on Civil War precedents. *See Hamdan*, 548 U.S. at 596 n.27 ("the commissions established during that conflict operated as both martial law or military government tribunals and law-of-war commissions. . . . The Civil War precedents must therefore be considered with caution."). Historically, courts have referred to all three types as having jurisdiction under the law of war (sometimes, the "common law of war"). *See, e.g. Madsen v. Kinsella*, 343 U.S. at 354-5 (occupation military commission); *Ex parte Milligan*, 71 U.S. 2 (1866) (martial law commission). Civil War commissions frequently served all three roles. *Hamdan*, 548 U.S. at 596 n.27. Thus, orders issued by General Halleck, who was the military governor of the Department of Missouri as well as a Union military commander, served to maintain civil order as well as provide for the punishment of war criminals. Orders requiring acts of "murder,

robbery, theft, pillaging and marauding" to be tried by military commission do not establish that these crimes were genuine war crimes triable by a law-of-war military commission. [12] Gov't. Br. 30.

Second, the Government argues that military commission jurisdiction over the offenses of "spying" and "aiding the enemy" demonstrates that commissions have jurisdiction over other crimes that do not constitute law of war violations, including MST. Gov't. Br. 41-44. But the Government makes far too much of this. Military commissions have exercised jurisdiction over spying and aiding the enemy, and those offenses are identified in the Uniform Code of Military Justice as crimes

[12] The *Hamdan* plurality explained that the first commission convened to try Hamdan was a law-of-war commission: "Since Guantanamo Bay is neither enemy-occupied territory nor under martial law, the law-of-war commission is the only model available." *Hamdan*, 548 U.S. at 597. The commissions authorized by the 2006 MCA were law-of-war commissions, as they only exercised jurisdiction over unlawful *combatants*,10 U.S.C. § 948d(a) (2006), and a required element of each of the punishable offenses was that it take place "in the context of and [be] associated with armed conflict." *See* Manual for Military Commissions, pt. IV, § 6(1)(b)(3) (2007). Moreover, section 2 of the 2006 MCA expressly preserved for the President the authority to set up the *other* types of commissions that are *not* the subject of the MCA, *i.e.*, "military commissions for areas declared to be under martial law or in occupied territories should circumstances so require." MCA § 2, 10 U.S.C. § 948a note (2006).

triable by military commission. 10 U.S.C. §§ 904 and 906. But those references can best be understood as legislative recognition that, historically, under international law, those two offenses were triable before military tribunals. MST has never had that status. Spying and aiding the enemy are anomalous, but (like the practice of martial law or occupation commissions, which have prosecuted many non-law-of war offenses) they do not establish a "U.S. common law of war" or open the door to the prosecution by military tribunal of any and all offenses that can—by analogy or otherwise—be characterized as similar, as the Government's theory would permit.

3. The doctrine of a "U.S. common law of war," if accepted, would violate the separation of powers between Article I and Article III courts

Petitioner's opening brief explained why the CMCR's expansive reading of the Define and Punish Clause power violated separation of powers by encroaching on the jurisdiction of Article III courts. Pet. Br. 44-48. Those concerns pale by comparison with the impact on Article III jurisdiction were the Court to adopt the Government's "U.S. common law of war" theory.

The danger of Congressional overreaching is real if crimes with as little as historical and international support as MST may be "defined and punished" under the Define and Punish Clause. But that clause, at least, provides a standard that should guide Congress and the courts conformance to the customary "Law of Nations." There is no such standard under the general war powers.

The Government never spells out the precise nexus between MST and Congress's war powers, but it hardly needs to, given the vast scope of conduct related to "provid[ing] for the common Defence" (U.S. Const. art. I, § 8, cl. 1) or "rais[ing] and support[ing] Armies" (U.S. Const. art. 1, § 8, cl. 12). Under the Government's analysis, any crime related to Congress's war powers could be tried by military commission, *retroactively*, if there is some evidence that similar conduct was tried by military commission in the past. The range of crimes made retroactively triable by military commission under this theory is virtually limitless, especially when combined with the broad deference the Government claims is due to Congress. Gov't. Br. 23-24.

In fact, the Government's position is even more intrusive on the jurisdiction of Article III courts than would be the case were commission jurisdiction tied to historical examples, however wide-ranging they may be. The Government asserts: "This is not to say, when acting prospectively in the exercise of its constitutional war-making powers, Congress is necessarily limited to identifying traditional law-of-war violations as subject to trial by military commission." Gov't. Br. 27 n.6. In other words, if the crime has *any nexus at all* to Congress's war-making powers, regardless of whether similar conduct was ever tried by military commission in the past, then Congress is empowered to make it triable by military commission on a prospective basis. Nor does the requirement that the criminal conduct have a relationship to hostilities provide any meaningful limitation, because "the war power does not necessarily end with the cessation of hostilities." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 141 (1948).

Thus, the Government's position eviscerates the most basic separation of powers principles, to an even greater extent than the customary international law-based rule adopted by the CMCR. "Article

III, § 1 safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts 'to transfer jurisdiction for the purpose of emasculating' constitutional courts, and thereby preventing 'the encroachment or aggrandizement of one branch at the expense of the other.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986). Criminal trials for felony offenses are the paradigmatic example of the core judicial functions protected by Article III. *See Peretz v. United States*, 501 U.S. 923, 929 (1991). The Government's "U.S. common law of war" theory constitutes an assault on that core judicial function, and should be rejected on separation of powers grounds.

Moreover, as shown in Petitioner's opening brief, Congress erroneously relied on the Assimilative Crime Act of 1948 to import into the MCA the *domestic* MST offense, after being informed by DoD and Department of Justice officials that MST is not a violation of the law of war. Pet. Br. 26, 44-45. The Government passes over this telling aspect of legislative history in silence, and indeed, compounds the separation of powers problem by advancing a novel, unsupported, and radically

unsound theory of a "U.S. common law of war," where any conduct that can be linked, however tenuously, to "provid[ing] for the common Defense" (U.S. Const. art. I, § 8, cl. 1), can be prosecuted in a military commission.

C. Punishing MST by Military Commission Is Not "Necessary and Proper" to Comply with Obligations Under International Law

The Government's alternative theory is that, although MST is not an "Offense . . . against the Law of Nations," it is nevertheless triable by military commission because such prosecutions are "necessary and proper" to "fulfill our nation's international responsibilities to prevent and punish terrorism itself." Gov't. Br. 51. Thus, the Necessary and Proper Clause, acting in tandem with the Define and Punish Clause, permits Congress to extend the jurisdiction of a law-of-war military commission to offenses that do not violate the law of war.

This theory is, like the "U.S. common law of war" notion, completely untenable. A statute is "necessary and proper" within the meaning of the Necessary and Proper Clause if it "constitutes a means that is rationally related to the implementation of a constitutionally

enumerated power," *United States v. Comstock*, __ U.S. __, 130 S. Ct. 1949, 1956 (2010), so long as the statute is "not . . . prohibited" by the Constitution, *id.* at 1957 (quoting *M'Culloch v. Maryland*, 17 U.S. 316, 421 (1819)). Here, the means (trial of an offense that is not a war crime in a law-of-war commission) is "prohibited" by Article III, which requires strict policing of the jurisdiction of military tribunals to prevent the encroachment of an Article I court on the core function of the judiciary.

The Supreme Court has twice considered and rejected the Government's Necessary and Proper argument in similar circumstances. In *Reid v. Covert*, 354 U.S. 1 (1957), the Court addressed whether Congress's power "[t]o make Rules for the Government and Regulation of the land and naval Forces," Article I, § 8, cl. 14, could be extended to authorize military trials for civilian spouses of service members living abroad. In defending that position, the Government argued that "[T]he Necessary and Proper Clause . . . when taken in conjunction with Clause 14 allows Congress to authorize the trial of Mrs. Smith and Mrs. Covert by military tribunals and under

military law." *Reid*, 354 U.S. at 20. The Court rejected that argument, holding that "the Necessary and Proper Clause cannot operate to extend military jurisdiction to any group of persons beyond that class described in Clause 14—'the land and naval Forces.'" *Id.* at 20-21. The Court explained:

> Not only does Clause 14, by its terms, limit military jurisdiction to members of the 'land and naval Forces,' but Art. III, s 2 and the Fifth and Sixth Amendments require that certain express safeguards, which were designed to protect persons from oppressive governmental practices, shall be given in criminal prosecutions—safeguards which cannot be given in a military trial.

Id. at 22. *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), is to the same effect. There the Court considered a statute that authorized court-martial jurisdiction over ex-service members who had committed crimes during their service. *Id.* at 14. As in *Reid*, the Government argued that "the Act [was] a valid exercise of the power granted Congress in Article I of the Constitution 'To make Rules for the Government and Regulation of the land and naval Forces', as supplemented by the Necessary and Proper Clause." Again, the Court

rejected that argument and held that the Government and Regulation Clause "itself does not empower Congress to deprive people of trials under Bill of Rights safeguards, and we are not willing to hold that power to circumvent those safeguards should be inferred through the Necessary and Proper Clause." *Id.* at 21-22.

Reid and *Covert* thus stand for the proposition that the Necessary and Proper Clause cannot be employed to extend military jurisdiction beyond the express language of the enumerated power that authorizes such jurisdiction, because of the unacceptable encroachment on Article III jurisdiction. As the Court put it in *Quarles* with regard to court-martial jurisdiction, "[d]etermining the scope of the constitutional power of Congress to authorize trial by [military tribunal] presents another instance calling for limitation to 'the least possible power adequate to the end proposed.'" *Id.* at 23 (citation omitted). The Government's similar effort to expand the scope of military commission jurisdiction here should also be rejected.

II. HAMDAN'S CONVICTION VIOLATED THE EX POST FACTO PRINCIPLE

A. The Ex Post Facto Clause Applies and Must Be Enforced

The Government acknowledges, consistent with Supreme Court precedent, that the Ex Post Facto Clause is a "structural limitation on Congress's power." Gov't. Br. 66. The CMCR likewise correctly observed that the Ex Post Facto Clause "was understood by the Founders to be among the most significant rule of law guarantees in the Constitution." App. 73. Indeed, this "principle—encapsulated in the maxim *nulla poena sine lege*—which dates from the ancient Greeks . . . has been described as one of the most 'widely held value-judgment[s] in the entire history of human thought.'" *Rogers v. Tennessee*, 532 U.S. 451, 467-68 (2001) (Scalia, J., dissenting) (quoting J. Hall, GENERAL PRINCIPLES OF CRIMINAL LAW 59 (2d ed. 1960)). Accordingly, the parties agree that the ex post facto principle must be respected in this case as a matter of U.S. constitutional law.

B. The Government's Suggestion That the Ex Post Facto Principle Does Not Fully Apply Should Be Rejected

Having acknowledged that the Ex Post Facto Clause applies and must be respected, the Government then cites a case from the

Nuremberg tribunals, *Trial of Altstötter*, 6 L. Rep. Trials of War Criminals 41 (1948), as well as *Rogers v. Tennessee*, 532 U.S. 451 (2001), for the proposition (apparently) that the ex post facto principle need not be adhered to in this case. Gov't. Br. 68. But the Government fails to explain that while Nuremberg represented a derogation from ex post facto principles, it has been widely recognized in the post-Nuremberg era that the prohibition against ex post facto prosecutions is now a non-derogable principle of international law. As one scholar recently observed:

> The transformation of the principle of legality from a principle of justice to a binding rule of customary international law, applicable to international organizations such as international tribunals, as well as to states, means that Nuremberg and Tokyo and the rest of the post-World War II prosecutions retroactively creating crimes against peace . . . should be a one-time event . . . . The current state of international law prohibits the retrospective application of a newly created customary international crime where the acts involved were not criminal under law applying to the actor at the time of the act.

Kenneth S. Gallant, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW 405-406 (2010); *see also* Theodore Meron,

WAR CRIMES LAW COMES OF AGE, 244 (1998) ("The prohibition of retroactive penal measures is a fundamental principle of criminal justice, and a customary, even peremptory, norm of international law that must in all circumstances be observed by national and international tribunals.").

Likewise, the Government's reliance on *Rogers* is misplaced, as it has plucked a single sentence out of context from that decision to erroneously suggest that the evolution of the common law is incompatible with enforcement of the Ex Post Facto Clause of the U.S. Constitution. Indeed, the Government presents *Rogers* as if it were tantamount to judicial nullification of the ex post facto principle. *Rogers* does not stand for that proposition; the case did not even deal with the Ex Post Facto Clause. Instead, it dealt with due process limitations on "an act of common law judging," and "not [as in this case,] the interpretation of a statute," where the constraints of the Ex Post Facto Clause are in full effect. 532 U.S. at 461. *Rogers* affirmed a decision by the Tennessee Supreme Court that a murder conviction could stand in the face of judicial abrogation of the antiquated common law "year-and-

a-day" rule,[13] even when the new rule was applied retroactively. The Court held that because the old rule was "widely viewed as an outdated relic," its abolition by the Tennessee judiciary was neither "unexpected [nor] indefensible by reference to the law which had been expressed prior to the conduct in issue," which is the standard that the Court had previously articulated for judicial action in *Bouie v. City of Columbia*, 378 U.S. 347 (1964). *Id.* at 462. The Court held that "this limitation [preserves the due process principle of fair warning and] adequately serves the common law context," where "there often arises a need to clarify or even to reevaluate prior opinions" as "part of the judicial business in States in which the criminal law retains some of its common law elements." *Id.* at 461. The Court cited its previous holding that the Ex Post Facto Clause "is a limitation on the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government." *Id.* at 456 (quoting *Marks v. United States*, 430 U.S. 188, 191 (1977)). It then made clear that "the Ex Post Facto Clause does not

[13] Under that rule, for conduct to qualify as murder, the victim must die within a year and a day of being attacked by the accused. *Rogers*, 532 U.S. at 453.

apply to judicial decisionmaking" of the sort at issue in *Rogers*, and that the *Calder* categories that describe when a statute runs afoul of the Ex Post Facto Clause were not applicable in that context. *Id.* at 461-62; *see* Pet. Br. 49 (describing the Court's seminal case on the Ex Post Facto Clause, *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798)).

In short, *Rogers* has no application here, where this Court is called upon to evaluate whether a statute (the 2006 MCA) was applied in a manner consistent with the Ex Post Facto Clause.[14] In fact, the prosecution in this case violated ex post facto under the very first *Calder* category, because it punished previously lawful conduct. The conduct forming the basis for Petitioner's MST conviction is set forth in Military Commission Order No. 2-09 (16 July 2009), which recites the specifications in the Charge Sheet and indicates the Commission's

[14] Likewise, the Government's reference to *State v. Hylton*, 154 Wash. App. 945, 226 P.3d 246 (2010), provides no support for its position. That case involved a statute that codified a long-standing common law sentencing practice that was properly applied to the defendant prior to the enactment of the statute. It did not involve an attempt to create a new crime and then apply the criminal sanction to pre-enactment conduct, as occurred in this case.

verdict with respect to each specification. Petitioner was found "Guilty" of the following specifications of the MST charge:

- spec. #2 ("providing personnel, himself")
- spec. #5 ("service or transportation by serving as a driver")
- spec. #6 ("service or transportation")
- spec. #7 ("service as an armed bodyguard")
- spec. #8 ("service as an armed bodyguard")

App. 115-119. As four Justices of the U.S. Supreme Court stated (after reviewing essentially identical charges against Petitioner in the 13 July 2004 Charge Sheet, App. 90-93) such acts have never been deemed war crimes. *See Hamdan*, 548 U.S. at 600 ("None of the overt acts that Hamdan is alleged to have committed violates the law of war") (plurality). Thus, it cannot fairly be said that it was "foreseeable and accessible to [Petitioner] that his concrete conduct was punishable." App. 75.

The Government's reliance on a decision from the Special Tribunal for Lebanon, *Ayyash et al.* (Case No. STL-11-01/I/AC/R176bis, Interlocutory Decision on the Applicable Law (Feb. 16, 2011)), is also

unavailing. *Ayyash* simply applied the ex post facto principles of accessibility and foreseeability under international law to determine that a defendant accused of bombing and killing could reasonably foresee that such behavior would be punishable as terrorism. But the court in that case noted that "[a] criminal conviction should . . . never be based upon a norm which an accused could not reasonably have been aware of at the time of the acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility." *Id.* at ¶ 137 (internal quotation marks omitted). Thus, the case does not compromise the ex post facto principle fundamental in international law, or provide support for the Government's baseless contention that "Hamdan was engaged in conduct that any reasonable person would have known was both wrongful and criminal." Gov't. Br. 71.

C. The Government Fails to Support Its Expansive Definition of the Offense or Its Claim That Such Conduct Has Long Been Condemned as a Crime

The Government's ex post facto argument is summed up in the contention that "the prohibition against providing material support to unlawful combatants does not criminalize previously innocent conduct

but, instead, simply codifies an offense that has long been punished under our nation's common law of war and has been condemned as criminal by the international community." Gov't. Br. 67. That statement reflects an amorphous and expansive conception of the offense that is unsupported by current legal authority and inconsistent with the Government's own concession elsewhere in its brief.

First, the Government refers to the alleged offense not as "providing material support for *terrorism*"; it is now (according to the Government's ever-changing position in this case) "providing material support to *unlawful combatants*." This elasticity in the definition of the crime is the Government's *modus operandi*, entailing unacceptable imprecision in a criminal prosecution and serious misstatements about the law of war. For example, the Government's claim that supporting unlawful combatants "has been condemned as criminal by the international community" is unsupported by citation to authority and is, in fact, an inaccurate statement of the law of war as it now stands. The law of war does not regard unlawful combatantcy, standing alone, as a war crime. *See, e.g.,* Gary D. Solis, THE LAW OF ARMED CONFLICT

211 (2010) ("Being an unlawful combatant/unprivileged belligerent is not a war crime in itself. Rather, the price of being an unlawful combatant is that he forfeits the immunity of a lawful combatant."); Richard R. Baxter, *So-called "Unprivileged Belligerency": Spies, Guerillas, and Saboteurs*, 28 Brit. Y.B. Int'l L. 323, 338 (1951) ("guerrilla warfare . . . should not be regarded as violative of international law").[15] Forfeiting combatant immunity means that unlawful combatants are subject to prosecution under applicable civil law for their violent acts. *See* Jennifer K. Elsea, *The Military Commissions Act of 2006* at 23 (CRS, updated Sept. 27, 2007) (unlawful combatants "do not enjoy immunity under the law of war for their violent conduct and can be tried and punished under civil law for their belligerent acts"). It does not mean that those acts necessarily violated the law of war. And while it is true that unlawful combatants may,

[15] As noted in Petitioner's opening brief, Baxter was the primary author of the U.S. military's leading statement on the law of war in the aftermath of the ratification of the 1949 Geneva Conventions, THE LAW OF LAND WARFARE, FM 27-10 (1956). Pet.'s Br. 43. The Government ignores this authority, while proliferating references to prohibitions against crimes that, in every case, differ substantially from the MST offense codified in the MCA.

under appropriate circumstances, be tried by a military commission, it is of the utmost importance to be clear about the law that can properly be applied, and the type of commission convened. It is not a law-of-war commission of the sort that convicted Petitioner here; rather, it is an occupation or martial law commission applying civil law or martial law: "[The] conduct [of unlawful combatants] is dealt with according to the law of the criminal jurisdiction in which it occurred, which could mean a civil trial or trial by a military tribunal *convened by an occupying power*." *Id.* at 19 (emphasis added). Here, the Government attempts to justify a prosecution in a law-of-war commission. But its precedents all relate to occupation or martial law commissions (or "hybrid" versions thereof, as the *Hamdan* plurality explained). And because it admits (finally) that the law of war does not criminalize MST, it manufactures a purported "U.S. common law of war" to try to supply the applicable law. But the conduct it analogizes to MST is markedly different, and its precedents reflect prosecution of acts prohibited, not by the law of war, but by civil or martial law being enforced by occupation or martial law commissions in vastly dissimilar circumstances in the past. Indeed,

under the Government's theory—that anyone who provides material support to unlawful combatants is a war criminal (and has long been recognized as such)—the U.S. Government itself could have been charged with war crimes by supporting anti-Soviet insurgents in Afghanistan in the 1980s, as those fighters engaged in guerilla warfare.

Moreover, the Government's contention that providing support to unlawful combatants is condemned as criminal by the international community is inconsistent with its admission that "the offense of providing material support to terrorism has not attained international recognition at this time as a violation of customary international law." Gov't. Br. 55; *see also id.* 48 (same), 61 (same). If supporting terrorism is not an international law offense, then it is unreasonable to contend that less culpable conduct (such as supporting a civilian who has taken up arms but targets only enemy combatants) is such an offense.

Second, the Government's position that this virtually unbounded alleged offense (supporting unlawful combatants) "has long been punished under our nation's common law of war" fails for all the reasons discussed above, namely, there is no such thing as "the

American common law of war." *See supra*, section I. Instead, as the Supreme Court has repeatedly held, the common law of war is a subset of international law, and while there is American *practice* in applying that law, there is no separate body of uniquely American law of war. *See Quirin*, 317 U.S. at 27 (the law of war is "part of the law of nations"); *Yamashita*, 327 U.S. at 7 (referring to "the Law of Nations . . ., of which the law of war is a part").

D. Petitioner Did Not Have Fair Notice Under Any Authority Cited by the Government

1. International Law

The Government contends that Hamdan's prosecution does not violate ex post facto principles because "[t]he type of conduct engaged in by Hamdan . . . has been condemned as criminal . . . by a series of international tribunal decisions, treaties, and other authoritative pronouncements by the international community that antedated Hamdan's active support of bin Laden and al Qaeda." Gov't. Br. 70. But the Government cannot credibly maintain that Hamdan should have known his conduct would violate the law of war when it admits that MST "has not attained international recognition at this time as a

violation of customary international law." Gov't. Br. 48. Indeed, as noted above, four Justices of the U.S. Supreme Court would not have recognized Hamdan's conduct as punishable under international law. *See Hamdan*, 548 U.S. at 600.

For this reason, the authorities cited by the Government cannot carry its argument. *Ayyash*, for instance, held that "international crimes are those offences that are considered so heinous and contrary to universal values that the whole community condemns them through customary rules." *Ayyash*, ¶ 134. Here, as the Government has conceded, Hamdan's conduct (providing service as a driver and bodyguard) does not qualify as an international crime under this definition. Indeed, even the Government's quotation of the CMCR on the ex post facto issue omits five words critical to the holding—and damning to the Government's case: "When appellant's charged offenses began in 1996, the underlying wrongful conduct of providing material support for terrorism, as now defined under the 2006 MCA, was a cognizable offense *under the law of war*." App. 77 (emphasis added). Thus, the CMCR and the Government rely on customary international

law as the basis for their assertion that Hamdan's conviction does not violate ex post facto principles, but the Government has now conceded that customary international law does not prohibit that same conduct.

Moreover, international law strongly disapproves of the reasoning by analogy employed by the Government in this case. For example, the European Court of Human Rights has made clear that Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[16] "prohibits . . . extending the scope of existing offences to acts which previously were not criminal offences" and "lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy." *Case of Custer, Deveaux and Turk v. Denmark*, Appl. Nos. 11843/03, 11847/03, and 11849/03 (E.C.H.R. 2007) ¶ 76. "It follows that offences and the relevant penalties *must be clearly defined by law*. This requirement is satisfied where the individual can know from the wording of the

[16] European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 7(1), E.T.S. 5 (1953) ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed").

relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable." *Id.* (emphasis added). The E.C.H.R. has further held that the concept of "law" is one which "implies qualitative requirements, including those of accessibility and foreseeability." *Id.* ¶ 77. Those requirements have not been met in this case.

2. U.S. Common Law and Domestic MST Statute

The Government also contends that Hamdan should have known his conduct is punishable based on U.S. common law which predates his capture. But this reliance on obscure records from the American Civil War, the Philippine Insurrection, or other episodes from the remote past to support the conviction only underscores that Hamdan could not possibly have had "fair notice" his conduct would be deemed criminal. No fair-minded, impartial observer could believe that such materials (*e.g.*, Gov't. Supp. Authorities, tabs A and B) are "accessible," or that it was "foreseeable" that the summary adjudications referenced in those fragmentary materials would be deployed as precedent for this prosecution. Indeed, who would reasonably expect that the United

States in 2012 would rely on the utterly discredited 1818 trial of Arbuthnot and Ambrister to support its criminal prosecution of a Yemeni citizen captured in Afghanistan in 2001? *See* Gov't. Br. 39.

The implausibility of such a prosecution is even greater when one considers that the U.S. Supreme Court expressly cautioned against such conduct in the year prior to the referral of the charges at issue in this case: "[E]ven in jurisdictions where common-law crimes are still part of the penal framework, an act does not become a crime without its foundations having been firmly established in precedent. . . . The caution that must be exercised in the incremental development of common-law crimes by the judiciary is . . . all the more critical when reviewing developments that stem from military action." *Hamdan*, 548 U.S. 602 n.34 (plurality). To the extent that this reflects a longstanding principle of U.S. law, Hamdan could hardly have been on notice that the Government would subvert that rule and apply its newly-minted theory of a U.S. common law of war to retroactively criminalize his conduct, by analogy, no less. *See* Gov't. Br. 28 ("today's terrorists have quite properly been analogized to guerilla operatives of earlier times.").

Moreover, even if acts could be criminalized under U.S. common law (they cannot; *see*, *e.g.*, *Rogers*, 532 U.S. at 476: "the notion of a common-law crime is utterly anathema today" (Scalia, J., dissenting)), the existence of an analogous crime does not satisfy the fair notice standard under either the Ex Post Facto Clause of the U.S. Constitution or international ex post facto principles. In short, it is unreasonable and unfair to contend that Hamdan should have divined that his actions were comparable to obscure precedents relied on by the Government now.

The Government also insists that the domestic statute criminalizing MST, 18 U.S.C. § 2339A(b) (2004), was not the basis for Hamdan's conviction, but it cannot deny that the MCA incorporates the definition of "material support or resources" directly from that statute. Gov't. Br. 73; 10 U.S.C. § 950v(25)(B). The Government claims that the 2004 amendment to the domestic statute—enacted three years after Hamdan's capture—was "merely a clarification of the definition of material support set forth in the 1996 statute." *Id.* But in fact, none of the specifications of which Hamdan was found guilty would have been

covered by the 1996 statute, which prohibited providing "personnel, transportation, *and other physical assets*." 18 U.S.C. § 2339A(b) (1996) (emphasis added). The 2004 amendment added the all-important terms "service" and "personnel (1 or more individuals who may be or include oneself)," which, as described above, provided the sole basis for the MST conviction in this case. 18 U.S.C. § 2339A(b) (2004). *See* App. 116-18 (Hamdan convicted of providing "personnel, himself," "serv[ing] as a driver," and "serv[ing] as an armed body guard"). While the Government casually contends that the question of whether the 2006 MCA derived its language from the U.S. Code is "inconsequential," *see* Gov't. Br. 73-74, the fact remains that Hamdan would not have understood his acts to be punishable by reference to the U.S. domestic statute at the time of his capture in 2001.

For all these reasons, Mr. Hamdan's conviction should be vacated as an illegal ex post facto prosecution.

III. HAMDAN'S MILITARY COMMISSION VIOLATED EQUAL PROTECTION

A. Application of Equal Protection to Criminal Trials at Guantanamo Is Not "Impracticable or Anomalous"

Under *Boumediene v. Bush*, 553 U.S. 723 (2008), constitutional protections apply at Guantanamo unless it is "impracticable or anomalous" to afford them. Yet, the Government's brief fails to mention *Boumediene*, much less explain why the Court's constitutional analysis does not apply to Hamdan's equal protection claim. *See* Gov't Br. 74-84.[17] *Boumediene* rejected a "formalistic, sovereignty-based test for determining" whether a particular constitutional provision applies extraterritorially, *id.* at 762, and instead adopted a "functional approach" that turns on "whether judicial enforcement of the provision would be 'impracticable and anomalous.'" *Id.* at 759, 765 (citation omitted).

There is nothing "impracticable or anomalous" in enforcing equal protection at Guantanamo. The base is "under the complete and total

[17] The Government references *Boumediene* just once, without any analysis or discussion, in its summary of the relevant rulings of the Military Judge. Gov't. Br. 16.

control of our Government," and the United States is "answerable to no other sovereign for its acts on the base." *Id.* at 770-71. It is not "located in an active theater of war," "is no transient possession," and "[i]n every practical sense . . . is not abroad; it is within the constant jurisdiction of the United States." *Id.* The Government simply ignores *Boumediene* and instead cites, in one paragraph and with no analysis, post-*Boumediene* cases from this Circuit. Gov't. Br. 75 (citing *Al-Madhwani v. Obama*, 642 F.3d 1071 (D.C. Cir. 2011); *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009); and *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009)).

The Government does not meaningfully address the fact that: (1) the constitutional analyses in these cases were *dicta* unnecessary to the decisions, and (2) this authority, if read to contain constitutional rulings, cannot be squared with *Boumediene*. Significantly, these cases erroneously rely on *Johnson v. Eisentrager*, 339 U.S. 763 (1950)—a decision whose analysis the *Boumediene* Court explicitly rejected. *Boumediene*, 553 U.S. at 764 (rejecting *Eisentrager*'s formalistic approach to determine the scope of the Constitution); *see also* Gov't. Br.

61-63 (discussing *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010)); *Rasul v. Meyers*, 563 F.3d 527; and *Kiyemba v. Obama*, 555 F.3d 1022).[18] The Government repeats this error, by continuing to cite *Eisentrager*, despite the Court's repudiation of that decision in *Boumediene*. Gov't. Br. 76, 80. The Government's avoidance of *Boumediene* is telling. Due Process and Equal Protection extend to Guantanamo, *id.*, 553 U.S. at 764, and the Government fails to demonstrate otherwise.

B. The Government's Reliance on Immigration and Fourth Amendment Cases to Support Its "Rational Basis" Argument Is Misplaced

Laws that invade fundamental rights are subject to strict scrutiny. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Procedural protections provided to a defendant in a criminal trial are fundamental to the "central aim of our entire judicial system" to "[p]rovide equal justice." *Griffin v. Illinois*, 351 U.S. 12, 16-18 (1956) (internal quotation

[18] The Government also cites *Al-Madhwani v. Obama*, 642 F.3d 1071 (D.C. Cir. 2011). The Court in *Al-Madhwani* quoted *Kiyemba* in *dicta*, and failed to reach the constitutional due process issue presented because of a lack of evidence in the record bearing on that issue. *Id.* at 1077.

marks and citation omitted); *see also* Pet. Br. 64-66. The Government does not dispute that such rights are fundamental, but instead argues that "individuals who are properly subject to trial by military commissions are not entitled to the same panoply of procedural rights as criminal defendants charged with offenses cognizable by Article III courts." Gov't. Br. at 80. This argument misses the point: military commissions convened under the MCA apply *only* to "alien unlawful enemy combatant[s]." 10 U.S.C. § 948c (2006). This classification based on alienage is subject to strict scrutiny. *See Graham v. Richardson*, 403 U.S. 365, 372 (1971) ("Classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny.").

The Government's reliance on the Second Circuit's decision in *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984), to argue otherwise is similarly misplaced. In *Duggan*, the Second Circuit held that the Foreign Intelligence Surveillance Act's probable cause requirement for nonresident aliens did not violate Equal Protection. 743 F.2d at 75-76. The Second Circuit reasoned that the different treatment was "justified by both the greater likelihood that those engaged in the [spying]

activities against which FISA seeks to protect the United States will be nonresident aliens, and *by the need for the government to be able to act more quickly in situations where the target is unlikely to reside permanently in the United States*." *Id.* at 76 (emphasis added) (citing S. Rep. 95-604 at 21, *reprinted in* 1978 U.S.C.C.A.N. 3904, 3922-23). No such concerns are present here, where the United States maintains "complete and total control" of Guantanamo and those imprisoned there. *Boumediene*, 553 U.S. at 770-71.

The Government fails to explain how *Duggan's* narrow Fourth Amendment holding supports a broad abdication of equal protection rights that otherwise guarantee equal procedural protections in criminal trials. *See Duggan*, 743 F.2d at 77 n.6. The Supreme Court has made clear that "[t]he Constitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the Framers thought indispensable to a fair trial[,]" but held, in contrast, that "[t]he protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment

of truth at a criminal trial." *Schneckloth v. Bustamonte*, 412 U.S. 218, 242 (1973) (knowing and intelligent waiver not required to consent to warrantless search in contrast to "strict standard of waiver" applied to criminal trial rights); *see also id.* at 241("There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment."). Where fundamental criminal trial rights are impinged, strict scrutiny, not rational basis, applies.

Finally, the Government's citation to immigration cases that apply rational basis review to immigration rights claims, cannot be extrapolated to permit rational basis review of equal protection claims in the context of criminal prosecution. *Compare* Gov't. Br. 76-77 ("Congressional policies regarding the treatment of aliens" justified rational basis review of Hostage Taking Act and of deportation proceedings) (citing *United States v. Ferreira*, 275 F.3d 1020 (11th Cir. 2001); *United States v. Lue*, 134 F.3d 79 (2d Cir. 1998); *United States v. Lopez-Florez*, 63 F.3d 1468 (9th Cir. 1995); and *Narenji v. Civiletti*, 617 F.2d 745, 748 (D.C. Cir. 1979)) *with Fiallo v. Bell*, 430 U.S. 787 (1977)

(Supreme Court has "repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens") (quotation and citation omitted); *Wing Wong v. United States*, 163 U.S. 228, 238 (1896) (upholding deportation order for aliens but invalidating sentence for imprisonment because it was imposed without the procedural protections that citizens would have received under the Fifth and Sixth Amendments). While the national government may treat aliens differently in conferring governmental benefits and in matters of immigration and naturalization,[19] there is no authority to permit discrimination in criminal proceedings based on the citizenship of the accused.

C. The MCA Cannot Survive Strict Scrutiny

Like the CMCR, the Government identifies two bases for arguing that the MCA does not violate Equal Protection: (1) Congress has a "national security interest" that justifies lesser criminal procedural protections and (2) the federal government has authority to "subject

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[19] *See, e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 78 (1976) (while aliens are not necessarily "entitled to enjoy all the advantages of citizenship," "all persons, aliens and citizens alike, are protected by the Due Process Clause" of the Fifth Amendment).

[enemy aliens] to a different legal regime than citizens" during a time of armed combat. Gov't. Br. 79-80 (citing *Eisentrager*, 339 U.S. 763 and *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010)).

First, as noted in *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004), citizens as well as aliens may take up arms against the United States, and may pose as great a threat to our national security. There is no national security reason to try one category of unlawful combatants in a civilian court and the other in a military commission. Second, the Court in *Al-Bihani* did not hold that procedures in criminal trials are inapplicable to non-citizens because that question was not before it. *Al-Bihani*, 590 F.3d at 875. For these and the reasons set forth in Hamdan's Principal Brief, such rationales do not survive strict scrutiny. *See* Pet. Br. at 68-70.

CONCLUSION

For the foregoing reasons and for those stated in Petitioner's opening brief, the Court should reverse the CMCR and vacate Hamdan's conviction.

Respectfully submitted,

DATED: March 8, 2012

By: /s/ *Charles C. Sipos*
One of the attorneys for Salim Ahmed Hamdan

Adam Thurschwell
OFFICE OF THE CHIEF DEFENSE COUNSEL MILITARY COMMISSIONS
1099 14th Street NW
Box 37 (Ste. 2000E)
Washington, D.C. 20006
Telephone: 202.588.0437

Attorneys for Petitioner-Appellant SALIM AHMED HAMDAN

Harry H. Schneider, Jr.
Joseph M. McMillan
Charles C. Sipos
Rebecca S. Engrav
Angela R. Martinez
Abha Khanna
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: 206.359.8000

Attorneys for Petitioner-Appellant SALIM AHMED HAMDAN

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