[Oral Argument Not Yet Scheduled]
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)

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

A. Parties and Amici

1. The named petitioner-appellant is Salim Ahmed Hamdan.

2. The named respondent-appellee is the United States of America.

3. Amici appearing before the United States Court of Military Commission Review were: (1) the National Institute of Military Justice, (2) two law professors addressing international law issues (Dr. Terry D. Gill and Dr. Gentian Zyberi), (3) two law professors specializing in law of war issues (Geoffrey S. Corn and Victor M. Hansen), and (4) a group of constitutional law scholars addressing the Define and Punish Clause.

4. Petitioner Hamdan anticipates that the following amici will appear in this Appeal: (1) constitutional law scholars on the Define and Punish Clause, (2) two law professors specializing in law of war issues (Geoffrey S. Corn and Victor M. Hansen), (3) the National Institute of Military Justice and Beth Hillman, (4) two law professors addressing international law issues (Dr. Terry D. Gill and Dr. Gentian Zyberi), (5)

the National Asian Pacific Bar Association, (6) the Center for Constitutional Rights, and (7) law of war scholar David Glazier.

B. Rulings Under Review

This appeal is from a decision of the United States Court of Military Commission Review in *United States of America v. Salim Ahmed Hamdan*, CMCR 09-0002 (June 24, 2011). The petition for review was filed on July 11, 2011.

C. Related Cases

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

DATED: November 15, 2011

By: /s/ *Joseph M. McMillan*
One of the attorneys for Salim Ahmed Hamdan

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES*

Page

FEDERAL CASES

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

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TREATIES

FEDERAL STATUTES

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

GLOSSARY OF TERMS

ACHR ..... American Convention on Human Rights

AE ..... Appellate Exhibits

App. ..... Appendix

CMCR ..... Court of Military Commission Review

DoD ..... Department of Defense

ECHR ..... European Convention on Human Rights

ICC ..... International Criminal Court

ICCPR ..... International Covenant on Civil and Political Rights

ICTY ..... International Criminal Tribunal for Former Yugoslavia

JCE ..... Joint Criminal Enterprise

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

MMC ..... January 2007 Manual for Military Commissions

MST ..... Material Support for Terrorism

JURISDICTIONAL STATEMENT

The Court of Military Commission Review ("CMCR") had jurisdiction pursuant to 10 U.S.C. § 950c(a), which vests that court with jurisdiction to review any final decision of a military commission that has been approved by the Convening Authority. On August 7, 2008, Petitioner Hamdan ("Hamdan") was found guilty of Providing Material Support for Terrorism (sometimes herein referred to as "MST"), 10 U.S.C. § 950v(b)(25), by a military commission convened at Guantanamo Bay Naval Station, Cuba ("Guantanamo"). App. 115-118. The Convening Authority approved Hamdan's conviction and sentence on July 16, 2009. App. 119.

On June 24, 2011, the CMCR issued an opinion affirming Hamdan's conviction. App. 5. On July 11, 2011, pursuant to 10 U.S.C. § 950g(c), Hamdan timely filed in this Court a petition for review of the CMCR's ruling.

This Court has jurisdiction over this appeal pursuant to 10 U.S.C. § 950g(a), which gives the United States Court of Appeals for the D.C. Circuit exclusive appellate jurisdiction to review final judgments of

military commissions that have been approved by the Convening Authority and reviewed by the CMCR. Hamdan has exhausted all other appeals and this Court's jurisdiction is therefore proper pursuant to 10 U.S.C. § 950g(b).

STATEMENT OF ISSUES

1. Whether the CMCR erred in holding that MST, as defined in the Military Commission Act of 2006 ("MCA") and the January 2007 Manual for Military Commissions ("MMC"), was a cognizable offense against the law of war and therefore within the subject matter jurisdiction of the military commission that convicted Hamdan of that offense.

2. Whether the CMCR erred in holding that MST was a cognizable offense against the law of war during the time of the conduct that formed the basis for Hamdan's conviction, such that his conviction did not violate the Ex Post Facto Clause of the U.S. Constitution.

3. Whether the CMCR erred in holding that the MCA, which established the criminal procedures that applied to Hamdan's military

commission and on its face applies only to aliens and not citizens, does not violate the Equal Protection Clause of the U.S. Constitution.

STATUTES AND REGULATIONS

All pertinent statutes and regulations relied on are set forth in the Addendum included with this brief.

STATEMENT OF FACTS

I. Capture and Initial Military Commission Proceedings

On November 24, 2001, Hamdan, a Yemeni national, was seized in Afghanistan by members of an anti-Taliban militia and delivered to U.S. forces operating in the area south of Kandahar. App. 10. Following interrogations at Bagram, Kandahar, and elsewhere, he was transferred to Guantanamo in April 2002. *Id.* In July 2004, a charge of "Conspiracy" against Hamdan was referred to a military commission established pursuant to the President's Military Order of November 13, 2001. App. 91-93. Hamdan challenged the legality of the military commission and the charge in federal court. In June 2006, the Supreme Court ruled in *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006), that the military commission scheme violated the Uniform Code of Military Justice and the Geneva Convention, and that Hamdan was entitled to

the protections of Common Article 3 of the Geneva Convention. A plurality of the Court further held that "conspiracy" is not a cognizable offense under the law of war. *Id.* at 611-12.

Shortly thereafter, Congress passed the MCA, which was signed into law on October 17, 2006. Pub. L. No. 109-366, 120 Stat. 2600 (2006). The MCA established a revised system of military commissions for the prosecution of alien unlawful enemy combatants, and identified "Conspiracy" and "Providing Material Support for Terrorism" as pre-existing offenses triable by military commission.

II. The Second Military Commission Proceeding Against Hamdan

On May 10, 2007, new charges against Hamdan were referred to a new military commission convened pursuant to the MCA. App. 94-100. The charges were (1) Conspiracy in violation of 10 U.S.C. § 950v(b)(28) and (2) Providing Material Support for Terrorism in violation of 10 U.S.C. § 950v(b)(25). The proscribed conduct constituting those offenses was identified in the MCA, and the elements of the crimes were further defined in the MMC promulgated by the Department of Defense ("DoD") in January 2007. The Conspiracy charge contained two specifications.

Specification 1 of the Conspiracy charge included an allegation that Hamdan had "join[ed] an enterprise of persons" that shared a "common criminal purpose" to commit a variety of criminal acts. App. 96.

The MST charge against Hamdan contained eight specifications relating to alleged conduct and/or services provided by Hamdan for Osama bin Laden and al Qaeda. The alleged conduct consisted of (1) driving, (2) serving as a bodyguard, (3) weapons transport, and (4) unspecified training. App. 97-100. This conduct was alleged to have occurred at unspecified times between February 1996 and the date of Hamdan's capture in Afghanistan, November 24, 2001. *Id.*

Prior to trial, Hamdan moved to dismiss for lack of subject matter jurisdiction on the grounds that the charges were not law of war offenses, but rather an ex post facto prosecution in violation of the U.S. Constitution and international law. AE 088. Hamdan was charged for conduct occurring between February 1996 and November 2001, but the offenses were not fully defined until the MMC set forth the elements of those crimes in January 2007, more than five years after Hamdan's capture. *See* MMC, pt. IV, § 6(25), (28) (2007). The Military Judge

denied the motion, finding that the charges stated pre-existing offenses under the law of war. App. 102-107.

Hamdan also moved to dismiss for lack of personal jurisdiction, arguing that the prosecution violated equal protection guarantees provided by the Constitution. AE 008. The Military Judge denied the motion, concluding that the Constitution did not apply at Guantanamo. AE 084. Hamdan moved for reconsideration after the Supreme Court held, in *Boumediene v. Bush*, 553 U.S. 723 (2008), that applying constitutional protections at Guantanamo Bay was neither impracticable nor anomalous, and accordingly, aliens held as enemy combatants at Guantanamo were protected by the Suspension Clause of the Constitution. AE 220. The Military Judge also denied that motion. App. 108-114.

In addition, prior to trial, Hamdan filed a Motion to Dismiss Specification 1 of Charge 1 (Conspiracy). AE 124. Hamdan argued that the specification should be dismissed because Congress, in enacting 10 U.S.C. § 950v(b)(28), did not criminalize joining an enterprise of persons who shared a common criminal purpose, and by introducing joint

criminal enterprise ("JCE") as an alternative definition of "Conspiracy" in the MMC, the Secretary of Defense had impermissibly broadened the scope of that crime. App. 193; AE 124 at 2.

On June 1, 2008, the Military Judge granted Hamdan's motion in part, ruling that in enacting the MCA, Congress did not intend to import a JCE theory of liability into the offense of Conspiracy. The Military Judge struck the allegations from Specification 1 relating to joint criminal enterprise, and ruled that "the Government may not proceed to trial on its 'enterprise' theory of liability." App. 195; AE 211 at 3-4.

Hamdan pled "not guilty" to both the Conspiracy and the MST charges. At trial, he was found "not guilty" of Conspiracy. App. 115. He was found "guilty" of five specifications of MST and "not guilty" of three specifications of that charge. App. 116-118. On August 7, 2008, the military commission members imposed a sentence of sixty-six months, and the Military Judge awarded confinement credit of sixty-one months, seven days. App. 118.

Hamdan served most of his sentence at Guantanamo. In November 2008, he was transferred to Yemen for the remaining weeks of confinement. App. 12. In January 2009, Hamdan was released by Yemeni authorities and returned to his home in Sana'a, Yemen. *Id.* On July 16, 2009, the Convening Authority approved Hamdan's conviction and sentence. App. 119.

III. The CMCR Approved the Action of the Military Commission

Following its approval of the conviction and sentence, the Convening Authority referred this case to the CMCR for automatic review pursuant to 10 U.S.C. § 950c. Hamdan assigned error to several of the legal rulings of the Military Judge, and urged the CMCR to vacate the MST conviction. Specifically, Hamdan argued: (1) MST is not a violation of the law of war and, therefore, falls outside the limited jurisdiction of the military commission; (2) even if MST became a law of war offense after the enactment of the MCA in October 2006, it was not such an offense at the time of the alleged conduct (February 1996 – November 2001), and therefore Hamdan's conviction is the result of an illegal ex post facto prosecution; and (3) the prosecution of Hamdan by a

military commission affording fewer rights and procedural protections than would be afforded to a similarly situated U.S. citizen, violated Equal Protection principles enforceable under both U.S. and international law. App. 12. These are the same issues Hamdan now raises on appeal to this Court.

The CMCR rejected Hamdan's assignments of error and affirmed the findings and sentence of the military commission. App. 5.

SUMMARY OF ARGUMENT

Hamdan's conviction for "Providing Material Support for Terrorism" in violation of 10 U.S.C. § 950v(b)(25) should be vacated because the military commission, established pursuant to Congress's Article I power to "define and punish . . . Offences against the Law of Nations," lacked subject matter jurisdiction over that offense. Subject matter jurisdiction is absent because MST is not a violation of international law, particularly that subset of international law—the law of war—which is the sole arena in which the military commission could properly exercise jurisdiction. In defining MST in the MCA as a crime "traditionally . . . triable" by a law of war commission, 10 U.S.C.

§ 950p(a), Congress not only ignored historical reality, it overstepped the limited grant of power conferred on it by the Define and Punish Clause. The CMCR, which relied on an irrelevant and distinguishable assortment of historical records and other sources, erred in holding that MST is a law of war offense.

Even if Congress is deemed to have acted within the scope of its authority by "defining" a nascent offense, Hamdan's conviction is nonetheless an ex post facto prosecution prohibited by both the U.S. Constitution and international law. The MST offense, 10 U.S.C. § 950v(b)(25), appeared for the first time in the MCA, a statute signed into law in October 2006, almost five years after Hamdan was seized by coalition forces in Afghanistan. The elements of this crime were first identified by the DoD in the MMC, promulgated in January 2007 to implement the MCA. These criminal provisions cannot be retroactively applied to Hamdan consistent with the Ex Post Facto Clause of the U.S. Constitution. The CMCR, because it had erroneously determined MST to be a pre-existing law of war offense, failed to meaningfully address the ex post facto nature of Hamdan's prosecution and conviction.

Finally, the MCA provided Hamdan fewer substantive rights and procedural protections in his criminal trial than would be afforded to a similarly situated U.S. citizen facing the same charges. Discrimination against aliens in connection with the fundamental right of fair and equal criminal trial procedures violates the Equal Protection guarantees of the U.S. Constitution. The CMCR erred in ruling that the Constitution's Equal Protection rights do not extend to aliens detained at Guantanamo. Any language in cases from within this Circuit suggesting otherwise is pure *dicta*, and cannot be relied on to hold that aliens, and aliens alone, can be subject to a lesser and unequal form of criminal process.

ARGUMENT

I. Providing Material Support for Terrorism Is Not an Offense Against the Law of War

The law of war is "that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals." *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942). The Supreme Court has recognized that the source of Congress's authority to establish military commissions for the prosecution of war

crimes is the Define and Punish Clause of the Constitution. U.S. Const. art. I, § 8, cl. 10; *Hamdan*, 548 U.S. at 601; *In re Yamashita*, 327 U.S. 1, 7 (1946); *Quirin*, 317 U.S. at 28. The question presented here is whether the Define and Punish Clause confers authority on Congress to designate Material Support for Terrorism as an "Offense against the Law of Nations."

A. Congress Has the Power to Define, Not Create, Offenses Against the Law of War

Congress has no power unilaterally to declare that a particular act constitutes an "Offense against the Law of Nations." This limitation was recognized by the Framers at the Constitutional Convention, where James Wilson noted that "[t]o pretend to define the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance . . . that would make us look ridiculous." 2 The Records of the Federal Convention of 1797, at 615 (Max Farrand ed., 1911). "[Gouverneur] Morris replied by suggesting that 'define' was intended to suggest the need to provide detail, not to *create* offenses where none had previously existed . . . ." Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and*

Punish . . . Offenses against the Law of Nations," 42 Wm. & Mary L. Rev. 447, 473 (2000). "The debates at the Constitutional Convention made clear that Congress would have the power to punish only actual violations of the law of nations, not to create new offenses." *Id.* at 474. As one scholar put it:

> [T]his is not to say that the founders intended to give Congress free rein to *determine* offenses against the law of nations; rather, the word "define" was carefully chosen. It is clear from the drafting history of the Clause that only offenses established by the "consent" of nations, to use Marshall's phrase, would qualify. Congress could not create offenses, but retained only the second-order authority to assign more definitional certainty to those offenses already existing under the law of nations at the time it legislated.

Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 Harv. Int'l L.J. 121, 141 (2007). This understanding was also expressed by the U.S. Attorney General in 1865: "To *define* is to give the limits or precise meaning of a word or thing in being; to make is to call into being. Congress has power to

define, not to make, the laws of nations . . . ." 11 Op. Att'y Gen. 297, 299 (1865), App. 121.

The fact that Congress asserted in the MCA (at 10 U.S.C. § 950p(a) (2006)) that MST is a pre-existing offense traditionally triable by military commissions—*i.e.*, a violation of the law of war—does not make it so. "Whether the offense as defined is an offense against the law of nations depends on the thing done, not on any declaration to that effect by congress." *United States v. Arjona*, 120 U.S. 479, 488 (1887). The Supreme Court has rejected congressional efforts to criminalize and punish, pursuant to its "Define and Punish" power, an offense that was not a recognized violation of the law of nations. *See United States v. Furlong*, 18 U.S. 184, 197-98 (1820) (rejecting the claim that Congress had the power to designate murder at sea as an offense against the law of nations). *Furlong* and *Arjona* instruct that Congress's statements about the content of international law deserve careful scrutiny and that courts must not abdicate their role in deference to the political branches, as "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137,

177 (1803). This extends to ascertaining the content of the law of war. *See, e.g.*, *Quirin*, 317 U.S. at 29 (in addressing "whether it is within the constitutional power of the national government to place petitioners upon trial before a military commission . . . [w]e must . . . first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal").

While the CMCR paid lip service to *Marbury* in stating that it would not afford "absolute deference" to Congress's declaration that the MCA merely codified pre-existing law, App. 36, lengthy sections of the CMCR's opinion are devoted to explaining why Congress's determination is nevertheless entitled to heavy deference. But the CMCR's stance created precisely what the Supreme Court cautioned against in *Boumediene*, 553 U.S. 723, *i.e.*, "a striking anomaly in our tripartite system of government, leading to a regime in which the Congress and the President, not this Court, say 'what the law is.'" *Id.* at 765 (quoting *Marbury*, 5 U.S. at 177).

Furlong illustrates the proper attitude of the courts toward congressional recitations and enactments concerning the content of

international law. In that case, which the CMCR ignored despite Hamdan's reliance on it in briefing and at oral argument, the Court held that Congress does not have authority to "define" as a violation of international law (and thereby bring within the jurisdiction of American courts) any conduct it deems offensive, without regard to international opinion on the subject. *Furlong* involved an indictment for "piratical murder" criminalized by a federal statute of 1790. The Court took exception to the offense as defined in the statute, pointing to the "well-known distinctions between the crimes of piracy and murder," and gave only limited effect to the statute that purported to "declare[ ] murder as well as robbery to be piracy." *Id.* at 196-97. The Court said that while piracy, *i.e.*, "robbery on the seas," is "an offence within the criminal jurisdiction of all nations," (because as a violation of international law, it is an offense for which universal jurisdiction exists) it is "[n]ot so with the crime of murder." *Id.* "Nor is it any objection," said the Court, "that the law declares murder to be *piracy*. These are things so essentially different in their nature, that *not even the*

omnipotence of legislative power can confound or identify them." *Id.* at 198 (second emphasis added).

Thus, the Supreme Court refused to give effect to the section of the statute that the Government was relying on in *Furlong* to punish murder on the high seas. While the general indictment against the accused was sustained because of the sufficiency of the facts alleging piracy, the Court made clear that the portion of it charging murder of a foreigner by a foreigner, on board a foreign vessel at sea, was not punishable by the United States, *i.e.*, was not a violation of international law within the jurisdiction of all nations. *Id.* at 197-98. In short, the act of Congress was inconsistent with international law. As the Court stated, "[i]t is obvious that the penman who drafted the section under consideration, acted from an indistinct view of the divisions of his subject." *Id.* at 196. The relevant section of the act therefore was given no effect. Instead, it was construed by "reference to the punishing powers of the body that enacted it." *Id.* In other words, the Court refused to defer to Congress's faulty definition of an international law violation and refused to countenance its explicit

assertion of a "punishing power" with respect to that offense. To do otherwise would exceed the limited grant of power in the Define and Punish Clause and afford Congress an unprecedented measure of law-making power within the international arena: "[i]f by calling murder *piracy*, [Congress] might assert a jurisdiction over that offence committed by a foreigner in a foreign vessel, what offence might not be brought within their power by the same device? The most offensive interference with the governments of other nations might be defended on the precedent." *Id.* at 198.

Likewise, in the context of military commissions specifically, the Supreme Court has rebutted the notion that Congress can confer on such tribunals the power to try offenses that are not law of war violations. *See, e.g.*, *In re Yamashita*, 327 U.S. at 13 ("[n]either Congressional action nor the military orders constituting the commissions authorized it to place petitioner on trial unless the charge preferred against him is of a violation of the law of war"). Thus, contrary to the great deference shown by the CMCR, American courts have vigorously policed the jurisdiction of military tribunals: "[t]he

attitude of a free society toward the jurisdiction of military tribunals—our reluctance to give them authority to try people for nonmilitary offenses—has a long history." *Lee v. Madigan*, 358 U.S. 228, 232 (1959).

The CMCR confused the distinct questions of (1) whether particular conduct is truly recognized as a war crime by agreement and practice among nations, and (2) what degree of latitude should be afforded Congress in specifying the elements of (*i.e.*, "defining") an uncodified but universally acknowledged war crime. While some measure of deference may be appropriate on the latter question, *Furlong* and *Arjona* demonstrate that Congress is entitled to little or no deference on the former.[2] But instead of relying on *Furlong*, *Arjona*, or

[2] The CMCR's reliance on *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 939 (D.C. Cir. 1988) (stating that "no enactment of Congress can be challenged on the ground that it violates customary international law"), to justify its deference is misplaced, as that case dealt with an appropriation of funds under U.S. domestic law, not an effort to define the content of international law. Moreover, the court in that case recognized as unsettled the question of whether Congress is bound by peremptory norms of international law ("*jus cogens*"): "Such basic norms of international law as the proscription against murder and slavery may well have the domestic legal effect that appellants suggest. That is, they may well restrain our government in the same way that the Constitution restrains it." *Id.* at 941. In this case, Congress is bound by the Define and Punish Clause, which incorporates international law, law that the Supreme Court has repeatedly stated is established by the common consent of nations. As recognized in a 1792 opinion of our nation's first Attorney General, Edmund Randolph, Congress cannot unilaterally modify the substantive content of that law: "The law of nations,

the records of the Constitutional Convention—none of which it cited—the CMCR embarked upon a lengthy discussion of Congress's *other* war and foreign affairs powers, concluding from these that Congress is entitled to great deference in its determination of what is, or is not, a war crime. App. 17-24. However, the Supreme Court has spoken clearly that, for the creation of law of war military commissions of the sort at issue here, the Define and Punish Clause, and not other war-related powers, is the source of congressional authority. *In re Yamashita*, 327 U.S. at 7 ("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' . . . as an appropriate tribunal for the trial and punishment of offenses against the law of war.") (internal citations omitted). Thus, the CMCR's reliance on multiple constitutional provisions that relate specifically to other war powers (*e.g.*, to "raise and support Armies," or "provide and

---

although not specifically adopted by the constitution or any municipal act, is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation, subject to modifications on some points of indifference." 1 U.S. Op. Att'y Gen. 26-27 (1792), App. 121.

maintain a Navy," App. 17) in order to adopt a deferential stance, is misplaced. By allowing the prosecution of a domestic offense in a law of war court, moreover, such deference departs from the long tradition in this country of protecting the jurisdiction of civilian courts from encroachment by military tribunals. *Reid v. Covert*, 354 U.S. 1, 21 (1957) (plurality) ("the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law"). [3]

B. Plain and Unambiguous Precedent and Wide Acceptance by the International Community Are Required to Establish that Particular Conduct Violates the Law of War

"'Actionable violations of international law must be of a norm that is specific, universal, and obligatory.'" *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (quoting *In re Estate of Marcos, Human Rights*

[3] Whether it is the case that "courts are required to defer to Congress's 'unambiguous exercise' of its power to grant jurisdiction to agencies or to courts," App. 22, in other contexts (a highly questionable proposition with regard to Article I courts generally), it is emphatically not the case with respect to military courts. The Supreme Court has consistently "been alert to ensure that Congress does not exceed the constitutional bounds and bring within the jurisdiction of the military courts matters beyond that jurisdiction." *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 66 n.17 (1982); *see also United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (striking down unconstitutional statutory extension of court-martial jurisdiction); *Reid v. Covert*, 354 U.S. 1 (1957) (same).

Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994)). "[A]n act does not become a [war] crime without its foundations having been firmly established in precedent," a precedent that "must be plain and unambiguous." *Hamdan*, 548 U.S. at 602 & n.34 (plurality). A cognizable violation of the law of nations must have no "less definite content and acceptance among civilized nations than the historical paradigms familiar [in 1789]." *Sosa*, 542 U.S. at 732. In determining whether these conditions are met, courts look to "'the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.'" *Sosa*, 542 U.S. at 734 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

Two recent decisions by the Supreme Court have pointed to examples in which this "high standard" was met. *Hamdan*, 548 U.S. at 603. First, in *Hamdan*, the Court noted that the violation alleged in *Quirin* "was, by 'universal agreement and practice' both in this country and internationally, recognized as an offense against the law of war."

Id. (quoting *Quirin*, 317 U.S. at 30). As authority, the *Quirin* Court cited the British Manual of Military Law and twelve treatises in English, German, and French, all of which declared the precise conduct charged in the military commission to be a violation of the law of war. Second, in *Sosa*, the Court cited *United States v. Smith*, 18 U.S. 153 (1820), as an example of an international law norm with sufficiently "definite content and acceptance among civilized nations" to satisfy its standard. *Sosa*, 542 U.S. at 732. The *Smith* majority cited 31 treatises in Latin, English, French, and Spanish and three British cases, in a footnote extending over 17 pages, to establish that piracy was sufficiently well-defined in the law of nations to support criminal liability without further specification by Congress.

A further example is provided by *The Scotia*, 81 U.S. 170 (1871), a decision in which the Court left no possible doubt concerning the need for "the common consent" of nations in order to recognize and enforce an international law norm:

> Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of

> nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct.

Id. at 187. [4]

In light of this authority, the CMCR's statement that "[t]here is no constitutional prerequisite of universal, international, or scholarly unanimity" before Congress can define MST as a war crime must be rejected as an effort to sweep aside an established standard limiting Congress's power under the Define and Punish Clause. App. 24. As shown below, this "high standard" required by *Hamdan*, *Sosa*, and *The Scotia*, and exemplified by *Quirin* and *Smith*, has not been met with respect to the offense of MST.

---

[4] The CMCR's only authority for a lower standard of international acceptance, *United States v. Laden*, 92 F. Supp. 2d 189 (S.D.N.Y. 2000), App. 23-24, predates *Sosa* and *Hamdan*, and is not consistent with Supreme Court precedent. *Id.* at 220 (acceptance "by at least some members of the international community as being offenses against the law of nations" sufficient to warrant Congress in "defining" the offense). This statement is *dictum*, however, because the district court held that the "more important" reason that the federal long-arm terrorism statutes, 18 U.S.C. §§ 2332 and 2332A, were constitutional was that they were enacted under Congress's national security powers, not the Define and Punish Clause. *Laden*, 92 F. Supp. 2d at 221. In any event, even if the *Laden* standard were accepted, it would not save the prosecution in this case, as *no* members of the international community recognize MST as a war crime.

C. There Is No Precedent for Defining Material Support for Terrorism as a War Crime

1. Domestic and International Authorities Have Rejected or Cast Doubt Upon MST's War Crime Status

Although it is usually difficult to prove a negative, in this case there is abundant affirmative evidence that Material Support for Terrorism is not a war crime. It has never been tried by a U.S. law of war military commission. *See* David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 Va. J. Int'l L. 5 (2005); Michael O. Lacey, *Military Commissions: A Historical Survey*, Mar. 2002 Army Lawyer 41 (2002). It is not identified as a war crime in the War Crimes Act, 18 U.S.C. § 2441, or in the *Law of War Handbook*. Int'l & Operational Law Dept., Judge Advocate General's Legal Ctr. Sch., U.S. Army, *Law of War Handbook* at 206-15 (Maj. Keith E. Pulse d., 2005).[5] A Congressional Research Service Report concluded that "defining as a war crime the 'material support for terrorism' does not appear to be supported by historical precedent."[6]

---

[5] *Available at* http://www.loc.gov/rr/frd/Military_Law/pdf/law-war-handbook-2005.pdf.

[6] Jennifer K. Elsea, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military*

Indeed, the dearth of precedent for identifying MST as a war crime is so plain and telling that the General Counsel of the DoD advised Congress that the offense should be dropped from the then-anticipated 2009 revision of the MCA:

> After careful study, the Administration has concluded that appellate courts may find that "material support for terrorism"—an offense that is also found in Title 18 [of the U.S. Code]—is not a traditional violation of the law of war. As you know, the President has made clear that military commissions are for law of war offenses. We believe it would be best for material support to be removed from the list of offenses triable by military commission, which would fit better with the statute's existing declarative statement [about prosecution of pre-existing offenses].

Prepared Statement of Jeh C. Johnson, General Counsel, Dept. of Defense, before the Senate Armed Services Comm., July 7, 2009, App. 134. Similar testimony was provided by Assistant Attorney General David S. Kris of the National Security Division of the Department of Justice. App. 140.

Justice 12 (CRS, updated Sept. 27, 2007), *available at* http://www.fas.org/sgp/crs/natsec/RL33688.pdf.

Moreover, MST fails the test for a war crime recognized by the plurality in *Hamdan*: "it is not enough to *intend* to violate the law of war and commit overt acts in furtherance of that intention unless the overt acts either are themselves offenses against the law of war or constitute steps sufficiently substantial to qualify as an attempt." 548 U.S. at 604 (emphasis added) (citing Col. William Winthrop, *Military Law and Precedents* 841 (2d ed. 1920)). In this case, none of the acts on which Hamdan's MST conviction was based are law of war violations standing alone; nor were they steps that constituted an attempt to commit any such violation. The Supreme Court plurality explicitly stated as much (twice) in the *Hamdan* decision: "None of the overt acts that Hamdan is alleged to have committed violates the law of war," *Id.* at 600; "None of the overt acts alleged to have been committed in furtherance of the agreement is itself a war crime, or even necessarily occurred during time of, or in a theater of, war," *id.* at 612.[7]

[7] The 13 July 2004 Charge Sheet to which the plurality was referring set forth a single charge, "Conspiracy," and alleged that Hamdan acted in furtherance of that conspiracy by serving as "a bodyguard and personal driver for Usama bin Laden," by "deliver[ing] weapons, ammunition or other supplies to al Qaida members and associates," and by "receiv[ing] training on rifles, handguns and machine guns."

International law sources also reject war crime status for MST. Neither the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land nor the Geneva Conventions of 1929 or 1949 take cognizance of MST; nor does the 1998 Rome Statute of the International Criminal Court ("ICC"), which currently has over 120 signatory nations, mention it. *See* Rome Statute, July 17, 1998, 2187 U.N.T.S. 90. Nor is the purported offense recognized by the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, or the Iraqi Special Tribunal. Likewise, the U.N. Special Rapporteur has stated that MST is an "offence[ ] which do[es] not in fact form part of the laws of war." Special Rapportuer, *Report of the Special Rapporteur* 12, U.N. Doc. A/HRC/6/17/Add.3 (Nov. 22, 2007), App. 153.

In short, with the exception of the CMCR's opinion below, MST has been expressly rejected or thrown into severe doubt by every

---

App. 93. These are the same allegations that later served as the basis for the MST conviction. *See* App. 116-17.

domestic and international authority that has addressed the issue, including high officials of the Government.

2. Analogies to Other War Crimes Do Not Establish MST as a War Crime

The CMCR's analysis is fundamentally flawed in presuming that MST can be established as a war crime by demonstrating that it is "analogous" or "similar" to other, well-established war crimes. *See, e.g.*, App. 36 (considering "pre-existing examples of criminalization under the law of war of conduct similar to that for which appellant was convicted"); App. 40 ("broad language similar to providing material support for terrorism"); App. 44 (JCE theory "brings a similar analytical nexus to providing material support for terrorism"); App. 60 (1865 Attorney General Opinion "supports a tradition of prosecution by military commission of offenses similar to aiding or assisting in the President's murder or providing material support for terrorism").

There are two reasons this method fails to yield legitimate determinations of law of war culpability. First, it flies in the face of the Supreme Court's holdings that conduct is not prosecutable as a war crime unless there is plain, specific, unambiguous, and firmly

established precedent for that treatment. *See* Sections I.B. and C., *supra*; *Hamdan*, 548 U.S. at 602 & n.34; *Sosa*, 542 U.S. at 725 and 732. Second, identifying crimes "by analogy" has long been condemned under both U.S. constitutional law and international law. In Chief Justice Marshall's words, "[i]t would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated." *United States v. Wiltberger*, 18 U.S. 76, 96 (1820); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168-69 (1972) ("punishment by analogy . . . [is] not compatible with our constitutional system.") (internal quotation marks and citation omitted); *United States v. Hubbard*, 856 F. Supp. 1416, 1418 (E.D. Cal. 1994) ("Simply said, in this country, unlike [other] regimes . . . , there are no crimes by analogy.") (citing *Zschernig v. Miller*, 389 U.S. 429, 435 n.6 (1968)).

International law likewise condemns the imposition of criminal liability by analogy. The Nazi criminal justice system incorporated

directives to judges to find defendants guilty of crimes by analogy if their conduct did not fall into any specific criminal prohibition. *See United States v. Josef Altstötter,* (the Justice Trial), 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1, 176-78 (1948). At the Justice Trial, one of the allegations against the defendants was that they perverted the German criminal code by creating and enforcing the crime by analogy principle. *Id.*; *see also Trial of Josef Altstötter and Others*, 6 Law Reports of Trials of War Criminals 1, 95 (1948).

Both the constitutional and international law doctrines are animated by the concern—also expressed in *Furlong*—that liability by analogy grants potentially unchecked discretion to the adjudicator or legislature, to impose retroactive criminal liability on the theory that the defendant's conduct was "close enough" to an existing offense. Quite apart from the ex post facto problem discussed below, the CMCR's method of proceeding by analogy to determine the content of international law is itself inconsistent with international law

principles.[8] Once this is recognized, the CMCR's holding in this case is revealed as a ruling devoid of legal support. It does not matter how many statutes, treaties,[9] or vaguely similar past prosecutions the CMCR cites in its voluminous opinion. None of them involved the conduct defined as Material Support for Terrorism in the MCA. Accordingly, none provides a genuine precedent for the extraordinary prosecution in this case.

3. The CMCR's Review of Other Crimes Does Not Support Its Holding that MST Is a War Crime

a. Terrorism is not Material Support for Terrorism

Throughout its discussion of international and historical authorities, the CMCR suggests that the asserted status of "terrorism" as a war crime supports the same status for Material Support for Terrorism. This, however, is a nonsequitur and an example of

---

[8] *See, e.g.*, Rome Statute of the ICC art. 22(2): "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."

[9] "[T]reaties, like contracts, are legally binding on States that become parties to them by consenting to be bound, and may constitute evidence of a norm of customary international law only if an overwhelming majority of States have ratified the treaty *and* those States uniformly and consistently act in accordance with its principles." *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 325 n.11 (2d Cir. 2007) (internal quotation marks and citation omitted).

identifying a crime by analogy. The two are entirely different offenses. Terrorism requires proof of an act of violence motivated by the intent to influence government policy. *See, e.g.*, 18 U.S.C. § 2331(1). MST has no such requirements. Whether terrorism is a war crime simply has no bearing on the status of MST.

b. Conspiracy is not Material Support for Terrorism

The CMCR also suggests that statutes and treaties criminalizing conspiracy support war crime status for MST. *See, e.g.*, App. 41, 50. Again, this is plainly crime by analogy. Even assuming *arguendo* that conspiracy is a war crime, *but see Hamdan*, 548 U.S. at 604-05 (plurality) (stating that it is not), that has no bearing on MST's status. The elements of conspiracy are entirely different from those of MST. Conspiracy criminalizes an agreement by two or more persons to commit a specific crime, and an overt act in furtherance of that objective. *See, e.g.*, 10 U.S.C. § 950t(29). MST does not contain such requirements. The MCA sets a very low bar for culpability for MST; for example, the MCA imposes criminal liability for providing goods or services to an organization with the knowledge that the organization

has, at some point in the past, engaged in a terrorist act. *See* 10 U.S.C. § 950v(25) (2006); 10 U.S.C. § 950t(25) (2009). MST requires neither agreement nor specific intent that a particular crime be committed. Thus, conspiracy (even if it were a war crime) does not constitute precedent for treating MST as a war crime.

c. Aiding and abetting or joint criminal enterprise liability for terrorism are not Material Support for Terrorism

The CMCR also relied on a variety of municipal laws and international treaties that criminalize terrorism and aiding and abetting terrorism, or recognize some form of JCE liability for terrorism. App. 36-46. But these measures do not remotely support the proposition that MST is a war crime. Aiding and abetting and JCE liability are not crimes in themselves; they are forms of derivative or extended liability for another crime committed by another perpetrator. They require acts or mental states not present in the elements of MST, such as a completed criminal act, substantial assistance, intent, and/or

a common plan to commit a recognized crime.[10] Because MST is not an underlying war crime, there can be no extended liability for remote actors (participants in a common plan) pursuant to a JCE theory. Likewise, "aiding and abetting" requires a completed criminal act, substantial assistance, and intent that the criminal act occur. Antonio Cassese, *International Criminal Law* 214-17 (2d ed. 2008) ("the aider and abettor must willingly aim to help or encourage another person in the commission of a crime; in this respect *intent* is therefore required"). These elements are not present in the MCA's definition of MST, and therefore an MST conviction cannot be equated with "aiding and abetting" terrorism.

d. Aiding the enemy is not Material Support for Terrorism

Aiding the enemy also is entirely distinct from MST. Despite the CMCR's erroneous claim to the contrary, App. 58, the gravamen of aiding the enemy is and always has been the betrayal of allegiance

[10] *See* Appellant's Reply Brief to the CMCR (at 9-12), submitted December 21, 2009, and Appellant's Supplemental Brief on Joint Criminal Enterprise and Aiding the Enemy (at 3-16), submitted February 24, 2011. In addition, as noted above, the Military Judge refused to allow the Government to proceed to trial on a JCE theory in connection with its Conspiracy charge. AE 211 at 4.

owed to a sovereign, not the provision of aid standing alone. *Hamdan*, 548 U.S. at 600 n.32 (plurality) ("aiding the enemy may, in circumstances where the accused owes allegiance to the party whose enemy he is alleged to have aided, be triable by military commission").

Solely as a matter of logic, the crime of "aiding the enemy" cannot be construed to be applicable to the "enemy" himself—that is, one who is a citizen, resident, or otherwise adheres to a state or entity against which the United States is at war. To hold otherwise would make all enemy combatants—privileged or unprivileged—guilty of war crimes simply by virtue of taking up arms against the United States, regardless of whether their conduct conforms to the laws of war.

Accordingly, legal authorities uniformly hold that aiding the enemy requires a breach of allegiance. That requirement is included in the 2006 MCA, which makes breach of allegiance a defining element of its version of the crime. 10 U.S.C. § 950v(b)(26) (2006) ("Wrongfully Aiding the Enemy" requires "breach of an allegiance or duty to the United States"). Consistent with this, courts have treated the offense as a species of treason, which requires the violation of a duty of allegiance

to the United States for conviction. *See, e.g.*, *Carlisle v. United States*, 83 U.S. 147, 154 (1872); *Wiltberger*, 18 U.S. at 97 ("Treason is a breach of allegiance"); *United States v. Batchelor*, 22 C.M.R. 144, 157 (C.M.A. 1956).

4. There Is No Historical Precedent for Treating Material Support for Terrorism as a War Crime

There is no historical basis for treating MST as a war crime. The historical incidents cited by the CMCR are easily distinguishable or so isolated and condemned by legal authorities that they cannot possibly be construed to represent a norm accepted by the international community.

The case of Ambrister and Arbuthnot is a good example of the latter. App. 54-55. During what is now generally regarded as an illegal military incursion into Spanish Florida against the Seminole tribe and escaped slaves sharing their territory, *see* Kenneth Wiggins Porter, *Negroes and the Seminole War, 1817–1818*, 36 J. Negro Hist. 249, 254 (1951), General Andrew Jackson captured and ultimately executed two British nationals who, with the sanction of the British and Spanish governments, had been trading with the Seminoles and former slaves.

Jackson tried them for "aiding the enemy" despite their lack of any duty of allegiance to the United States. Not only does this case stand virtually alone in ignoring the defendants' allegiance, it is among the most condemned proceedings in U.S. history, leading to the near-censure of Jackson by Congress, uniform criticism of its legal merits, and condemnation that has continued to this day.[11] It is an understatement to say that it has not garnered the consent of the international community.

The CMCR's reliance on the Civil War and Philippine Insurrection precedents is also misplaced, App. 55-66, as all of these cases involve a breach of allegiance to the United States. Many of the Civil War records state this duty explicitly, either by reciting the accused's citizenship and breach of allegiance, or by less formal language to the same effect.[12] Generally, *any* U.S. citizen at the time of secession, who thereafter

---

[11] House Committee on Military Affairs, 15th Cong., *Report of the Committee on Military Affairs, to Whom Was Referred So Much of the President's Message, of 17th November Last, as Relates to the Proceeding of the Court Martial, in the Trial of Arbuthnot and Ambrister, and the Conduct of theSeminole War* (1819) (calling for censure); Winthrop, *supra* at 464-65 ("For such an order and its execution a military commander would now be indictable for murder."); Brian Baldrate, *The Supreme Court's Role in Defining the Jurisdiction of Military Tribunals: a Study, Critique, & Proposal for* Hamdan v. Rumsfeld, 186 Mil. L. Rev. 1, 24 (2005).

[12] *See, e.g.*, App. 190 and records provided in Supplemental Authorities, Tab A.

adhered to the Confederacy, by that very act breached his or her duty of allegiance, because American courts continued to regard such individuals as citizens of the United States. *Ford v. Surget*, 97 U.S. 594, 605 (1878); *The Amy Warwick*, 67 U.S. 635, 673-74 (1862). Moreover, as the *Hamdan* plurality explained:

> [T]he military commissions convened during the Civil War functioned at once as martial law or military government tribunals and as law-of-war commissions. Accordingly, they regularly tried war crimes and ordinary crimes together. Indeed, as Howland observes, "[n]ot unfrequently the crime, as charged and found, was a combination of the two species of offenses."

548 U.S. at 608 (citations omitted). Thus, reference to the cursory records of the "hybrid military commissions of the Civil War" cannot provide reliable guidance for what was a law of war violation (as opposed to a domestic crime) even at that remote period, much less today. *Id.*

The situation is similar for the records of the Philippine Insurrection. At the time of the insurrection (1899-1902), the United States was an occupying power and the indigenous people owed it their allegiance on that basis. *United States v. Lapene*, 84 U.S. 601, 603

(1873). In every case charging aiding the enemy, the charge invariably specified either a sworn oath of allegiance or facts that established a duty of allegiance by operation of law.[13]

The CMCR also cites the charges in the *Quirin* military commission, which included a charge of "relieving . . . the enemy" made against all of the defendants, all but one of whom were German citizens. App. 66. But this was not among the charges upheld by the Supreme Court, and thus, just as with the Conspiracy charge, "*Quirin* supports Hamdan's argument that [the offense] is not a violation of the law of war." *Hamdan*, 548 U.S. at 606 (plurality). In addition, because the saboteurs in *Quirin* were on U.S. territory at the time of their acts, they owed a temporary duty of allegiance to the United States which they violated by their conduct. *Carlisle*, 83 U.S. at 154.

Nor do the World War II era Nuremberg cases support treating MST as a war crime. The CMCR cites convictions for "membership in a criminal organization" obtained in the Nuremberg Military Tribunals under Control Council Law 10, art. II(1)(d), which criminalized

[13] *See* the records provided under Supplemental Authorities, Tab B.

"Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal." App. 68-71.[14] But the concept of a "criminal organization" upon which the membership crime was predicated has never been accepted by the international community. Patricia Wald, *Running the Trial of the Century: The Nuremberg Legacy*, 27 Cardozo L. Rev. 1559, 1593 (2006). Indeed, the Rome Conference specifically considered and rejected including the Nuremberg "criminal organization" provisions in the ICC Statute.[15] It was controversial even at the Nuremberg trials themselves. Taylor, *Final Report*, *supra*, at 148-49; Wald, *supra*, at 1593. Since the

[14] *See* Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10*, App. D (1949), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_final-report.html (last visited Nov. 10, 2011) (Control Council Law 10 is included in Supplemental Authorities, Tab C, at 1).

[15] *See* Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Vol. 2 (Rome, 15 June - 17 July 1998) 133,-136 (2002) (available at http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf) (multiple doubts expressed about French proposal to include the Nuremberg provisions); Statute of the ICC, art. 25(1), (2) (court has jurisdiction over "natural persons" who are "individually responsible" for criminal conduct).

Nuremberg trials, it has been held by at least one international tribunal not to be a war crime.[16]

But "membership in a criminal organization" is a poor analogy to MST in any event. MST covers a far broader scope of conduct than membership in an organization. Equally important, MST lacks the crucial element of a "criminal organization," which in the membership crime is a fact that must be proved beyond a reasonable doubt, not a legislative or administrative designation, as it is under the 2006 MCA and federal MST crime. In short, this reference to the anomalous Control Council Law 10 provides no support for the CMCR's holding.

Finally, the 1914 and 1956 Army Field Manuals provide no support either. It appears that the CMCR cites them because they state that individuals who take up arms without satisfying the criteria as privileged belligerents are not prisoners of war and may be tried for their conduct. The 1914 Manual specifies that they are "liable to punishment for such hostile acts as war criminals." *The Law of Land*

[16] In *Prosecutor v. Staki*, Case No. IT-97-24-T, ¶ 433 (ICTY Trial Chamber, July 31, 2003), *available at* www.icty.org/case/stakic/4 (last visited Nov. 10, 2011), the ICTY Trial Chamber held that "membership in an organisation . . . would constitute a new crime not foreseen under the Statute and therefore amount to a flagrant infringement of the principle *nullum crimen sine lege*."

Warfare ¶ 369 (1914). The parallel provision of the 1956 Manual, however, states only that they "may be tried and sentenced to execution or imprisonment." *The Law of Land Warfare*, FM 27-10 ¶ 80 (1956). It does not state that they may be tried as "war criminals." Thus, regardless of whether the law of war in 1914 permitted hostile conduct by an unprivileged belligerent to be treated as a war crime, this situation had changed by 1956. By omitting the "war criminal" characterization, it restates the significance of the combatant privilege under post-World War II international law, which forbids trial and punishment of a privileged belligerent *by an ordinary civilian court for municipal crimes* that would otherwise apply (such as murder and assault), but permits municipal trial and punishment for unprivileged belligerents. Thus, the 1956 Manual demonstrates that the U.S. military does not consider hostilities perpetrated by unprivileged belligerents to be war crimes, but ordinary municipal crimes. Indeed, that was the view of the 1956 Manual's primary drafter at the time.[17]

[17] Richard R. Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs*, 28 Brit. Y.B. Int'l L. 323, 338 (1951). ("[G]uerrilla warfare and private hostilities in arms should not be regarded as violative of international law . . . What

D. Designating a Domestic Crime for Trial by a Military Commission Violates the Separation of Powers

In including MST in the MCA, Congress took an existing domestic crime, called it a war crime, and purported to give power to an Article I court to adjudicate that domestic crime. This is not only impermissible under the Define and Punish Clause, it also violates the Separation of Powers, because jurisdiction over domestic criminal prosecutions is a core judicial function of Article III courts.

The legislative history of the 2009 MCA indicates that Congress included MST in the list of offenses triable by military commission based on a mistaken reliance on the Assimilative Crime Act of 1948, 18 U.S.C. § 13(a). That statute provides that when a criminal offense has been committed on land reserved or acquired by the federal government (such as military bases and Indian reservations), and the offense is not punishable by an act of Congress, a federal offense can be charged

---

formulation of law is necessary to permit his 'punishment' if he fails so to qualify [for prisoner of war status] is essentially a matter of domestic law or practice."); *see also* W. Hays Park, "National Security Law in Practice: The Department of Defense Law of War Manual 2 (2010), *available at* http://jnslp.files.wordpress.com/2010/11/aba-speech-11082010-final-as-given.pdf (last visited Nov. 10, 2011) (identifying Baxter as the "primary author" of FM 27-10).

based on the elements that would apply under state law. In the hearings leading to the enactment of the 2009 MCA, Senator Graham asked: "I think I understand the administration's view that [material support for terrorism] is not a traditional charge under the law of armed conflict. But under the Uniform Code of Military Justice, we incorporate the Assimilated [sic] Crimes Act. Could that doctrine be used here?" Admiral McDonald responded, "Yes, sir." *Hearing re Military Commissions and Trial of Detainees for Violations of the Law of War, S. Comm. on Armed Servs.*, 111th Congress 14 (2009) (statement of Vice Admiral Bruce E. MacDonald, USN), App. 210.

Admiral McDonald was mistaken. Military courts, as a species of Article I courts, have strictly limited jurisdiction. *United States v. Denedo*, 129 S. Ct. 2213, 2224 (2009) ("The military courts are markedly different [from Article III courts]. They are Article I courts whose jurisdiction is precisely limited at every turn.") (Roberts, C.J., concurring in part and dissenting in part); *Reid*, 354 U.S. at 21 (plurality); *Toth*, 350 U.S. at 17 ("We find nothing in the history or constitutional treatment of military tribunals which entitles them to

rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property."); *id.* at 22 ("There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.").

In contrast, Article III, § 1 of the U.S. Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." "Article III, § 1, serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government, and to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (internal quotation marks and citations omitted); *accord N. Pipeline Constr. Co. v.*

Marathon Pipe Line Co., 458 U.S. 50, 58 (1982) (Article III serves as "an inseparable element of the constitutional system of checks and balances") (striking down a statute that conferred broad jurisdiction on Article I bankruptcy judges who lacked lifetime tenure and protection against salary diminution, essential attributes of independence protected by Article III); *Hamdan*, 548 U.S. at 591 ("Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8 and Article III, § 1 of the Constitution unless some other part of that document authorizes a response to the felt need.").

Thus, it is no response to say—as the CMCR suggested, App. 75—that the MCA merely authorizes a change in venue or court. The distinction between an Article I military tribunal and an Article III civilian court is a matter of the utmost significance in preserving civilian primacy and the balance of powers in our constitutional system: "Trial by military commission raises separation-of-powers concerns of the highest order." *Hamdan*, 548 U.S. at 638 (Kennedy, J., concurring in part). Because in this case a domestic crime was improperly adjudicated

in a military court that lacked jurisdiction over the offense, Hamdan's MST conviction must be vacated.

II. Hamdan's Conviction Is The Result Of An Illegal Ex Post Facto Prosecution

Material Support for Terrorism is not now and never has been a war crime. But the Court need not reach that question in order to vacate Hamdan's conviction. Even if, at the outer reaches of its power under the Define and Punish Clause, Congress properly defined MST as a war crime in 2006 based on evolving international norms, the Government's prosecution of the crime for conduct occurring up to a decade prior to 2006 violates the Ex Post Facto Clause of the U.S. Constitution, Art. I, § 9, cl. 3.

A. If Hamdan's Conviction Was the Result of an Ex Post Facto Prosecution, It Must Be Vacated

1. Congress Lacks Authority to Authorize Ex Post Facto Prosecutions

The U.S. Constitution prohibits the enactment of ex post facto laws. U.S. Const. Art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."). "The Ex Post Facto Clause raises to the constitutional level one of the most basic presumptions of our law:

legislation, especially of the criminal sort, is not to be applied retroactively." *Johnson v. United States*, 529 U.S. 694, 701 (2000). Ex post facto laws are criminal statutes that retroactively (1) punish previously lawful conduct; (2) aggravate the criminal nature of an act; (3) increase the punishment for a crime; or (4) change the rules of evidence to lower the burden of proof or reduce the quantum of evidence necessary to convict the defendant. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).[18]

The Ex Post Facto Clause is a structural limitation on the power of Congress imposed by the Constitution. *Downes v. Bidwell*, 182 U.S. 244, 277 (1901) ("There is a clear distinction between . . . prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several states. Thus, when the Constitution declares that 'no bill of attainder or ex post facto law shall be passed,' . . . it goes to the competency of Congress to pass a bill *of that description*."). As an absolute, structural limitation on the competence

[18] *Calder* still provides the "authoritative account of the scope of the Ex Post Facto Clause." *Stogner v. California*, 539 U.S. 607, 611 (2003).

of Congress, the Ex Post Facto Clause makes no exception for the prosecution of law of war offenses. The Supreme Court recognized constitutional limitations in this context in *Quirin*, when it noted that Congress, in that case, "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 (emphasis added).

Both the Military Judge and the CMCR agreed with these principles. App. 73-74, 103. Congress itself, when passing the MCA, acknowledged the limits imposed by the Ex Post Facto Clause. 10 U.S.C. § 950p (2006) ("This chapter does not establish new crimes that did not exist before its enactment . . . . Because the provisions of this subchapter . . . are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.").

2. International Law Also Prohibits Ex Post Facto Prosecutions

International law similarly prohibits ex post facto prosecutions. Common Article 3 of the Geneva Convention incorporates the ex post facto principle as one of the indispensable judicial guarantees that must be afforded to all defendants. Common Article 3 applies and protects Hamdan in this case. *Hamdan*, 548 U.S. at 631-32. Common Article 3 "must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of Protocol I to the Geneva Convention of 1949, adopted in 1977." *Id.* at 633. Article 75 states:

> [N]o one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed.

Additional Protocol I, art. 75, ¶ 4(c), 1125 U.N.T.S. 3.[19]

The *Law of War Handbook*, the principal statement of the U.S. military on the law of war, also recognizes that international law prohibits ex post facto prosecutions. In prosecuting a war crime, "the

[19] *Available at* http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument.

principle of *nullum crimen sine lege* requires that the law to be applied in the trial be binding on the defendant at the time the offense was committed," and the principle of "*[n]ulla poena sine lege* requires that acts that may be punished as war crimes be clearly defined such that the defendant is on notice." *Law of War Handbook* 206.

In addition, the International Committee of the Red Cross identifies the ex post facto principle as a fundamental tenet of customary international law. *See* 1 Int'l Comm. of the Red Cross, *Customary International Humanitarian Law* 371-72 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005). The prohibition on ex post facto prosecution has been codified in the Rome Statute governing the ICC. Rome Statute, arts. 22, 24, 2187 U.N.T.S. 90. The International Covenant on Civil and Political Rights ("ICCPR") states that the *ex post facto* principle is non-derogable. ICCPR, art. 4, ¶ 2, 999 U.N.T.S. 171.[20] Both the American Convention on Human Rights ("ACHR") and the European Convention on Human Rights ("ECHR") echo that provision. *See* ACHR, arts. 9, 27, 1144 U.N.T.S. 123; ECHR,

[20] *Available at* http://www2.ohchr.org/english/law/ccpr.html.

arts. 7, 15, 213 U.N.T.S. 221. Similarly, the ICTY has stated that it "cannot impose criminal responsibility for acts which, prior to their being committed, did not entail such responsibility under customary international law." *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgment, ¶ 78 (July 29, 2004). In its decision, the CMCR acknowledged and embraced international law's *nullum crimen sine lege* principal. App. 74.

B. Any Power Congress Has to Participate in the Development of International Law Is Prospective, Not Retrospective

The CMCR appears to have upheld Hamdan's conviction based in part on a determination that Congress can modify and update principles of international law: "[l]ike the law of nations, the law of war must adapt to changing circumstances to be effective." App. 18. The CMCR apparently deferred to the inclusion of the MST offense in the MCA as part of a perceived congressional prerogative to "define" nascent offenses that are still in the process of gaining international recognition.

However, there is nothing in the CMCR's rationale, the authority it cites, or in logic or common sense, to suggest that such power (if it

exists) has retrospective, as well as prospective, application. As the laws of war "grow and expand to meet changed conditions," *id.* at 16, they need not—nor, to preserve the fundamental principle of *nullum crimen sine lege*, can they be permitted to—reach backward to retroactively criminalize conduct occurring under prior legal regimes. To the extent that Congress had any basis to define MST as a violation of the law of war, it engaged in that definitional project only as of October 2006, and its codification should only be enforced prospectively.

C. Material Support for Terrorism Was Not a Violation of the Law of War During the Period of Hamdan's Conduct

While the MCA recites that it has codified pre-existing offenses, it does not specify *how long* each offense has been recognized as a war crime. Thus, the statute is not a source of authority for the proposition that MST was a war crime in the 1996-2001 time period.

1. Changes in Domestic Law After 2001 Do Not Support the CMCR's Position

The MCA of 2006 responded to a post-2001 world in which terrorism had become a major preoccupation of the American Government, as well as a source of greater concern to other nations.

Thus, the CMCR noted that some countries enacted criminal prohibitions against assisting terrorist organizations after the September 11 attacks. App. 32 (MCA "encompass[es] the peculiarities of the modern geopolitical environment"), App. 36.

However, nearly all of the domestic terrorism laws from other countries cited by the CMCR were enacted *after* Hamdan's capture in Afghanistan. The CMCR focused on antiterrorism laws in Canada, India, and Pakistan. App. 48-52. But Canada's 2001 Anti-terrorism Act was enacted in 2001, at which time Hamdan was already in U.S. custody. App. 48. India's Prevention of Terrorism Act was enacted in 2002. App. 50. While Pakistan's original Anti-Terrorism Act was enacted in 1997, it was not until 2004 that the Act was amended to "'increase[] the penalties *for persons assisting terrorists in any manner*.'" App. 51-52 (quoting Saba Noor, *Evolution of Counter-Terrorism Legislation in Pakistan*, 1 Conflict and Peace Studies 1, 9 (2008)).

These foreign laws include elements somewhat similar to (though still not nearly as broad as) those listed in the MCA. But to the extent

the CMCR was swayed by post-2001 law (and its opinion indicates it was, *see* App. 36), its decision plainly violates ex post facto principles.

2. The Domestic Material Support for Terrorism Statute Similarly Does Not Support the CMCR's Holding

Similarly, the CMCR's reliance on the U.S. domestic MST statute, App. 24-30, was misplaced for ex post facto reasons as well as the reasons described in Section I above. Even if the domestic statute were a relevant indicator of international norms at the corresponding time (it is not, and never has been), the prosecution in this case of the offense as defined in the MCA of 2006 violated ex post facto principles. This is so because the domestic offense was significantly narrower in scope *in 2001* (the time of Hamdan's capture) than the offense later codified in the MCA.

The domestic MST statute was first enacted in 1994. 18 U.S.C. § 2339A (1994). In April 1996, it was amended to define "material support or resources" as:

> currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other

> physical assets, except medicine or religious materials.

18 U.S.C. § 2339A(b) (1996). Then, in 2004—three years after Hamdan's capture—the definition was broadened to include:

> *any property, tangible or intangible, or service, including* currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel *(1 or more individuals who may be or include oneself),* and transportation, except medicine or religious materials;

18 U.S.C. § 2339A(b) (2004) (emphasis added). It is this 2004 definition that the MCA incorporates. 10 U.S.C. § 950v(b)(25)(B).

The 2004 amendment codified in the MCA imposed criminal liability for providing "any . . . service" and expanded the scope of the term "personnel" to include "1 or more individuals who may be or include oneself." These more expansive grounds for culpability were absent from the domestic offense existing when Hamdan was captured. Any argument that the MST charge was a pre-existing offense based on Title 18 is therefore untenable. *See Bouie v. City of Columbia*, 378 U.S.

347, 362 (1964) (effort to retroactively impose criminal culpability for a broader range of conduct than set forth in statute existing at time of conduct offends Ex Post Facto Clause); *United States v. Torres*, 901 F.2d 205, 226-29 (2d Cir. 1990) (vacating a conviction where an intervening statute imposed new grounds for culpability and defendants may have been convicted on those grounds, "even if they did not engage in the specified conduct at any time after that section's enactment").

The MCA's reliance on the 2004 definition of "material support" has significant implications here, as Hamdan was convicted of providing "personnel, himself, to al Qaeda," "[s]erv[ing] as a driver for Usama bin Laden," and "serv[ing] as Usama bin Laden's armed bodyguard." App. 116; *see also* App. 117 (conviction on specifications 5-8 for providing "service" to bin Laden as a driver and bodyguard). Between 1996 and 2001, however, providing "oneself" as personnel and general "service" was not criminalized under the domestic statute.

When the CMCR's erroneous reliance on post-2001 laws and the U.S. domestic statute is set aside, there is nothing left to support a conclusion that MST was a war crime in 1996 to 2001. Thus, regardless

of whether MST as a war crime in 2006, the conviction in this case must be vacated on *ex post facto* grounds.

III. Hamdan's Trial by Military Commission Offends Equal Protection Guarantees

A. Equal Protection Applies at Guantanamo

In *Boumediene*, the Supreme Court held that the constitutional right to habeas corpus applies at Guantanamo for the benefit of noncitizen alleged enemy combatants. 553 U.S. at 770. The Court 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, 764 (citation omitted). The Court reasoned that "practical considerations, related not to the petitioners' citizenship but to the place of their confinement and trial" were the key factors in the determination. *Id.* at 760. The Court found nothing impracticable or anomalous about extending the protections of the Suspension Clause to alleged enemy combatants at Guantanamo, an enclave under the "complete jurisdiction and control" of the United States. *Id.* at 755.

The CMCR nevertheless held that Equal Protection does not apply "under all circumstances" at Guantanamo because "extending constitutional equal protections" to Guantanamo would be "impracticable and anomalous." App. at 83. The CMCR's opinion cannot be reconciled with *Boumediene*. Just as there was nothing impracticable or anomalous about affording constitutional habeas rights at Guantanamo, there is nothing impracticable or anomalous about affording Equal Protection rights guaranteed by the Constitution's Due Process Clause in the exact same location. *See* U.S. Const. amend. V; U.S. Const. amend XIV, § 1.

Boumediene was not limited to the narrow issue of whether the Suspension Clause applied at Guantanamo, but instead established an analytical method to determine whether constitutional protections generally would apply to claims arising from detainees there. *Boumediene* distinguished *Johnson v. Eisentrager*, 339 U.S. 763 (1950), rejecting *Eisentrager*'s cramped analysis that relied nearly exclusively on the concept of *de jure* sovereignty to determine whether the Constitution applies outside the United States. The Court explained,

"[n]othing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus." 553 U.S. at 764.

Certain post-*Boumediene* cases in this Circuit have suggested that the narrow analytical approach used in *Eisentrager* remains valid. *See Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011); *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009); *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009). The language in these cases concerning due process is *dicta* and, if read to prohibit application of the Due Process Clause at Guantanamo, contrary to *Boumediene*.

In *Al-Bihani*, this court noted, in *dicta*, that "the procedures to which Americans are entitled are likely greater than the procedures to which noncitizens seized abroad during the war on terror are entitled." *Al-Bihani*, 590 F.3d at 877 n.3. But the court in *Al-Bihani* did not hold that procedures available to citizens in criminal trials are inapplicable to non-citizens such as Hamdan because that question was not before it. *See Al-Bihani*, 590 F.3d at 875 (deciding procedures available in habeas proceeding).

Similarly, in *Rasul*, this court considered due process claims in the context of a *Bivens* action asserted by former Guantanamo detainees. 563 F.3d at 528. While the court suggested (in *dicta*) that *Boumediene* did not "disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause," it decided the case on qualified immunity grounds and stated that it would "not decide whether *Boumediene* portends application of the Due Process Clause . . . to Guantanamo detainees." *Id.* at 529. Likewise, in *Kiyemba*, which concerned a district court order to release detainees into the United States as a habeas remedy, the court speculated that the district court "may have had the Fifth Amendment's due process clause in mind" as a source of authority, and then rejected those grounds as a basis for relief. 555 F.3d at 1026-27. Ultimately, the court reversed based on "settled law" regarding "the prerogatives of the political branches" to establish conditions for entry into the United States. *Id.* at 1028-29. Thus, none of these cases, properly read, hold that due process

does not apply at Guantanamo. To the extent those cases are susceptible to such a reading, they contravene *Boumediene*.[21]

Here, the MCA offends Equal Protection in at least two ways: (1) it deprives those subject to it of the fundamental right of equality in criminal procedures; and (2) it applies only to aliens.

B. The MCA Violates Equal Protection Because It Discriminates as to Fundamental Rights of Criminal Procedure Guaranteed by Due Process

Under Equal Protection, laws that impinge on the exercise of fundamental rights are subject to strict scrutiny. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("[C]lassifications affecting fundamental rights are given the most exacting scrutiny.") (citation omitted). Fundamental rights are those that have their "source, explicitly or implicitly," in the Constitution. *Plyler v. Doe*, 457 U.S. 202, 217 n.15 (1982). The rights of a criminal defendant to procedural protections to ensure a fair trial

[21] In both *Rasul* and *Kiyemba*, this court based its due process *dicta* on the purported force of *Eisentrager* as an absolute bar to extraterritorial application of the Constitution. *Rasul*, 563 F.3d at 529; *Kiyemba*, 555 F.3d at 1026-27. That cannot be squared with *Boumediene*'s repudiation of such a "constricted reading" of *Eisentrager*, which the Court said "overlooks what we see as a common thread uniting the Insular Cases, *Eisentrager*, and *Reid*: the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism." 553 U.S. at 764.

have long been recognized as fundamental due process rights. *Douglas v. California*, 372 U.S. 353, 358 (1963); *Griffin v. Illinois*, 351 U.S. 12, 15-16 (1956); *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922) (describing as "fundamental" Fifth Amendment due process rights).

"Providing equal justice" has always been a "central aim of our entire judicial system," such that "our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons." *Griffin*, 351 U.S. at 16-17; *see also id.* at 18 ("at all stages of the [criminal] proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations").

Hamdan was afforded inferior criminal procedures as a defendant before a military commission. For example, the Military Judge denied Hamdan's pretrial motion to suppress statements obtained without advising him of his right against self-incrimination. AE 213. In denying that motion, the Military Judge ruled that the MCA required a "result in this case [that] is at odds with what would normally obtain under our

law. It is true that in any other criminal trial held in American courts, an accused who was questioned before trial without warning regarding his right to remain silent, could not later be prejudiced by the admission of those statements against him." AE 213 at 4; *see also* App. 108-114 (denying motion to reconsider). Thus, the MCA affords an inferior process in that it permits evidence obtained in violation of a defendant's right against self-incrimination. By contrast, a U.S. citizen facing the same charges would be tried in a civilian court, where the procedural protections would be markedly greater, *i.e.*, the remedy of suppression for pretrial statements taken without the rights warnings would be applied.[22] If "the equal protection of the laws is a pledge of the protection of equal laws," then clearly the MCA fails to conform to that standard. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

[22] The MCA also shifts the burden with respect to hearsay, placing on the party opposing admission of the evidence the burden of showing its unreliability. 10 U.S.C. § 949a. This alters the rules of evidence normally applied in U.S. courts, and undermines the confrontation rights of a criminal defendant protected by the Sixth Amendment. *See Crawford v. Washington*, 541 U.S. 36, 49 (2004). Likewise, the MCA permits the use of evidence obtained through coercion. 10 U.S.C. § 948r. This standard would not prevail in any other U.S. court, where evidence obtained by coercion is clearly inadmissible. *See, e.g., Chambers v. Florida*, 309 U.S. 227, 238-41 (1940).

Far less intrusive impositions in criminal proceedings have been subject to strict scrutiny under equal protection, and have failed to survive that analysis. For example, in *Douglas*, 372 U.S. at 358, the Court struck down on equal protection grounds a California law that allowed the court to decline to provide appellate counsel to indigent defendants. Similarly, in *Griffin*, 351 U.S. at 15-16, the Court vacated a decision by the Illinois Supreme Court that, due to cost, effectively denied indigent defendants access to court transcripts necessary for appellate review. When measured against these precedents, the MCA fails to survive strict scrutiny given its far more severe deprivations of criminal procedural rights.

C. The MCA Violates Equal Protection Because Only Aliens Are Subject to It

Equal Protection applies to all "persons" regardless of citizenship and "directs that all persons similarly circumstanced shall be treated alike." *Plyler*, 457 U.S. at 216 (internal quotation marks and citations omitted). "The fourteenth amendment . . . is not confined to the protection of citizens . . . . [Its] provisions are universal in their application, to all persons within the territorial jurisdiction, without

regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." *Yick Wo*, 118 U.S. at 369. Laws that discriminate against suspect classifications such as alienage are subject to strict scrutiny. *See Graham v. Richardson*, 403 U.S. 365, 372 (1971) ("classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny") (footnotes omitted). To survive strict scrutiny, the Government must demonstrate that classifications resulting in different treatments are "precisely tailored to serve a compelling governmental interest." *Plyler*, 457 U.S. at 217. The MCA—with its different levels of protection afforded to alien unlawful combatants as opposed to citizen unlawful combatants—cannot survive such scrutiny.

In this case, even if one acknowledges that the Government has a compelling interest in protecting the nation against terrorist attacks, the use of military commissions for alien, as opposed to citizen, enemies is not narrowly tailored to promote national security. 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. *See also United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002) (citizen unlawful combatant captured in Afghanistan tried in federal district court, with all procedural protections guaranteed by Fifth and Sixth Amendments). And as with the habeas inquiry at issue in *Boumediene*, there is nothing impracticable or anomalous about providing Equal Protection in matters of criminal procedure at Guantanamo.

D. The CMCR's Rationale for Depriving Hamdan of His Equal Protection Rights Was Erroneous

The CMCR had two principal bases for refusing to apply Equal Protection (or apply it under a proper strict scrutiny analysis): (1) the "national interests" at issue in military commissions justify lesser criminal procedural protections, and (2) the federal government has authority to discriminate against aliens. App. 83-84, 87. Both bases are erroneous.

As to the first rationale, the CMCR reasoned that where the Supreme Court found competing national interests, "special deference to the political branches of the Federal Government [is] appropriate."

App. 84. This reasoning is based on an incomplete reading of *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), and *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010). Specifically, in *Mow Sun Wong*, the Court noted that although "there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State . . . when a federal rule is applicable to only a limited territory, such as the District of Columbia, or an insular possession, . . . the Due Process Clause has been construed as having the same significance as the Equal Protection Clause." 426 U.S. at 100. And contrary to the CMCR's characterization of *Holder*, the *Holder* Court made clear that "concerns of national security and foreign relations do not warrant abdication of the judicial role." 130 S. Ct. at 2727.

Similarly, the CMCR erred in holding that, because of Congress's authority with respect to immigration matters, federal statutes that deal with treatment of aliens are subject only to rational basis review. App. 87. Congress's power to control immigration does not give it plenary power over aliens themselves. For this reason, the CMCR's

reliance on immigration cases, such as those cases decided under the Hostage Taking Act, is misplaced. *Compare* App. 82 ("Congress's plenary control over immigration legislation" justified rational basis review of Hostage Taking Act) (citing *United States v. Lopez-Florez*, 63 F.3d 1468 (9th Cir. 1995)) *with Fiallo v. Bell*, 430 U.S. 787, 791-92 (1977) (noting that deference to Congress concerns its powers regarding "the admission of aliens"). While the federal government may treat aliens differently in conferring governmental benefits and in matters of immigration and naturalization, there is no authority or valid rationale for discriminating in criminal proceedings based on the citizenship status of the accused. *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).

CONCLUSION

This Court should therefore reverse the CMCR and vacate Hamdan's conviction.

Respectfully submitted,

DATED: November 15, 2011

By: /s/ *Joseph M. McMillan*
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

CERTIFICATION OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   ☒ this brief contains 13,993 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); *or*

   ☐ this brief uses a monospaced typeface and contains ____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   ☒ this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font size and Century type style; *or*

   ☐ this brief has been prepared in a monospaced typeface using _____ with _____.

DATED: November 15, 2011

By: /s/ *Joseph M. McMillan*
One of the attorneys for Salim Ahmed Hamdan

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

U.S. Court of Appeals Docket Number(s): 11-1257

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on November 15, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature: /s/ *Joseph M. McMillan*
Joseph M. McMillan

ADDENDUM

CONTENTS

ADDENDUM
(continued)

United States Constitution

U.S. CONST. art. I, § 8, cl. 10

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations

U.S. CONST. art. I, § 9, cl. 3

No bill of attainder or ex post facto Law shall be passed.

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ADDENDUM
(continued)

Military Commissions Act of 2006, 120 Stat. 2600-2637 (Oct. 17, 2006), codified at 10 U.S.C. § 948a et seq.

10 U.S.C. § 948c (2006), Persons subject to military commissions

Any alien unlawful enemy combatant is subject to trial by military commission under this chapter.

10 U.S.C. § 948d(2006), Jurisdiction of military commissions

(a) JURISDICTION.—A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.

(b) LAWFUL ENEMY COMBATANTS.—Military commissions under this chapter shall not have jurisdiction over lawful enemy combatants. Lawful enemy combatants who violate the law of war are subject to chapter 47 of this title. Courts-martial established under that chapter shall have jurisdiction to try a lawful enemy combatant for any offense made punishable under this chapter.

(c) DETERMINATION OF UNLAWFUL ENEMY COMBATANT STATUS DISPOSITIVE.—A finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006, by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter.

(d) PUNISHMENTS.—A military commission under this chapter may, under such limitations as the Secretary of Defense may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when authorized under this chapter or the law of war.

ADDENDUM
(continued)

10 U.S.C. § 950g (2006), Review by the United States Court of Appeals for the District of Columbia Circuit and the Supreme Court

(a) EXCLUSIVE APPELLATE JURISDICTION.—(1)(A) Except as provided in subparagraph (B), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority) under this chapter.

(B) The Court of Appeals may not review the final judgment until all other appeals under this chapter have been waived or exhausted.

(2) A petition for review must be filed by the accused in the Court of Appeals not later than 20 days after the date on which—

(A) written notice of the final decision of the Court of Military Commission Review is served on the accused or on defense counsel; or

(B) the accused submits, in the form prescribed by section 950c of this title, a written notice waiving the right of the accused to review by the Court of Military Commission Review under section 950f of this title.

(b) STANDARD FOR REVIEW.—In a case reviewed by it under this section, the Court of Appeals may act only with respect to matters of law.

(c) SCOPE OF REVIEW.—The jurisdiction of the Court of Appeals on an appeal under subsection (a) shall be limited to the consideration of—

(1) whether the final decision was consistent with the standards and procedures specified in this chapter; and

(2) to the extent applicable, the Constitution and the laws of the United States.

ADDENDUM
(continued)

(d) SUPREME COURT.—The Supreme Court may review by writ of certiorari the final judgment of the Court of Appeals pursuant to section 1257 of title 28.

10 U.S.C. § 950p (2006), Statement of substantive offenses

(a) PURPOSE.—The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.

(b) EFFECT.—Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.

10 U.S.C. § 950v(b)(25) (2006), Crimes triable by military commissions [Providing Material Support for Terrorism]

(b) OFFENSES.—The following offenses shall be triable by military commission under this chapter at any time without limitation:

. . .

(25) PROVIDING MATERIAL SUPPORT FOR TERRORISM.—

(A) OFFENSE.—Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization

ADDENDUM
(continued)

has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.

(B) MATERIAL SUPPORT OR RESOURCES DEFINED.—In this paragraph, the term "material support or resources" has the meaning given that term in section 2339A(b) of title 18.

10 U.S.C. § 950v(b)(26) (2006), Crimes triable by military commissions [Wrongfully Aiding the Enemy]

(b) OFFENSES.—The following offenses shall be triable by military commission under this chapter at any time without limitation:

. . .

(26) WRONGFULLY AIDING THE ENEMY.—Any person subject to this chapter who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished as a military commission under this chapter may direct.

10 U.S.C. § 950v(b)(28) (2006), Crimes triable by military commissions [Conspiracy]

(b) OFFENSES.—The following offenses shall be triable by military commission under this chapter at any time without limitation:

. . .

(28) CONSPIRACY.—Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military

ADDENDUM
(continued)

commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.