ORAL ARGUMENT SCHEDULED FOR MAY 3, 2012
No. 11-1257

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

SALIM AHMED HAMDAN, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR REVIEW FROM THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW

BRIEF FOR THE UNITED STATES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES

Salim Ahmed Hamdan is the petitioner in this case. The United States is the respondent. Amici supporting Hamdan include: the Center for Constitutional Rights ("CCR"); Professor David Glazier ("Glazier"); the Japanese American Citizens League, Asian American Legal Defense and Education Fund, National Asian Pacific American Bar Association, and Asian Law Caucus ("JACL"); Constitutional Law Scholars William R. Casto, Roger S. Clark, Martin Flaherty, Elizabeth L. Hillman, John V. Orth, Michael D. Ramsey, Richard D. Rosen, David Sloss, and Beth Stephens ("CLS"); and International Legal Scholars Terry D. Gill and Gentian Zyberi ("ILS").

II. RULINGS

The ruling under review in this case is the decision of the United States Court of Military Commission Review affirming petitioner's convictions.

III. PRIOR DECISIONS AND RELATED CASES

The United States Court of Military Commission Review has issued a published decision in this case. United States v. Hamdan, 801 F. Supp. 2d 1247 (C.M.C.R. June 24, 2011) (en banc) (Pet. App. 3-88).[1] That decision affirms two

[1] "Pet. App." is the abbreviation for the Appendix to Brief of Petitioner.

pertinent written opinions issued by the military judge who presided over Hamdan's military commission proceedings. See United States v. Hamdan, Docket No. D-012 (July 14, 2008) (unpub.) (Ruling on Motion to Dismiss on *Ex Post Facto* Grounds) (App. Ex. 263);[2] United States v. Hamdan, Docket No. D-043 (July 15, 2008) (unpub.) (Ruling on Defense Motion to Reconsider Ruling on Personal Jurisdiction (Equal Protection)) (App. Ex. 288).

This Court has issued a prior decision relating to this case. Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), rev'd, 548 U.S. 557 (2006).

The United States District Court for the District of Columbia has also issued published decisions relating to this case. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004); Hamdan v. Rumsfeld, 464 F. Supp. 2d 9 (D.D.C. 2006); Hamdan v. Gates, 565 F. Supp. 2d 130 (D.D.C. 2008).

A related case is also pending in this Court. See Ali Hamza Ahmad Suliman al Bahlul v. United States, No. 09-001, 2011 WL 4916373 (C.M.C.R. Sept. 9, 2011) (en banc), petition for review filed, No. 11-1324 (D.C. Cir. Sept. 14, 2011). That case presents the following issues in common with this case: (1) whether material support for terrorism constitutes an offense triable by military

[2] "App. Ex." is the abbreviation for Appellate Exhibit; "Gov't Ex." is the abbreviation for Government Exhibit; "Def. Ex." is the abbreviation for Defense Exhibit.

commission; (2) whether the application of that offense to petitioner violates the Ex Post Facto Clause; and (3) whether confining the jurisdiction of military commissions to alien unlawful enemy combatants violates the equal protection component of the Due Process Clause.

DATED: January 17, 2012

/s/
John F. De Pue
Attorney for Respondent

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GLOSSARY OF ABBREVIATIONS

App. Ex.. . . . . Appellate Exhibit

ATS. . . . . Alien Tort Statute

AUMF. . . . . Authorization for Use of Military Force

CCR. . . . . Center for Constitutional Rights

CLS. . . . . Constitutional Law Scholars

CMCR. . . . . United States Court of Military Commission Review

Def. Ex.. . . . . Defense Exhibit

FISA.. . . . . Foreign Intelligence Surveillance Act

G.A. Res.. . . . . United Nations General Assembly Resolution

G.O.. . . . . General Order

Gov't Ex.. . . . . Government Exhibit

HLP. . . . . Humanitarian Law Project

HQ. . . . . Headquarters

ILS. . . . . International Law Scholars

JACL. . . . . Japanese American Citizens League

MCA. . . . . Military Commissions Act

OR. . . . . Official Records of the Union and Confederate Armies

Pet. App.. . . . . Appendix to Brief of Petitioner

S.C. Res... . . . . United Nations Security Council Resolution

Tr... . . . . Trial Transcript

UCMJ.. . . . . Uniform Code of Military Justice

U.N.. . . . . United Nations

Winthrop. . . . . William Winthrop, Military Law and Precedents

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STATEMENT OF JURISDICTION

The military commission had jurisdiction over this case pursuant to Section 948d(a) of the Military Commissions Act of 2006 ("2006 MCA"), Pub. L. No. 109-366, 120 Stat. 2600. 10 U.S.C. § 948d(a) (2006). The United States Court of Military Commission Review ("CMCR") had appellate jurisdiction under Sections 950c(a) and 950f of the Military Commissions Act of 2009 ("2009 MCA"), enacted as part of the National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190 (2009). 10 U.S.C. §§ 950c(a), 950f (2009). The CMCR issued its decision on June 24, 2011. Hamdan filed a timely petition

for review in this Court on July 11, 2011. This Court has "exclusive appellate jurisdiction" to "determine the validity" of the final judgment rendered by Hamdan's military commission, as approved by the convening authority and the CMCR, pursuant to Section 950g(a) of the 2009 MCA. 10 U.S.C. § 950g(a) (2009).

Because Hamdan, who is now in Yemen, has finished serving his sentence and is no longer in custody, see Pet. App. 12, his release raises the issue whether his appeal to this Court from his military commission convictions is moot. As this Court has noted, "a former prisoner challenging his conviction should be presumed to present a justiciable case," and the government can rebut this presumption "only if it c[an] show there was 'no possibility that any collateral legal consequences [would] be imposed on the basis of the challenged conviction.'" Gul v. Obama, 652 F.3d 12, 15 (D.C. Cir. 2011) (quoting Sibron v. New York, 392 U.S. 40, 57 (1968)), petition for cert. filed, No. 11-7827 (Dec. 9, 2011). In Gul, this Court found that the Sibron presumption did not apply in determining whether a habeas corpus petition was moot, but the Supreme Court has recently confirmed that the Sibron presumption does apply on direct appeal from a criminal conviction. See United States v. Juvenile Male, 131 S. Ct. 2860, 2864 (2011) (per curiam) ("When the defendant challenges his underlying

conviction, this Court's cases have long presumed the existence of collateral consequences.") (citing Sibron, 392 U.S. at 55-56); Turner v. Rogers, 131 S. Ct. 2507, 2514 (2011) (describing Sibron as holding that "release from prison does not moot a *criminal* case because 'collateral consequences' are presumed to continue").

Although the issue is not free from doubt, the government does not believe that it can rebut the Sibron presumption in this case because Hamdan's conviction could be used against him in the event he returns to the conflict, is detained by the United States, and is tried for any new offenses. See, e.g., Manual for Military Commissions, Rule 1001(b)(1)(A) (2010) ("The trial counsel may introduce evidence of military or civilian convictions, foreign or domestic, of the accused. For purposes of this rule, there is a 'conviction' in a military case when a sentence has been adjudged."); 18 U.S.C. § 3553(a)(1) (sentencing court must consider "the history and characteristics of the defendant"). Such a possibility is sufficient to render Hamdan's appeal of his conviction justiciable. See Minnesota v. Dickerson, 508 U.S. 366, 371 n.2 (1993); Sibron, 392 U.S. at 55-56. But cf. Perez v. Greiner, 296 F.3d 123 (2d Cir. 2002).

QUESTIONS PRESENTED

1. Whether the offense of providing material support for terrorism is, as Congress has found, properly triable by military commission.

2. Whether Hamdan's convictions by a military commission for providing material support for terrorism violate the Ex Post Facto Clause.

3. Whether the Military Commissions Act violates the equal protection component of the Due Process Clause because it limits the jurisdiction of military commissions to offenses committed by alien unlawful enemy combatants.

SUMMARY OF PROCEEDINGS

Salim Ahmed Hamdan, a detainee at the U.S. Naval Station, Guantanamo Bay, Cuba, was charged with conspiring to commit violations of the law of war, in violation of 10 U.S.C. § 950v(b)(28) (2006) (Charge I), and eight specifications of providing material support for terrorism, in violation of 10 U.S.C. § 950v(b)(25) (2006) (Charge II). Following trial before a military commission, Hamdan was convicted on five of the material support counts, and he was acquitted on the remaining charges. The military commission sentenced him to 66 months of confinement, and the military judge awarded him confinement credit of 61 months and 7 days. The convening authority approved the findings and sentence. The en banc United States Court of Military Commission Review affirmed the

convictions and sentence. United States v. Hamdan, 801 F. Supp. 2d 1247 (C.M.C.R. June 24, 2011) (en banc) (Pet. App. 3-88).

STATEMENT OF FACTS

A. The Military Commissions Acts of 2006 and 2009

On September 11, 2001, members of the al Qaeda terrorist organization executed one of the worst terrorist attacks in history against the United States. Terrorists from that organization hijacked commercial airliners and used them as missiles to attack prominent American targets, including the World Trade Center and the Pentagon. The attacks resulted in the loss of nearly 3,000 lives, the destruction of hundreds of millions of dollars in property, and severe damage to the American economy. See National Commission on Terrorist Attacks Upon the United States, The 9/11 Commission Report 4-14 (2004).

On September 18, 2001, Congress passed, and the President signed, the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224. Among other things, the AUMF authorizes the President to "use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided" the 9/11 terrorist attacks. Id. Acting pursuant to the AUMF, the President ordered the armed forces of the United States to invade Afghanistan, whose regime he determined harbored al

Qaeda. In addition, on November 13, 2001, the President issued a military order that authorized the trial by military commission of non-citizens he had reason to believe were or had been members of al Qaeda; those who had engaged in, aided or abetted, or conspired to commit international acts of terrorism against the United States; and those who had harbored others covered by the military order. See 66 Fed. Reg. 57,833, 57,834.

In 2003, the President determined that Hamdan and five other detainees held at Guantanamo Bay were triable by military commission under his military order. In Hamdan v. Rumsfeld, 548 U.S. 557 (2006), however, the Supreme Court held that the adoption by the President and the Secretary of Defense of military commission procedures that deviated from those governing courts-martial was inconsistent with the Uniform Code of Military Justice ("UCMJ"). In response to that decision, Congress enacted the Military Commissions Act of 2006, which provided statutory authority for the military commissions, limited their jurisdictional scope, codified various offenses triable by the commissions, and reformed their procedures in various ways to enhance the procedural rights of military commission defendants.

Under the 2006 MCA, only an "alien unlawful enemy combatant," defined as an alien who "has engaged in hostilities . . . against the United States . . . who is

not a lawful enemy combatant," was subject to trial by a military commission. 10 U.S.C. §§ 948c, 948a(1) (2006). In addition, the 2006 MCA contained a list of offenses that were subject to trial by military commission, and one of the listed offenses was providing material support for terrorism.

In particular, the 2006 MCA authorized trial and punishment by military commission of

> [a]ny 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 . . . , or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism . . . .

10 U.S.C. § 950v(b)(25)(A) (2006). The 2006 MCA defined the phrase "material support or resources" to have "the meaning given that term in section 2339A(b) of title 18," which in turn defines the term to mean "any property, tangible or intangible, or service," including personnel and transportation. 10 U.S.C. § 950v(b)(25)(B); 18 U.S.C. § 2339A(b)(1). The 2006 MCA defined terrorism as follows:

> Any person subject to this chapter who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against

> government conduct, shall be punished . . . as a military commission under this chapter may direct.

10 U.S.C. § 950v(b)(24) (2006).

In 2009, Congress amended the MCA as part of the National Defense Authorization Act for Fiscal Year 2010. See Pub. L. No. 111-84, div. A, tit. XVIII, 123 Stat. 2574. Although the legislation, designated the "Military Commissions Act of 2009," id. § 1801, 123 Stat. 2574, constituted a wholesale substitution of the 2006 Act, the 2009 MCA adopted without change many of the provisions of the 2006 MCA, including the material support offense. See id. § 1804, 123 Stat. 2612 (ratifying actions taken under the 2006 MCA); 10 U.S.C. § 950t(25) (2009) (material support offense).

B. Hamdan's Conduct and Prosecution

1. The Evidence at Trial

The government's evidence showed that in early 1996, Mohammed bin Attash, a close associate of Usama bin Ladin, convinced Hamdan to travel from his native Yemen to Tajikistan to participate in jihad. Trial Transcript ("Tr.") 2131, 2708. Equipped with a false passport, Hamdan traveled from Yemen to Pakistan and then on to Afghanistan, but he was unable to enter Tajikistan. Tr. 2131-32, 2708. After Hamdan returned to Afghanistan, bin Attash convinced

Hamdan to attend an al Qaeda-run training camp, where Hamdan met Usama bin Ladin. Tr. 2133-34. During training at the camp, Hamdan received instruction on a variety of weapons. Tr. 2374-75, 2505, 3419. He also attended lectures during which bin Ladin repeatedly stated that it was "every Muslim's duty to expel the infidels from the Middle East" and, to that end, to engage in martyrdom missions. Tr. 2722.

Later in 1996, at bin Ladin's suggestion, Hamdan became a vehicle driver. His duties included ferrying personnel and supplies between an al Qaeda guesthouse at Kandahar and al Qaeda's al Farouq training camp. Tr. 2136, 2378-79, 2709. After gaining the trust of bin Ladin and other senior al Qaeda officials, Hamdan became a driver for bin Ladin's convoys, and he then served as bin Ladin's personal driver. Tr. 2137-38, 2379-80, 2607, 3412. Armed with a pistol, Hamdan would chauffeur bin Ladin to al Qaeda training camps, where bin Ladin would address the trainees to encourage them while expressing his hatred for the United States. Tr. 2611-12, 3417. Hamdan also served as bin Ladin's bodyguard and pledged *bayat* or unquestioned allegiance to him. Tr. 2661-62, 2670, 2674, 2721, 3412-13. On several occasions, Hamdan delivered bin Ladin's orders to others for military supplies and logistical support, including weapons and

ammunition, and Hamdan delivered weapons and ammunition to an al Qaeda storage facility. Tr. 2162, 3416, 3418-19.

In August 1996, bin Ladin issued a "declaration of war" encouraging the killing of American soldiers on the Arabian Peninsula and calling on Muslims everywhere to expel the Americans by the use of explosions and "holy war." Pet. App. 7; Tr. 2958-59. In February 1998, bin Ladin and his colleagues signed a *fatwa* requiring all Muslims able to do so to kill Americans, including civilians, whom bin Ladin viewed as legitimate targets. Tr. 2973-75. Hamdan was fully aware of both the 1996 "declaration of war" and the 1998 *fatwa*. Tr. 3414-16.

On August 7, 1998, al Qaeda operatives detonated truck bombs outside the United States Embassies in Narobi, Kenya, and Dar es Salaam, Tanzania, killing 257 people, including 12 Americans, and wounding thousands of civilians. Pet. App. 7. Hamdan had advance knowledge that a terrorist attack outside Afghanistan targeting Americans would occur. Tr. 2146. Fearing retaliation by the United States, senior al Qaeda leaders directed Hamdan to assist in evacuating bin Ladin from his compound in Kandahar to Kabul several days before the bombings. Tr. 2138, 2140, 2145-46, 2712. Shortly after the attacks, Hamdan drove bin Ladin to a news conference related to the bombings. Tr. 2143. At the

news conference, Hamdan met Ayman al-Zawahiri, leader of the Egyptian Islamic Jihad Movement and a close associate of bin Ladin. Pet. App. 7.

In October 2000, at the direction of bin Ladin and other senior al Qaeda leaders, al Qaeda operatives detonated a bomb alongside the *U.S.S. Cole* in Aden Harbor, Yemen, killing 17 American sailors and injuring 39 others. Tr. 3010-11; Pet. App. 8. The attackers approached the *Cole* in a small boat containing hidden explosives. They were able to get near the vessel by deceiving its crew into believing that they were local workers seeking to remove garbage. Tr. 3010-11. Hamdan, who was then in Yemen, believed that, because of his known association with bin Ladin, he might be arrested in connection with the attack. Tr. 2714. He therefore arranged to return to Afghanistan. Id.

In August 2001, Hamdan drove bin Ladin to a gathering of Egyptian Islamic Jihad members and al Qaeda members. At that meeting, al-Zawahiri and bin Ladin announced that the two entities were merging. Thereafter, Hamdan drove bin Ladin to meetings with al-Zawahiri and participated in their convoys. Tr. 2168-70, 2719; Pet. App. 8.

Several days before the 9/11 terrorist attacks, bin Ladin informed Hamdan that they were evacuating their compound because an operation was about to occur. Tr. 2171, 2716-17, 3422. Hamdan drove bin Ladin and bin Ladin's son to

Kabul, where they remained until after the attacks occurred. Following the attacks, Hamdan overheard bin Ladin express pleasure with the results of the operation. Tr. 2176. In order to escape retaliation, bin Ladin then instructed Hamdan to drive him to a series of different locations until they reached a facility that contained numerous tunnels and other structures suitable for hiding. Tr. 2173-74, 2716-17, 2719. Hamdan, who was fully aware of the East African embassy bombings, the attack on the *U.S.S. Cole*, and the 9/11 attacks on targets in the United States, later told investigators that bin Ladin told him that the purpose of such operations was to "strike fear in the heart of the enemy and, in particular, to show the United States that al Qaeda . . . could hit it in the home-front." Tr. 3423. Hamdan also acknowledged that he viewed the attacks as a source of inspiration, and that he harbored an "[u]ncontrollable passion or zeal" in working for bin Ladin. Tr. 3423-24.

2. Hamdan's Capture, Trial, and Conviction

On October 7, 2001, the President announced to the nation that he was ordering U.S. armed forces to Afghanistan to attack al Qaeda and the Taliban regime that was supporting it. Tr. 3661. On November 24, 2001, Hamdan was captured by indigenous anti-Taliban forces in Afghanistan while driving a Toyota hatchback from Pakistan toward Kandahar. Tr. 1930. The vehicle contained two

SA-7 anti-aircraft missiles, see Tr. 1936, 1972, 1991, 2012-13, as well as a two-way radio, several "code cards" (one of which referred to SA-7 missiles), a document issued by al Qaeda authorizing the bearer to carry a weapon in Afghanistan, and a requisition for machine gun ammunition. See Tr. 2013-17, 2021, 2028-31, 2583-86; Gov't Exs. 15, 59, 59a. Hamdan's captors turned him over to U.S. military forces. Tr. 1944-45. Hamdan was subsequently transferred to the U.S. military detention facility at Guantanamo Bay, Cuba. Pet. App. 10.

Hamdan was initially prosecuted under the President's November 2001 military order regarding military commissions. The convening authority for military commissions referred to trial by military commission under that order one charge against Hamdan, which contained one specification alleging that Hamdan conspired with bin Ladin and other members of al Qaeda, *inter alia*, to attack civilians, to commit murder, and to engage in terrorism. Pet. App. 10-12. After the Supreme Court held that the military commission system then in existence contravened the UCMJ, and after Congress responded by enacting the 2006 MCA, the convening authority referred to trial by military commission one charge of conspiracy against Hamdan and one charge, containing eight specifications, alleging the provision of material support for terrorism by Hamdan. Id. at 11; App. Exs. 1, 2.

The members of the military commission convicted Hamdan on five specifications in the material support for terrorism charge. App. Ex. 320, at 5-6, 8-11 (verdict form). Those specifications charged Hamdan, "a person subject to trial by military commission as an alien unlawful enemy combatant," as follows:

- Hamdan . . . from in or about February 1996 to on or about November 24, 2001, in the context of or associated with an armed conflict and with knowledge that al Qaeda has engaged in or engages in terrorism, provide[d] material support or resources [in the form of] personnel, himself, to al Qaeda, an international terrorist organization engaged in hostilities against the United States, with the intent to provide such material support and resources to al Qaeda by becoming a member of the organization and . . . [r]eceiv[ing] training at an al Qaeda training camp; [s]erv[ing] as a driver for Usama bin Laden . . . ; [s]erv[ing] as Usama bin Laden's armed body guard . . . ; [and] [t]ransport[ing] weapons or weapons systems or other supplies for the purpose of delivering or attempting to deliver said weapons or weapons systems to Taliban or al Qaeda members and associates [Specification 2];

- Hamdan . . . from in or about February 1996 to on or about November 24, 2001 . . . provide[d] material support and resources . . . by serving as a driver for Usama bin Laden . . . knowing that by providing said service or transportation he was directly facilitating communication and planning used for an act of terrorism [Specification 5];

- Hamdan . . . from in or about February 1996 to on or about November 24, 2001 . . . with knowledge that al Qaeda, an international terrorist organization engaged in hostilities against the United States, had engaged in or engages in terrorism, intentionally provide[d] material support or resources to al Qaeda [in the form of] service or transportation

> to Usama bin Laden . . . knowing that by providing said service or transportation he was directly facilitating communication and planning used for acts of terrorism [Specification 6];
>
> - Hamdan . . . from in or about February 1996 to on or about November 24, 2001 . . . provide[d] material support and resources [in the form of] service as an armed body guard for Usama bin Laden, knowing that by providing said service as an armed bodyguard he was protecting the leader of al Qaeda and facilitating communication and planning used for acts of terrorism [Specification 7]; and
>
> - Hamdan . . . from in or about February 1996 to on or about November 24, 2001 . . . with knowledge that al Qaeda, an international terrorist organization engaged in hostilities against the United States, had engaged in or engages in terrorism, intentionally provide[d] material support or resources to al Qaeda [in the form of] service as an armed body guard for Usama bin Laden, knowing that by providing said service as an armed bodyguard he was protecting the leader of al Qaeda and facilitating communication and planning used for acts of terrorism [Specification 8].

App. Ex. 1, at 5-7; see Pet. App. 9-10.

C. Pertinent Rulings of the Military Judge

Hamdan moved to dismiss the material support counts before trial, arguing that those counts did not allege violations of the law of war and that, in any event, because his conduct predated the enactment of the 2006 MCA, prosecution for those charges violated the Ex Post Facto Clause. The military judge rejected Hamdan's claims. App. Ex. 263. After determining that the Ex Post Clause

governed Congress's authority to legislate substantive offenses subject to trial by military commission (id. at 2), the military judge deferred to Congress's "express declaration" that it was not enacting "a 'new crim[e] that did not exist before [the] enactment'" of the 2006 MCA. Id. at 6. The military judge also found that "[t]here is adequate historical basis for this determination with respect to [the material support offense]." Id.

In a separate motion, Hamdan argued that the jurisdictional provisions of the 2006 MCA violated the equal protection component of the Fifth Amendment because only aliens, and not citizens, could be tried by military commission under the statute. The military judge, after reviewing the Supreme Court's decision in Boumediene v. Bush, 553 U.S. 723 (2008), and finding multiple factors weighing against the application of the equal protection component of the Due Process Clause in Guantanamo Bay, concluded that "[t]he Equal Protection component of the 5th Amendment does not apply to protect Mr. Hamdan." App. Ex. 288, at 6-7.

D. The Decision of the U.S. Court of Military Commission Review

The en banc United States Court of Military Commission Review ("CMCR") affirmed Hamdan's convictions and sentence by unanimous vote. The CMCR rejected Hamdan's argument that Congress lacked the authority under the Define and Punish Clause (U.S. Const. art. 1, § 8, cl. 10) to declare material

support for terrorism a violation of the law of war subject to trial by military commission. Relying on an extensive discussion of international conventions prohibiting terrorism and requiring punishment for those who engage in acts of terrorism, as well as domestic terrorism laws and our nation's historic practice of prosecuting by military tribunals those who furnish aid and comfort to unlawful combatants, the CMCR found that Congress had an ample basis to conclude that material support for terrorism constituted a pre-existing law-of-war violation. Pet. App. 76. The court concluded that, because the underlying conduct of providing material support for terrorism was an offense cognizable under the law of war when Hamdan's charged offenses began in 1996, his prosecution and conviction under the codification of that offense in the 2006 MCA violated neither the Constitution's Ex Post Facto Clause nor the analogous doctrine under international law prohibiting punishment for acts lawful at the time of their commission. Id. at 77.

The CMCR also rejected Hamdan's argument that he was denied equal protection because the MCA confines the jurisdiction of military commissions to alien unlawful enemy combatants. The court held that Congress had a legitimate basis for making a distinction between aliens and U.S. nationals because, in enacting the MCA, Congress's very purpose was to bring to justice foreign

unlawful combatants bent on terrorizing U.S. citizens, and because such persons were likely to be captured on a battlefield where standard police investigative procedures cannot be applied. Pet. App. 87-88.

SUMMARY OF ARGUMENT

1. In the Military Commissions Acts of 2006 and 2009, Congress expressly determined that the provision of material support to terrorism by an alien enemy belligerent is an offense triable by military commission in the context of the armed conflict by al Qaeda and associated forces against the United States. It was within Congress's power to determine that providing material support to acts of unlawful belligerency (such as terrorism) against the United States, which has long constituted a violation of the U.S. common law of war, should subject the offender to trial and punishment by military commission. Because this legislative determination, which is based in Congress's extensive war-making powers, arises in the context of national defense and military affairs, "judicial deference . . . is at its apogee." Rostker v. Goldberg, 453 U.S. 57, 70 (1981). The historical record provides ample grounds for concluding that Congress acted well within its constitutional authority in codifying the offense of providing material support to terrorism, when committed by those engaged in hostilities against the United States, as an offense triable by military commission.

While Congress's choice of a "material support" label for this offense relates back to a federal criminal statute first enacted in 1996,[3] the act of aiding, assisting, or joining with those engaged in unlawful acts of belligerency has been treated as an offense by the United States and prosecuted by military commission for nearly two centuries. During the Civil War, for example, such offenses were codified by military regulation as offenses against the law of war, and offenders who joined, aided, or assisted guerillas were routinely tried by military commissions and subjected to severe punishment. Hamdan's offenses of conviction are modern analogues of offenses tried by military commission during the Civil War and other armed conflicts in which the United States has been engaged.

Congress's determination that providing material support to terrorism in the context of armed conflict is an offense triable by military commission also constitutes a proper exercise of its explicit constitutional authority to "define and punish . . . Offences against the Law of Nations." U.S. Const. art. I, § 8, cl. 10. Since the conclusion of the Second World War, the international community has decided, through a series of international agreements and U.N. Security Council

[3] See Pub. L. No. 104-132, tit. III, § 323, 110 Stat. 1255 (1996), codified at 18 U.S.C. § 2339A.

resolutions, that terrorist acts as a mode of warfare must be punished. Given international condemnation of terrorism and the United States' international obligations to combat terrorism, Congress properly exercised its discretion under the Define and Punish Clause to codify the provision of material support to terrorism as triable by military commission.

2. Hamdan's argument that his conviction for criminal activity that predated the enactment of the 2006 MCA violates the Ex Post Facto Clause fails for the same reason – the MCA did not create a new offense under the law of war. As Congress explicitly found in enacting the MCA, that statute merely codified a long-standing and well-established violation of the U.S. common law of war, and punished conduct that had previously been condemned as criminal by the international community.

3. Finally, Hamdan's claim that, because the MCA confines the jurisdiction of military commissions to alien unlawful enemy combatants, it violates the equal protection component of the Due Process Clause of the Fifth Amendment, is meritless. This Court has held that detainees at Guantanamo Bay possess no rights under the Due Process Clause with respect to challenges to their detention as alien unprivileged belligerents. Assuming *arguendo* that equal protection rights apply in the context of military commission proceedings against aliens held at

Guantanamo Bay, Hamdan's argument fails on the merits, given that our nation's practice since the adoption of the Constitution and the Bill of Rights has recognized the legitimacy of distinguishing between citizens and enemy aliens, especially in the context of armed conflict. Congress's decision to limit the jurisdiction of military commissions to alien unlawful enemy combatants fully satisfies the rational basis test that applies in this context.

ARGUMENT

I. PROVIDING MATERIAL SUPPORT TO TERRORISM IS PROPERLY SUBJECT TO PROSECUTION BY MILITARY COMMISSION

In the Military Commissions Acts of 2006 and 2009, Congress established a historically grounded and narrowly defined military jurisdiction within which the United States could pursue accountability for serious crimes committed during armed conflict. As the Supreme Court made clear in Hamdan v. Rumsfeld, "Congress has the power and responsibility to determine the necessity for military courts, and to provide the jurisdiction and procedures applicable to them." 548 U.S. at 645. Military commissions have been part of our legal architecture since the Revolutionary War, and they are tailored to the realities of armed conflict. They are a lawful and reasonable means of addressing the threat posed by al Qaeda and its associated forces. Indeed, Hamdan's capture in an active zone of combat –

Afghanistan in late 2001 – places him squarely at the heart of traditional military commission jurisdiction.

So too does the nature of his offense. The overarching thesis of Hamdan's argument is that, in enacting Section 950v(b)(25) of the 2006 MCA, Congress impermissibly transformed "an existing domestic crime" – that of providing material support to terrorists – into a "war crime" subject to trial by a military commission. Pet. Br. 21, 44. Section 950v(b)(25) does contain language similar to that found in the federal material support statute, 18 U.S.C. § 2339A, and incorporates by reference its definition of "material support or resources." See 10 U.S.C. § 950v(b)(25)(B) (2006). But, unlike the domestic statute, Section 950v(b)(25) applies only to persons "who ha[ve] engaged in hostilities or who ha[ve] purposefully and materially supported hostilities against the United States or its co-belligerents." Id. § 948a(1). And it embraces only those who have provided material support or resources to "an international terrorist organization engaged in hostilities against the United States." Id. § 950v(b)(25). Thus, in stark contrast to 18 U.S.C. § 2339A, the MCA defines a crime that can be committed only by an individual actively participating in or supporting hostilities against the United States or its allies. Under U.S. common law traditionally applied in wartime, which we refer to in this brief as the "U.S. common law of war," the

offense of aiding those engaged in unlawful acts of belligerency against the United States, such as terrorism, is nearly as old as the nation itself. Although the MCA defines this offense using the modern label of "providing material support for terrorism," Section 950v(b)(25) is nothing more than a modern codification of a long-recognized offense triable by military commission.

A. Congress Properly Exercised Its War-Making Powers When It Concluded That Providing Material Support to Terrorism Constitutes a Violation of the U.S. Common Law of War Triable by Military Commission

1. Standard of Review

Questions of law, including the question whether Congress's constitutional war-making powers authorize its determination that certain offenses are triable by military commission, are subject to plenary review by this Court. See 10 U.S.C. § 950g(d) (2009) (this Court "shall take action only with respect to matters of law, including the sufficiency of the evidence to support the verdict"); American Bus Ass'n v. Rogoff, 649 F.3d 734, 737 (D.C. Cir. 2011) (because a constitutional challenge presents a question of law, the standard of review is de novo). But Congress's determination that providing material support to terrorism during an armed conflict constitutes an offense triable by military commission is entitled to great deference. See, e.g., Rostker v. Goldberg, 453 U.S. at 70 ("judicial

deference . . . *is at its apogee* when legislative action under the congressional authority to raise and support armies . . . is challenged") (emphasis added); see also Holder v. Humanitarian Law Project ("HLP"), 130 S. Ct. 2705, 2727 (2011) (requiring deference to the political branches in cases involving "sensitive and weighty interests of national security and foreign affairs"). Moreover, when Congress's constitutional powers are exercised, as they are here, in tandem with the Necessary and Proper Clause, reviewing courts "look to see whether the statute constitutes a means that is rationally related to the implementation" of Congress's enumerated powers. United States v. Comstock, 130 S. Ct. 1949, 1956-57 (2010) (collecting cases).

2. Congress Has the Authority Pursuant to Its War-Making Powers To Codify U.S. Common Law of War Offenses Triable by Military Commission

Hamdan focuses exclusively (Pet. Br. 20) on Congress's power under the Define and Punish Clause in attacking his convictions, and he argues for a narrow reading of that power that is mistaken, as we explain below in Section I.B of this brief. But Hamdan ignores the primary constitutional powers that provide Congress with the authority to identify crimes subject to trial and punishment by military commission – Congress's extensive war-making powers under Article I. As the language of the 2009 MCA indicates, the substantive crimes that Congress

decided to include in the statute "codify offenses that have traditionally been triable under the law of war *or otherwise triable by military commission*." 10 U.S.C. § 950p(d) (2009) (emphasis added).[4] Congress's reference both to "offenses triable under the law of war" and to offenses "otherwise triable by military commission" is consistent with the conclusion that Congress's constitutional authority to specify offenses triable by military commission does not flow solely from its power under the Define and Punish Clause, but also stems from its broad war-making powers under Article I, Section 8 of the Constitution.[5]

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[4] Section 950p(a) of the 2006 MCA contained Congress's determination that "[t]he provisions of this subchapter codify offenses that have traditionally been triable by military commissions." Section 950p(d) of the 2009 MCA contains this language from the 2006 MCA as well as the language quoted in the text, which clarifies that war crimes under international law are only a subset of the offenses triable by military commission.

[5] In Ex parte Quirin, 317 U.S. 1, 26 (1942), the Supreme Court detailed the constitutional provisions that provide Congress with broad war-making powers: "To . . . provide for the common Defence" (art. 1, § 8, cl. 1); "To raise and support Armies" and "To provide and maintain a Navy" (art. 1, § 8, cl. 12, 13); "To make Rules for the Government and Regulation of the land and naval Forces" (art. 1, § 8, cl. 14); "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water" (art. 1, § 8, cl. 11); "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations" (art. 1, § 8, cl. 10); and "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof" (art. 1, § 8, cl. 18).

As Colonel Winthrop explained in his seminal treatise on military law: "[I]n general, it is those provisions of the Constitution which empower Congress to 'declare war,' and 'raise armies,' and which, in authorizing the initiation of war, authorize the employment of all necessary and proper agencies for its due prosecution, from which [the military commission] derives its original sanction." William Winthrop, Military Law and Precedents 831 (2d ed. 1920) ("Winthrop") (emphasis omitted). In identifying the class of offenses cognizable by military commission as "[v]iolations of the laws and usages of war," Colonel Winthrop explained that such offenses are "those principally, *in the experience of our wars*, made the subject of charges and trial." Id. at 839 (emphasis added). See also Henry W. Halleck, Military Tribunals and Their Jurisdiction (1864), reprinted in 5 Am. J. Int'l L. 958, 965-66 (1911) (noting that acts of marauders prosecuted by military commission during the Civil War violated the common law of war and that such tribunals were "simply a portion of the military power of the Executive"); Ex parte Milligan, 71 U.S. (4 Wall.) 2, 142 (1866) (Chase, C.J., concurring in judgment) ("We think that the power of Congress [in times of insurrection or invasion or during civil or foreign war] to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to raise and support armies and to declare war.").

In this case, Congress has codified the longstanding historical practice of the Executive Branch, undertaken pursuant to the President's authority as "Commander in Chief of the Army and Navy of the United States" (U.S. Const. art. II, § 2), of trying by military commission individuals who join with, and provide aid and assistance to, unprivileged belligerents in the context of an armed conflict against the United States.[6] Congress had full authority, not just under the Define and Punish Clause, but also under its war-making powers, to subject Hamdan to trial by military commission for the crimes he committed.

[6] This is not to say that, when acting prospectively in the exercise of its constitutional war-making powers, Congress is necessarily limited to identifying traditional law-of-war violations as subject to trial by military commission. Cf. Quirin, 317 U.S. at 43 (noting that the Fifth Amendment's exception for "cases arising in the land or naval forces" is "not restricted to those involving offenses against the law of war alone, but extend to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law"). The precise contours of such prospective authority, however, are not at issue in this case. Congress made clear in the 2006 MCA that it had chosen to codify only "offenses that have traditionally been triable by military commissions," and that the MCA therefore "d[id] not establish new crimes that did not exist before its enactment." 10 U.S.C. § 950p(a) (2006); see 10 U.S.C. § 950p(d) (2009) (same).

3. Providing Material Support to Unlawful Belligerents in an Armed Conflict Is an Offense Triable by Military Commission

As we explain below, there is a direct analogy between the "guerillas," "marauders," and "saboteurs" historically tried by U.S. military commissions, on the one hand, and modern-day terrorists engaged in unlawful belligerency, on the other. By whatever name they are called, the salient point is that they engage in acts of unlawful belligerency against the United States – including, particularly, attacks on civilian targets – that are beyond the pale of legitimate warfare. Indeed, today's terrorists have quite properly been analogized to guerilla operatives of earlier times. See, e.g., Sean D. Murphy, Evolving Geneva Convention Paradigms in the "War On Terrorism": Applying the Core Rules to the Release of Persons Deemed "Unprivileged Combatants", 75 Geo. Wash. L. Rev. 1105, 1112 (2007) (observing that "[t]he contemporary terrorist threat posed by a group such as al Qaeda is largely viewed in the United States as comparable to Lieber's guerrilla brigands"); William H. Taft IV, The Law of Armed Conflict After 9/11: Some Salient Features, 28 Yale J. Int'l L. 319, 320 (2003) ("Terrorists are belligerents who lack the entitlements of those legitimately engaged in combat."); G.I.A.D. Draper, The Status of Combatants and the Question of Guerilla Warfare, 45 Brit. Y.B. Int'l L. 173, 183 (1971) (observing that "[m]ore recently guerilla activities

have been conducted as a method of securing specific political objectives by groups or organizations disassociated from States or other belligerents, and directed at particular governments, their nationals and property").

Congress lawfully determined, as an incident of its war-making powers, that not only individuals who commit acts of unlawful belligerency during an armed conflict by engaging in terrorism, but also those who knowingly provide material aid and assistance to such unlawful belligerents, are properly subject to trial by military commission in accordance with our nation's longstanding practice under the common law of war. Congress's manifest purpose in reaching this legislative conclusion was to deter individuals who align with our nation's enemies from fostering acts of terrorism as a means of conducting hostilities against U.S. armed forces and launching attacks on U.S. civilians. Cf. HLP, 130 S. Ct. at 2731 (linking the federal material support statute to the constitutional responsibility of "[s]ecur[ing] [the nation] against foreign danger") (citation omitted). The historical precedents detailed below fully support Congress's wartime judgment.

a. Aiding and Assisting Guerillas and Other Unlawful Belligerents Was an Offense Commonly Tried by Military Commission During the Civil War

During the Civil War, bands of guerillas, not regularly enlisted in the Confederate army, who attacked Union military forces, bases of supply, railroads, and civilian targets of opportunity were not perceived as legitimate combatants entitled to the privileges of belligerents but, instead, as outlaws, marauders, and spies. See Francis Lieber, Guerrilla Parties Considered with Reference to the Laws and Usages of War 5-8, 18-19 (1862). In December 1861, for example, Major General Henry Wagner Halleck, then commanding the Department of Missouri (and a renowned international lawyer),[7] issued a General Order condemning, among other offenses, the commission by "[p]ersons not commissioned or enlisted in the service of the so-called Confederate States" of "acts of hostility" such as "murder, robbery, theft, pillaging and marauding." General Order ("G.O.") No. 13, Headquarters ("HQ"), Dep't of the Missouri (Dec. 4, 1861), reprinted in 1 The War of the Rebellion, Official Records of the Union and Confederate Armies, ser. II, at 233-36 (hereafter "1 OR ser. II") (1894). The

[7] Halleck's treatises include Military Tribunals, published posthumously in 1911, and International Law; or, Rules Regulating the Intercourse of States in Peace and War, published in 1861.

General Order directed that such individuals not be treated as prisoners of war but as "criminals." Id.

Another of Halleck's general orders directed that the adjudication of "violation[s] of the laws of war," when not triable by courts-martial and not within the jurisdiction of any existing civilian court, should be by "duly constituted military tribunal[s]" also referred to as "[m]ilitary commissions." G.O. No. 1, HQ, Dep't of the Missouri (Jan. 1, 1862), 1 OR ser. II, at 247-49. Significantly, General Order No. 1 distinguished between regularly enrolled members of "the military service of an enemy" – who were exempt from prosecution – and enemy "insurgents not militarily organized under the laws of the State, predatory partisans and guerilla bands," who were "not entitled to such exemptions" because they were "in a legal sense mere freebooters and banditti." Id., 1 OR ser. II, at 249.

In a similar fashion, Army General Order No. 100 (1863), commonly referred to as the "Lieber Code," specifically identified two categories of "[a]rmed enemies not belonging to the hostile army" who were subject to trial by military commission for unlawfully engaging in acts of armed violence. G.O. No. 100, § IV, art. 82 (Apr. 24, 1863), reprinted in Francis Lieber, Instructions for the Government of Armies of the United States in the Field 26 (1898). First, "[m]en,

or squads of men, who commit hostilities . . . without being part and portion of the organized hostile army . . . but who do so with intermitting returns to their homes and avocations . . . divesting themselves of the character or appearance of soldiers . . . if captured, are not entitled to the privileges of prisoners of war . . . ." Id. Second, "[a]rmed prowlers, by whatever names they may be called, or persons of the enemy's territory, who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war." Id. art. 84. Thus, the Lieber Code reflected a continuing understanding that, under the U.S. common law of war, those who engaged in hostilities as guerillas and marauders without being part of an organized army were subject to trial by military commission. Colonel Winthrop later collected examples of individuals tried by military commission during the Civil War for engaging in illegal warfare as guerillas and destroying bridges. See Winthrop, supra, at 839-40; see, e.g., G.O. No. 15, HQ, Dep't of the Mississippi (Apr. 3, 1862), 1 OR ser. II, at 472-76 (approving convictions by military commission of six individuals for "tak[ing] up arms as . . . insurgent[s]").

Critically, military authorities authorized trial by military commission of not only those who committed such acts, but also those who knowingly joined with, or

provided aid and assistance to, such guerillas and marauders. Halleck's General Order No. 13, for example, condemned individuals who aided and assisted lawless conduct by irregular belligerents as criminals subject to trial by military commission. G.O. No. 13, 1 OR ser. II, at 234 (declaring that "insurgents" who band together "for the purpose of assisting the enemy to rob, to maraud and to lay waste the country" are "by the laws of war in every civilized country liable to capital punishment"). General orders approving convictions by military commissions convened during the Civil War make clear that not only those who engaged in such acts of unlawful belligerency, but also those who knowingly joined with or aided and assisted such unlawful belligerents, were punished as criminals under the law of war. See, e.g., G.O. No. 20, HQ, Dep't of the Missouri (Jan. 14, 1862), 1 OR ser. II, at 402-06 (approving convictions by military commission of five individuals for burning bridges, railroad cars, and tracks, and for "*[g]iving aid and comfort to bridge burners*," in violation of the law of war) (emphasis added); G.O. No. 9, HQ, Dep't of the Mississippi (Mar. 25, 1862), 1 OR ser. II, at 464-71 (approving convictions by military commission of (a) William Kirk for membership in a "marauding or guerilla band known as Jeff. Thompson's band," and for committing acts of "rob[bery] and plunder[ing]" with that band; (b) John W. Montgomery for membership in the same guerilla band and for

"*purchasing and driving cattle*" for the band; (c) I.N. Giddings for "*spy[ing]*" for the band; and (d) William Lisk for *furnishing a firearm to a guerilla* for the purpose of firing on a train carrying U.S. troops) (emphasis added); G.O. No. 19, HQ, Dep't of the Mississippi (Apr. 24, 1862), 1 OR ser. II, at 476-83 (approving convictions by military commission of (a) Matthew Thompson for "*joining, aiding and assisting* a band of robbers and bandits" engaged in the destruction of railroads and bridges and for attempting to steal a horse for the use of the bandits; (b) Owen C. Hickam for "*giv[ing] clothing and goods* to certain persons to be . . . appropriated to the use of persons in rebellion" in violation of the law of war; and (c) Samuel Jamerson for *feeding and sheltering* outlaws who had destroyed a railroad) (emphasis added). See also 11 Op. Att'y Gen. 297, 312 (1865) ("to unite with banditti, jayhawkers, guerillas, or any other unauthorized marauders is a high offence against the laws of war; the offence is complete when the band is organized or joined").

Hamdan and an amicus contend that such Civil War precedents are inapposite because they involved breaches of a duty of loyalty to the United States, while Hamdan owed no such loyalty. See Pet. Br. 38; Glazier Amicus Br. 11-13. But, as the CMCR found in rejecting this argument, the breach of a duty of loyalty was not an element of the charged offenses. Pet. App. 53-54 & n.115.

Under the principles governing military prosecutions during the Civil War, the allegation of the offense contained in each specification was required to "specify the material facts necessary to constitute the alleged offense." Winthrop, supra, at 133. As Winthrop's treatise makes clear, "[i]f any fact or circumstances which is a necessary ingredient in the offence be omitted, such omission vitiates the indictment," and the want "of a direct allegation of anything material in the description of the substance, nature, or manner of the crime, cannot be supplied by any intendment or implication whatsoever." Id. at 133 n.3 (citation omitted).

Although in some of the cases discussed above, the defendant was contemporaneously charged with treasonable conduct (for example, in the case of John Montgomery), none of the separate specifications referenced above, which charge joining with or giving aid to unlawful bands of guerillas or marauders, allege or imply culpability as a consequence of a breach of a duty of loyalty owed to the United States. The fact that those convictions were not set aside on further review for failure to allege a required element of the offense demonstrates that the breach of a duty of loyalty was not an element of the crime. Moreover, the form specification that Colonel Winthrop provided in his treatise for "Guerilla warfare, in violation of the Laws of War," simply required an allegation that, during a time of war, the offender, while not being commissioned, enlisted, or employed in the

military service of the belligerent, but acting independently of the same, did, in combination with other persons similarly acting, "engage in unlawful warfare against the inhabitants of the United States." Winthrop, supra, at 1023; see also Pet. App. 52-54.

Relying on the plurality opinion in Hamdan v. Rumsfeld, Hamdan claims that Civil War military commission trials cannot "provide reliable guidance for what was a law of war violation" because such tribunals "'functioned at once as martial law or military government tribunals [charged with prosecuting purely civilian offenses] and as law-of-war commissions.'" Pet. Br. 39 (quoting Hamdan, 548 U.S. at 608 (plurality opinion)). While some military tribunals filled these dual roles, Colonel Winthrop summarized the offenses of which marauders and their supporters were convicted as "violation[s] of the laws and usages of war" rather than as ordinary civilian crimes subject to trial by a martial-law court. See Winthrop, supra, at 839-40. Moreover, in cases where the tribunals served such a dual function, the charges lodged against a particular defendant often distinguished between offenses subject to trial as violations of the law of war and those subject to prosecution as ordinary crimes. See, e.g., G.O. No. 9, 1 OR ser. II,

at 465 (charging Stephen Bontwell with "member[ship] [in] a marauding band" as a "[v]iolation of the laws of war" and, separately, charging him with "[r]obbery").[8]

The evidence in this case illustrates that Hamdan's unlawful conduct was directly analogous to the conduct of those tried and convicted by military commissions during the Civil War of joining with and aiding and assisting guerillas, marauders, and other unlawful combatants. While Hamdan's Civil War counterparts furnished weapons, supplies, and horses to guerillas engaged in unlawful hostile acts against the United States during an armed conflict, Hamdan ferried weapons and other supplies, including munitions, to al Qaeda fighters, and

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[8] Congress conducted a series of hearings prior to passage of the 2009 version of the MCA. Testifying witnesses expressed differing views as to whether providing material support to terrorism in the context of an armed conflict might be viewed by our courts as a violation of the law of war, but they provided Congress with an ample basis to conclude that such an offense was properly triable by military commission. Compare Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War, Hearing Before the S. Comm. on Armed Servs., 111th Cong., 1st Sess. 12 (2009) (statement of then-Assistant Attorney General David S. Kris observing that a court could conclude that material support "is not a traditional law of war offense") with Proposals for Reform of the Military Commission System, Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties, of the H. Comm. on the Judiciary, 111th Cong., 1st Sess. 109 (2009) (statement of former Deputy Assistant Attorney General Steven Engel expressing the view that the material support offense is properly based on analogous offenses prosecuted by military commissions during the Civil War). That Congress was exposed to different views on this issue before enacting the 2009 MCA provides confidence that it made an informed decision.

he provided transportation to and carried orders from al Qaeda's top leaders, thereby directly assisting and facilitating al Qaeda's unlawful attacks on the United States, its citizens, and its military personnel.[9] Hamdan's counterparts during the Civil War era also provided themselves and their services by joining with guerilla bands operating against U.S. military forces and the civilian populace, while Hamdan, knowing full well al Qaeda's murderous objectives and, in particular, its program of committing brutal terrorist attacks against the United States and its citizens, provided himself wholeheartedly to that organization by swearing *bayat* to bin Ladin, by receiving training at an al Qaeda training camp, and by furnishing personal services to bin Ladin and al Qaeda as a driver and armed bodyguard.[10]

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[9] See App. Ex. 320, at 5-6 (verdict form finding, in connection with Charge II, Specification 2, that Hamdan "[t]ransported weapons or weapons systems or other supplies for the purpose of delivering or attempting to deliver said weapons or weapons systems to Taliban or al Qaeda members and associates"); id. at 8-9 (finding Hamdan guilty of Charge II, Specifications 5 and 6); App. Ex. 1, at 6 (alleging, in Specifications 5 and 6, that Hamdan transported Usama bin Ladin "to various locations in Afghanistan knowing that by providing said service or transportation he was directly facilitating communication and planning used for [acts] of terrorism").

[10] See App. Ex. 320, at 5 (verdict form finding, in connection with Charge II, Specification 2, that Hamdan "[r]eceived training at an al Qaeda training camp," "[s]erved as a driver for Usama bin Laden," and "[s]erved as Usama bin Laden's armed body guard"); id. at 10 (finding Hamdan guilty of Charge II, Specifications 7 and 8); App. Ex. 1, at 6-7 (alleging, in Specifications 7 and 8, that

b. Other U.S. Precedents Confirm That the Offense of Aiding Unlawful Enemy Belligerents Is Triable by Military Commission and Does Not Require Proof of a Duty of Loyalty

Domestic precedents from both before and after the Civil War confirm that trying by military tribunal persons who engage in unlawful acts of belligerency, as well as individuals who knowingly aid and assist those engaged in such acts, does *not* require that the offender owe any allegiance to the United States. In 1818, for example, Robert C. Ambrister and Alexander Arburthnot, both British subjects residing in Spanish Florida, were tried by a military tribunal for, among other charges, aiding, comforting, and supplying the Seminole Indians in their armed conflict with the United States. 1 American State Papers: Military Affairs 721 (1832). While this prosecution was understandably controversial, largely because Major General Andrew Jackson ordered the two men to be executed,[11] see id. at

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Hamdan served as an armed bodyguard for Usama bin Ladin, "knowing that by providing said service as an armed bodyguard he was protecting the leader of al Qaeda and facilitating communication and planning used for acts of terrorism").

[11] The military affairs committees of both houses of Congress concluded that General Jackson's actions were unlawful because the charged offenses were not properly subject to trial by military commission and that, in any event, Ambrister and Arburthnot should not have been executed. See 1 American State Papers: Military Affairs 735 (1832). The House of Representatives, however, rejected the House committee's proposed resolution disapproving of Jackson's actions. See 33 Annals of Cong. 1132-37 (1819). In his treatise, Colonel

735, statements by President James Monroe and Secretary of State John Quincy Adams indicate that they considered Ambrister and Arburthnot, who owed no allegiance to the United States, to have been properly triable by military commission because their conduct involved assisting acts of belligerency undertaken in a manner that violated the customs and usages of war. See 33 Annals of Cong. 12-13 (1818) (statement of President Monroe); 4 American State Papers: Foreign Affairs 539-45 (1818) (statement of Secretary of State Adams).

During the Second World War, eight Nazi saboteurs – only one of whom claimed to be a U.S. national – were tried by a military commission for, among other offenses, unlawful belligerency, spying, and "relieving or attempting to relieve . . . the enemy"[12] in violation of Article 81 of the applicable Articles of War, and conspiracy to commit those offenses. See Quirin, 317 U.S. at 23. Although the Quirin Court had no "occasion to pass on the adequacy [of the

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Winthrop criticized the conduct of General Jackson in the case of Ambrister, but only because General Jackson had no authority to increase the sentence (flogging) imposed by the military tribunal. General Jackson's decision to order the execution of Ambrister was, in Winthrop's view, "wholly arbitrary and illegal," and amounted to murder. Winthrop, supra, at 464-65.

[12] "Relieving the Enemy" is defined in the Manual for Courts-Martial provision explaining Article 81 as "substantially equivalent to *furnishes* or *supplies*." See U.S. War Dep't, A Manual for Courts-Martial 234 (1917) (emphasis added).

remaining allegations] or to construe the 81st . . . Article[] of War," id. at 46, because it found that the defendants were properly subject to trial by military commission as unlawful belligerents, the charge of relieving the enemy levied against them constitutes further evidence that such an offense could be prosecuted by military commission due to the unlawful nature of the hostile acts in question, without regard to whether the defendants owed any allegiance to the United States.[13]

4. Other U.S. Common Law of War Offenses Have Been Triable by Military Tribunal Regardless of Their Status under International Law

Since the adoption of the Constitution, Congress and the Executive have repeatedly employed their war-making powers to identify what the Quirin Court called "common law" war crimes, see 317 U.S. at 34, and to make those offenses triable by military tribunal, rather than by an Article III court. For example, although customary international law recognizes that spies lack the immunity from

[13] To illustrate our nation's practice of prosecuting by military commission individuals who clandestinely engage in acts of "irregular and unlawful warfare," the Quirin Court summarized the prosecutions that occurred during the Civil War, characterizing the perpetrators as spies or guerillas and their activities as "offenses against the law of war." See 317 U.S. at 13 n.10. The Court did not indicate that any of those offenses violated customary international law but, instead, provided those examples to demonstrate that such activities have historically constituted offenses under our nation's existing common law of war.

prosecution that is afforded to lawful combatants, see id. at 30-31, spying is not, itself, generally considered a violation of the international law of war. See Dep't of the Army, Field Manual, FM 27-10, The Law of Land Warfare ¶ 77, at app. A-21 (1956) ("Spies are punished, not as violators of the laws of war, but to render that method of obtaining information as dangerous, difficult, and ineffective as possible."); Richard R. Baxter, So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs, 28 Brit. Y.B. Int'l L. 323, 333 (1951) ("The actions of a spy are not an international crime, for by his conduct he merely establishes that he is a belligerent with no claim to any of the protected statuses which international law has created."). Nonetheless, since the beginning of our nation, spying has been an offense punishable by military tribunal. See Winthrop, supra, at 765 (quoting 5 Journal of the Continental Congress 693) (Resolution of Aug. 21, 1776) (providing that "all persons, not members of, nor owing allegiance to, any of the United States of America . . . who shall be found lurking as spies . . . shall suffer death, according to the law and usage of nations, by sentence of a court-martial"); American Articles of War of 1806, art. 101, Winthrop, supra, at 985 (making spies, who are not citizens of and do not owe allegiance to the United States, subject to trial by court-martial). As the Quirin Court explained, "[b]y a long course of practical administrative construction by its military authorities, our

Government has likewise recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts . . . have the status of unlawful combatants punishable as such by military commission." 317 U.S. at 35.

Hamdan contends that in Quirin, the Supreme Court held that spying was "by 'universal agreement and practice' both in this country and internationally, recognized as an offense against the law of war." Pet. Br. 22 (citing Quirin, 317 U.S. at 30). In fact, the Quirin Court merely held that, "[b]y universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations." 317 U.S. at 30; see id. at 30 n.7 (collecting authorities). The Court made clear that "offenders against the law of war" were "subject to trial and punishment by military tribunals." Id. at 31. In finding that spying not only resulted in the offender losing any immunity as a combatant from prosecution but also subjected him to trial by military commission, the Quirin Court relied heavily on historical American practice dating to the Revolutionary War.[14] See id. at 31-34.

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[14] Amicus CCR argues (CCR Amicus Br. 4-20) that, at the time of his capture, Hamdan was a "civilian" rather than a "combatant" in a non-international armed conflict and that, consequently, his participation in hostilities against the United States was not a war crime. An amicus, however, is "constrained by the rule that [it] generally cannot expand the scope of an appeal to implicate issues

Like spying, aiding the enemy (by someone with a duty of loyalty to the United States), although not a war crime under international law, has long constituted an offense under the U.S. law of war, making the offender subject to trial by military tribunal. The Articles of War of 1775 made subject to trial by court-martial "[w]hoever belonging to the continental army, shall relieve the enemy with money, victuals, or ammunition, or shall knowingly harbor or protect an enemy." American Articles of War of 1775, art. 27, Winthrop, supra, at 955. When the Continental Congress re-enacted the Articles of War, it deleted the requirement that the offender belong to the Continental Army. See American Articles of War of 1776, § 13, art. 18, Winthrop, supra, at 967. This prohibition on aiding the enemy has remained substantially the same during the past 235 years.[15] Both aiding the enemy in violation of a duty of loyalty and spying are

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[not raised] by the parties to the appeal." Eldred v. Reno, 239 F.3d 372, 378 (D.C. Cir. 2001) (internal quotation marks and citation omitted). Therefore, because neither party has raised this issue, and because Hamdan did not raise it in the CMCR, this issue is not properly before this Court. In any event, CCR's argument is without merit. As Judge Bates explained in Hamlily v. Obama, 616 F. Supp. 2d 63, 73 (D.D.C. 2009), "the lack of combatant status in a non-international conflict does not, by default, result in civilian status for all, even those who are members of enemy 'organizations' like Al Qaeda."

[15] See American Articles of War of 1806, art. 56, Winthrop, supra, at 981; American Articles of War of 1874, art. 45, Winthrop, supra, at 989; Articles of War of 1916, art. 81 ("Whoever relieves the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds

offenses subject to trial by military commission under the 2006 and 2009 MCA,[16] and both are examples of offenses that constitute what the Quirin Court referred to as this nation's "common law of war." 317 U.S. at 34.

Contrary to Hamdan's suggestion, Application of Yamashita, 327 U.S. 1 (1946), does not undermine the conclusion that Congress's war-making powers enable it to codify, as subject to trial by military tribunal, common law offenses that have evolved in the experience of our nation's wars. See Pet. Br. 18-20; CLS Amicus Br. 18. In Yamashita, the Supreme Court held that "[n]either congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge preferred against him [was] a violation of the law of war." 327 U.S. at 13. But that passage simply acknowledged that neither Congress nor the President had authorized the commission to try any offense that was not a violation of the law of war. The

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correspondence with or who gives intelligence to the enemy . . . shall suffer death or such other punishment as a court-martial or military commission may direct."), reprinted in A Manual for Courts-Martial, supra, at 321. See also 10 U.S.C. § 904 (UCMJ art. 104) ("Any person who – (1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things . . . shall suffer death or such other punishment as a court-martial or military commission may direct.").

[16] 10 U.S.C. § 950v(b)(26) (2006) (wrongfully aiding the enemy); 10 U.S.C. § 950t(26) (2009) (same); 10 U.S.C. § 950v(b)(27) (2006) (spying); 10 U.S.C. § 950t(27) (2009) (same).

Court did not suggest – as Hamdan maintains (Pet. Br. 18-19) – that the Constitution prevented Congress from importing U.S. common law of war offenses into military commission jurisprudence if Congress wished to do so. Moreover, because the Court concluded that Yamashita's conduct in failing to prevent the soldiers under his command from committing atrocities against prisoners of war and civilians violated several international conventions governing warfare, 327 U.S. at 15-16, it did not need to consider whether such activity was also punishable by U.S. military tribunals under the U.S. common law of war. Although the Yamashita Court referred to the Define and Punish Clause as the source of Congress's authority to establish military commissions, the Court did not find, or even suggest, that the Define and Punish Clause provides the exclusive authority by which Congress may do so. See id. at 16.

Finally, Hamdan's claim (Pet. Br. 44-48) that Congress violated separation-of-powers principles by making the provision of material support to terrorism subject to trial by military commission rather than an Article III court is meritless. Because Congress acted within its constitutional authority in codifying the offense of providing material support to terrorism, and because similar offenses committed in the context of armed conflict have traditionally been tried by military tribunals, the offense is properly triable by military commission. See 10 U.S.C. § 950p(c)

(2009) (an offense codified by the MCA is triable by military commission "only if the offense is committed in the context of and associated with hostilities"). As the Quirin Court explained, "offenders against the law of war [are] subject to trial and punishment by military tribunals," 317 U.S. at 31, and such offenses "are not deemed to be within Article III, § 2 or the provisions of the Fifth and Sixth Amendments relating to 'crimes' and 'criminal prosecutions.'" Id. at 39. Hamdan therefore has no constitutional right to "demand a jury trial . . . [or to] be tried only in the civil courts."[17] Id.

B. Congress Properly Exercised Its Authority under the Define and Punish Clause When It Determined That Providing Material Support to Terrorism, in the Context of an Armed Conflict, Is an Offense Triable by Military Commission

1. Introduction and Standard of Review

Congress's constitutional authority to "define and punish . . . Offences against the Law of Nations," U.S. Const. art. 1, § 8, cl. 10, provides an additional basis for its determination that the provision of material support to terrorism, in

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[17] Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866), is not to the contrary. Hamdan, unlike Milligan, was "part of . . . the armed forces of the enemy," Quirin, 317 U.S. at 45, and accordingly may be made "subject to trial and punishment by military tribunals for acts which render [his] belligerency unlawful." Id. at 31. Indeed, Hamdan was captured on a foreign battlefield during armed conflict, while Milligan was arrested in peaceful Indiana. Moreover, the Milligan Court made clear that its holding went only to the jurisdiction of the military commission. See 71 U.S. at 118.

the context of an armed conflict, is an offense subject to trial and punishment by military commission. As explained below, engaging in terrorist acts as a mode of warfare violates international law, and the United States has an obligation under various international agreements and U.N. Security Council resolutions to prevent terrorist acts and to punish those who engage in such acts. Although the offense of providing material support to terrorism, like spying and aiding the enemy, has not attained international recognition at this time as a violation of customary international law, the Define and Punish Clause, in tandem with the Necessary and Proper Clause, affords Congress ample authority to make such an offense, in the context of armed conflict, subject to trial and punishment by military commission. Decisions from international tribunals established at the end of World War II support Congress's determination.

This Court has recognized that, while "[d]eference to the judgment of Congress and the President . . . is by no means absolute,"

> a determination by the political branches concerning the obligations of the United States is also a determination about the conduct of American foreign policy. Defining and enforcing the United States' obligations under international law require[s] the making of extremely sensitive policy decisions, decisions which will inevitably color our relationships with other nations. Such decisions "are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of

> a kind for which the Judiciary has neither aptitude, facilities nor responsibility . . . ."

Finzer v. Barry, 798 F.2d 1450, 1458-59 (D.C. Cir. 1986) (quoting Chicago & So. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)), aff'd in part sub nom. Boos v. Barry, 485 U.S. 312 (1988); United States v. Bin Ladin, 92 F. Supp. 2d 189, 220 (S.D.N.Y. 2000) ("Clause 10 does not merely give Congress the authority to punish offenses against the law of nations; it also gives Congress the power to 'define' such offenses."). As Justice Kennedy explained in addressing whether conspiracy was properly alleged as a war crime, "Congress, not the Court, is the branch in the better position to undertake the sensitive task of establishing a principle not inconsistent with the national interest or with international justice." Hamdan v. Rumsfeld, 548 U.S. at 655 (Kennedy, J., concurring, joined by Souter, Ginsburg, and Breyer, J.J.) (internal quotation marks and citation omitted).

In Hamdan v. Rumsfeld, the plurality indicated that, *in the absence of legislation* "positively identif[ying] [an offense] as a war crime," the government would be required to "make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war." 548 U.S. at 601-03 (plurality opinion); see Pet. Br. 22 (citing plurality opinion in Hamdan). Now that Congress has twice enacted legislation identifying the offense of providing material support to terrorism

during an armed conflict as an offense triable by military commission, this Court should defer to that legislative determination.

Nor does Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), assist Hamdan's claim that Congress's codifications of international norms governing armed conflict are not entitled to judicial deference. See Pet. Br. 21 & n.3; see also CLS Amicus Br. 20. Sosa involved the Alien Tort Statute ("ATS") enacted in 1789, 28 U.S.C. § 1350, and the judiciary's limited authority under that statute to transform "new and debatable" violations of the law of nations into a private right of action *in the absence of* "legislative guidance." 542 U.S. at 726-28. Under those circumstances, the Court refused to recognize any new cause of action under the ATS having a "less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." Id. at 732. Here, there is no such absence of guidance from Congress.

In codifying a prohibition on knowingly providing material support to terrorists and terrorist organizations during an armed conflict, Congress did not – as Hamdan maintains – fashion from whole cloth an entirely new violation of the law of armed conflict "without regard to international opinion on the subject." Pet. Br. 16. Instead, consistent with the latitude it possesses under the Define and Punish Clause, Congress determined that punishing the provision of material

support to terrorism is necessary and proper to fulfill our nation's international responsibilities to prevent and to punish terrorism itself, such that the offense is subject to trial and punishment by military commission when committed in the context of an armed conflict against the United States. Hamdan's specific offenses fall within the heartland of the type of activity condemned by the international community – directly facilitating the efforts of Usama bin Ladin and other key al Qaeda members in planning and implementing acts of terrorism, including the wanton murder of innocent civilians, knowing full well the nature and scope of their criminal objectives.

2. Terrorism, as a Mode of Warfare, Violates the Law of Nations

As even one of the amici supporting Hamdan concedes, "The Law of Armed Conflict has long criminalized specific acts which are often referred to as acts of terrorism [and] consist[] [of] deliberately launching an attack on civilians or civilian property . . . with the primary purpose of causing or spreading a state of terror." ILS Amicus Br. 2. At the conclusion of World War I, for example, the Allied Nations condemned Germany and its allied governments for a litany of "violations of the laws and customs of war," including "the execution of a system of terrorism" that involved "[m]urders and massacres [of non-combatants] . . . [and] the arbitrary destruction of public and private property." Commission of

Responsibilities, Conference of Paris 1919, Violation of the Laws and Customs of War 16-17 (Clarendon Press 1919). During World War II, the Judge Advocate General of the U.S. Army included "[s]ystematic terrorism" and "[w]anton destruction of property" in a published list of war crimes subject to trial by military commission under the "laws and customs of war." Foreign Relations of the United States, Diplomatic Papers 1944, H.R. Doc. No. 79-303, pt. 1, vol. 1, at 1267, 1272-73 (1945).

Following World War II, the Geneva Conventions of 1949 expressly prohibited terrorism as a mode of warfare. In particular, Article 33 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War prohibits all measures of "intimidation *or of terrorism*" against the civilian population in the territory of a party to the conflict. 6 U.S.T. 3516, T.I.A.S. No. 3365 (Aug. 12, 1949) (emphasis added).[18] And, as one of the amici explains in

[18] In Hamdan v. Rumsfeld, the Supreme Court found that the armed conflict with al Qaeda is a "conflict not of an international character occurring in the territory of one of the High Contracting Parties to which Common Article 3 [of the 1949 Geneva Conventions] applies." 548 U.S. at 629-30. See also Derek Jinks, September 11 and the Law of War, 28 Yale J. Int'l L. 1, 19 (2003) (arguing that the prohibitions of Common Article 3 are applicable to the armed conflict undertaken by al Qaeda and that the September 11 attacks are properly characterized as "war crimes"). Common Article 3 prohibits *any party* to a conflict not of an international character from subjecting persons taking no part in the conflict to "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture."

detail, see ILS Amicus Br. 6-11, the Additional Protocols to the 1949 Geneva Conventions further proscribe terrorism as a mode of warfare. Given the almost universal acceptance of the relevant principles embodied in these international conventions, there is broad agreement that "[i]nternational law uniformly prohibits terrorist acts committed in the course of an international or non-international armed conflict." ILS Amicus Br. 6 & n.9. Therefore, in enacting the 2006 MCA, Congress properly concluded that terrorism committed as part of armed conflict constitutes a "modern-day war crime[]," that is, a "practice[] contrary to the law of nations" that has "the same status as traditional war crimes." H.R. Rep. No. 109-664, pt. 1, at 25 (2006).

Although the prohibitions against terrorism that Congress codified in Section 950v(b)(24) of the 2006 MCA are confined to armed hostilities against the United States, Congress's determination that terrorism constitutes a practice "contrary to the law of nations" is also supported by developments in the international community that extend beyond the context of armed conflict. See United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (noting that certain acts of terrorism are "recognized by the community of nations as of [such] universal concern" as to enable any nation obtaining custody over an offender to prosecute him). Indeed, in a series of multilateral conventions, the international

community has not only branded as crimes the various means by which acts of terrorism are carried out, but has also imposed upon the signatory nations an affirmative obligation to criminalize the proscribed activities under their own domestic laws. See Pet. App. 38 n.59 (listing antiterrorism treaties and conventions).

Moreover, the United Nations has broadly condemned the acts, methods, and practices of terrorism as "criminal" acts that are inconsistent with the international community's most basic principles and values. As the CMCR observed, Pet. App. 39-40, the 1994 U.N. Declaration on Measures to Eliminate International Terrorism condemns "all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed," because they constitute "a grave violation of the purpose and principles of the United Nations, which may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society." G.A. Res. 49/60, U.N. Doc. A/RES/49/60 (Dec. 9, 1994). The Declaration urges member states "[t]o ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts, in accordance with the relevant provisions of their national law." Id. ¶ 5(b). Consistent with this general condemnation of terrorism,

the U.N. Security Council has specifically and repeatedly denounced Usama bin Ladin and his associates as terrorists and emphatically condemned al Qaeda's terrorist attacks as crimes. See, e.g., S.C. Res. 1189, U.N. Doc. S/RES/1189 (Aug. 13, 1998) (condemning Al Qaeda's attacks on U.S. embassies in Kenya and Tanzania); S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999) (establishing the "Al-Qaida and Taliban Sanctions Committee," expressly condemning bin Ladin, and calling on all states to cooperate and to provide assistance in apprehending the perpetrators of terrorist attacks); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (condemning the terrorist attacks of September 11, 2001, and terrorism as a crime, and requiring all member states to "[t]ake the necessary steps to prevent the commission of terrorist acts"). Congress thus had ample support for its conclusion that terrorism violated the law of nations, and that al Qaeda terrorist activities in particular violated principles of international law.

3. Congress Reasonably Determined That Punishing the Provision of Material Support to Terrorism Fulfills Its International Responsibilities To Prevent and To Punish Terrorism Itself

Hamdan argues that, while terrorist acts during an armed conflict may violate international law, the provision of material support to terrorists does not. Pet. Br. 25-43; see also ILS Amicus Br. 5-13. Although the offense of providing material support to terrorism has not attained international recognition at this time

as a violation of customary international law, Congress's power under the Define and Punish Clause is not restricted to criminal offenses that have achieved the status of customary international law. The "define and punish" power is broader than Hamdan suggests. For example, in United States v. Arjona, 120 U.S. 479 (1887), the Supreme Court held that Congress had the authority under the Define and Punish Clause to declare that "the counterfeiting within the United States of the notes of a foreign bank or corporation" was "an offense against the law of nations," id. at 482-83, reasoning that "if the thing made punishable is one which the United States are required by their international obligations to use due diligence to prevent, it is an offense against the law of nations." Id. at 488. This Court has also recognized that the Define and Punish Clause "authorizes Congress to derive from the often broadly phrased principles of international law a more precise code . . . necessary to bring the United States into compliance with rules governing the international community." Finzer, 798 F.2d at 1455.

In a series of tribunal decisions, treaties, and other authoritative pronouncements, the international community has made it plain that directly facilitating acts of terrorism and other war crimes cannot be tolerated. As early as the end of the Second World War, military tribunals administering international law condemned those who knowingly facilitated war crimes as war criminals

themselves. In 1947, for example, a U.S. military tribunal sitting in Nuremberg, Germany, as an "international tribunal" under the mandate of the Allied Control Council convicted Friedrich Flick and Otto Steinbrinck of, among other charges, providing financial support for the illicit activities of the Nazi S.S. through their membership in the "Himmler Circle of Friends." The Flick Trial, 9 L. Rep. Trials of War Criminals 16, 28-29 (1949). Declaring that it was "administer[ing] international law," the tribunal in that case explained that the gravamen of the offense was the provision of financial support to a criminal organization, the S.S., with knowledge that it was engaged in the commission of war crimes. Id. at 16, 28-29. In rejecting a defense argument that Flick and Steinbrinck "could not be liable because there had been no statute nor judgment declaring the S.S. a criminal organisation and incriminating those who were members or in other manner contributed to its support," the tribunal recognized more than 60 years ago that "[o]ne who knowingly by his influence and money contributes to the support [of such an organization] must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes." Id. at 29.

Similarly, a British military tribunal sitting in Hamburg, Germany, in 1946 sentenced to death both the owner of a German chemical firm and his primary deputy who, "in violation of the laws and usages of war," supplied the gas-

producing substance Zyklon B to the S.S., "well knowing" that it would be used to murder concentration-camp inmates. The Zyklon B Case, 1 L. Rep. Trials of War Criminals 93, 93 (1947). The prosecution's theory of culpability, which the tribunal accepted, was that to knowingly supply a commodity to a branch of the state using it to commit a war crime also rendered the supplier culpable as a war criminal. Id. at 93-94, 102-03. See also Trial of Shigeki Motomura, 13 L. Rep. Trials of War Criminals 138 (1949) (reporting a Netherlands East Indies case in which Dutch authorities tried and convicted a naval officer and subordinates in a military court for actions supportive of efforts by Japanese units to terrorize the civilian population and characterizing the actions as "contrary to the laws and customs of war").

Several international agreements lend further support to Congress's determination that not only terrorists, but also those who knowingly facilitate acts of terrorism in the context of armed conflict, are engaged in criminal conduct that has been condemned by the international community. For example, the 1997 Terrorist Bombing Convention[19] was designed to give effect to the U.N. Declaration on Measures to Eliminate Terrorism discussed above. See Terrorist

[19] International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 284, 37 I.L.M. 249 (entered into force May 23, 2001).

Bombing Convention pmbl. Article 2.1 of the Convention makes it an offense for any person unlawfully and intentionally to deliver, place, discharge or detonate an explosive or other lethal device, in or against a place of public use, with the intent to cause death or serious bodily injury. Article 2.3(c) of the Convention further provides that a "person also commits an offense" if that person

> [i]n any . . . way contributes to the commission of one or more offences . . . by a group of persons acting with a common purpose . . . [if] such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or . . . made in the knowledge of the intention of the group to commit the offence or offences concerned.

Article 2.1 of the 1999 Terrorist Financing Convention[20] similarly provides:

> Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used, or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) [a]n act which constitutes an offence within the scope of and as defined in one of the [nine terrorism] treaties listed in the annex; or (b) [a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

[20] International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 197, 39 I.L.M. 270 (entered into force Apr. 10, 2002).

Likewise, Section 2(e) of U.N. Security Council Resolution 1373 imposes on all member states the responsibility to "[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts *or in supporting terrorist acts* [be] brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offenses in domestic laws . . . ." Finally, although Article 8 of the 1998 Rome Statute of the International Criminal Court[21] does not expressly criminalize terrorism, it criminalizes a long list of violations of the laws of war, including some acts, such as attacks against civilian populations and objects, that are often undertaken to induce terror. The Rome Statute also extends individual criminal responsibility "for a crime within the jurisdiction of the Court" to anyone who, "[f]or the purpose of facilitating the commission of such a crime, . . . assists in its commission . . . including providing the means for its commission" or "[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose." Rome Statute art. 25(3)(c), (3)(d). These sources of international law provided Congress with an ample basis under the Define and Punish Clause to find that providing material support to

[21] July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

terrorism in the context of armed conflict is an offense triable by military commission.[22]

In this case, while providing material support to terrorism has not attained international recognition at this time as an offense under customary international law, the United States is required, under the international obligations described above, to use "due diligence to prevent" the commission of acts of terrorism. Arjona, 120 U.S. at 488. By including material support for terrorism in the 2006 MCA, Congress legislated "as a means to that end . . . , and it was clearly appropriate legislation for that purpose." Id.; see also Pub. L. No. 104-132, tit. III, § 301(a)(2), 110 Stat. 1247 (1996) (statutory finding, in support of domestic material support statute, that "the Constitution confers upon Congress the power to punish crimes against the law of nations and to carry out the treaty obligations of the United States"). In an effort to effectuate the United States' international obligations, Congress made a reasonable decision to criminalize not only acts of terrorism committed as a mode of conducting armed conflict, but also conduct that directly facilitates such terrorist acts, and the MCA thus bears a rational

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[22] While the choice of forum here is not governed by international law, as a matter of U.S. municipal law, custom, and practice, such an offense is properly triable by military commission when committed by an unlawful belligerent in the context of an armed conflict against the United States. See Quirin, 317 U.S. at 38-40.

relationship to existing treaty-based obligations to criminalize not only acts of terrorism, but also the provision of various types of support to terrorists and terrorist groups. See Finzer, 798 F.2d at 1459; United States v. Lue, 134 F.3d 79, 84 (2d Cir. 1998) (rejecting argument that legislation implementing the Hostage Taking Treaty was too broad because the legislation was "plainly adapted" to giving effect to the treaty).

Hamdan argues that the offense of terrorism is distinguishable from material support for terrorism because the material support offense under the MCA lacks the scienter requirement necessary for terrorism offenses, that is, that they are carried out for the purpose of "influenc[ing] government policy" or "spreading terror among the civilian population." Pet. Br. 33; see also ILS Amicus Br. 15. But the distinction between the two scienter requirements governing "terrorism" and "material support" is insubstantial. The MCA defines "terrorism" to involve "intentionally kill[ing] or inflicti[ing] great bodily harm on one or more protected persons, or intentionally engag[ing] in an act that evinces a wanton disregard for human life, *in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct.*" 10 U.S.C. § 950v(b)(24) (2006) (emphasis added).

Thus, the MCA's definition of terrorism embraces the very scienter requirement Hamdan and his amicus contend is crucial to comport with international law.[23]

Section 950v(b)(25) of the 2006 MCA requires, as an element of the offense of providing material support, that the defendant engage in the prohibited conduct "*knowing or intending* that [material support or resources] are to be used in preparation for, or in carrying out, an act of terrorism" or that the defendant provide material support to a terrorist organization "*knowing* that such organization has engaged or engages in terrorism." 10 U.S.C. § 950v(b)(25)(A) (2006) (emphasis added). Although the material support scienter requirement is not identical to the scienter requirement for the offense of terrorism itself, a defendant charged with providing material support cannot be convicted unless he either shares the intent of the terrorist he is supporting or knows that the individual

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[23] To buttress his claim that material support cannot constitute a war crime, Hamdan relies on language in the Court's plurality opinion in Hamdan v. Rumsfeld indicating that "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 (plurality opinion); see Pet. Br. 27 & n.7. That passage, however, did not address material support, but rather (as Hamdan acknowledges) the inchoate offense of conspiracy. Pet. Br. 27 n.7. Although the plurality also asserted that none of the overt acts alleged in the conspiracy count "violate[d] the law of war," 548 U.S. at 600, the questions whether such acts could constitute material support for terrorism, and whether Congress could properly determine that providing material support is triable by military commission, were not before the Court.

or organization that he is supporting is committing acts of terrorism for the purpose of intimidation, coercion, or retaliation.[24] See United States v. Stewart, 590 F.3d 93, 113 n.18 (2d Cir. 2009) (finding that, under the domestic material support statute (18 U.S.C. § 2339A), "the mental state [of the person providing the material support] . . . extends both to the support itself, and *to the underlying purposes for which the support is given*") (emphasis added), cert. denied, 130 S. Ct. 1924 (2010). As that formulation relating to the *mens rea* of a person supporting a war crime or act of terrorism has become a mainstay of international practice and conventions condemning such activity dating to the end of World War II, Congress acted reasonably under its "define and punish" authority in adopting the MCA's scienter requirement for the offense of providing material support to terrorism.

Given the record in this case, Hamdan is in no position to argue – in an as-applied challenge to his convictions – that his scienter and level of involvement in

[24] The jury instructions concerning the material support counts on which Hamdan was convicted required the members of the commission to find beyond a reasonable doubt that Hamdan "knew or intended that the material support or resources were to be used for carrying out an act of terrorism." Tr. 3748-49. The instructions defined "terrorism" as the "intentional killing or the intentional infliction of great bodily harm . . . in a manner calculated to influence or affect the conduct of government or a civilian population by intimidation or coercion, or to retaliate against government conduct." Tr. 3750.

criminal activity fell below the standards recognized by international precedents. As described above, Hamdan was both a member and a facilitator of al Qaeda, he pledged loyalty (*bayat*) to bin Ladin, he was an armed bodyguard who received arms training from al Qaeda, and he ferried weapons and orders for bin Laden. Hamdan did all this fully aware of the ongoing series of international terrorist attacks being conducted by al Qaeda. Indeed, the members of the military commission found that Hamdan acted knowingly, "with the intent to provide . . . material support and resources to al Qaeda," and that Hamdan "was directly facilitating communication and planning used for acts of terrorism." App. Ex. 1, at 5-7. After the September 11, 2001 attacks, Hamdan, who knew that bin Laden and al Qaeda were responsible for those attacks, helped bin Laden elude capture, and Hamdan was himself captured ferrying anti-aircraft missiles into an active war zone where al Qaeda was fighting the U.S. military. Any suggestion that, under the relevant international precedents, Hamdan did not have sufficient knowledge and intent to be convicted for his actions in support of al Qaeda is baseless.

II. HAMDAN'S CONVICTION UNDER THE MCA FOR PROVIDING MATERIAL SUPPORT DID NOT VIOLATE THE EX POST FACTO CLAUSE

A. Standard of Review

Whether the Ex Post Facto Clause forecloses Hamdan's prosecution by military commission for providing material support to terrorism is a question of law subject to *de novo* review. See American Bus Ass'n, 649 F.3d at 737.

B. Argument

Whether an alien unprivileged belligerent detained at Guantanamo Bay Naval Station may assert rights pursuant to the Ex Post Facto Clause (U.S. Const. art. I, § 9, cl. 3) is an issue that has not been addressed by this Court or by the Supreme Court. As Hamdan notes (Pet. Br. 49), the Supreme Court has described the Ex Post Facto Clause as a structural limitation on Congress's power, Downes v. Bidwell, 182 U.S. 244, 277 (1901) (Ex Post Facto Clause goes to the "competency of Congress to pass a bill"). And Congress incorporated ex post facto principles into the terms of the MCA itself. See 10 U.S.C. § 950p(b) (2006) ("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. § 950p(d) (2009). This expression of congressional intent in

the MCA would give effect to ex post facto principles without any need to decide the applicability of the Ex Post Facto Clause. In any event, the CMCR assumed that the Ex Post Facto Clause applied in this case and determined that the Clause, and its counterpart principle under international law, were not violated. Pet. App. 73-75. This Court can make the same assumption because, on the merits, the prohibition against providing material support to unlawful combatants does not criminalize previously innocent conduct but, instead, simply codifies an offense that has long been punished under our nation's common law of war and has been condemned as criminal by the international community.

The Ex Post Facto Clause bars retroactive application of a "statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense [previously] available." Collins v. Youngblood, 497 U.S. 37, 42 (1990) (quoting Beazell v. Ohio, 269 U.S. 167, 169-170 (1925)). Hamdan does not and cannot claim that the MCA increased his punishment or deprived him of a previously available defense. Nor was Hamdan's conduct "innocent when done." To the contrary, as the CMCR concluded in this case, "[w]hen [Hamdan's] charged offenses began in 1996, the underlying wrongful conduct of providing material support for terrorism, as now

defined under the 2006 M.C.A., was a cognizable offense." Pet. App. 77. Hamdan's conviction therefore does not violate the Ex Post Facto Clause.

As explained above, the crime for which Hamdan was convicted, although codified by statute, was already recognized by common law. As the U.S. military tribunal that was established to try crimes committed by Nazis observed, "the *ex post facto* rule cannot apply in the international field as it does under constitutional mandate in the domestic field," for "[t]o have attempted to apply the *ex post facto* principle to judicial decisions of common international law would have been to strangle that law at birth." Trial of Altstötter, 6 L. Rep. Trials of War Criminals 41 (1948); see also Rogers v. Tennessee, 532 U.S. 451, 461 (2001) ("The common law, in short, presupposes a measure of evolution that is incompatible with stringent application of *ex post facto* principles."); cf. State v. Hylton, 226 P.3d 246, 252-53 (Wash. App. 2010) (finding no Ex Post Facto Clause violation where a state legislature codified a pre-existing common law rule regarding sentencing enhancement, even though the defendant's conduct occurred before the codification, and the codification modified the common law rule). Nevertheless, it is clear that, whether denominated as an ex post facto principle or as *nullem crimen sine lege* (literally, "no crime without law"), as it is often called in international law, the applicable "principle of justice and fair play" requires that

Hamdan cannot be convicted unless, at the time of the applicable conduct, "he knew or should have known that he would be subject to punishment if caught." Altstötter, supra, at 43; accord Ayyash et al., Case No. STL-11-01/I/AC/R176bis, Interlocutory Decision on the Applicable Law ¶ 136 (Special Tribunal for Lebanon Feb. 16, 2011) ("What matters is that an accused must, at the time he committed the act, have been able to understand that what he did was criminal, even if without reference to any specific provision.") (internal quotation marks and citation omitted); 22 Trial of the Major War Criminals Before the International Military Tribunal 462 (1948) (to be lawfully convicted of a crime, the perpetrator "must [have] know[n] that he [was] doing wrong and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished"); cf. Rogers, 532 U.S. at 462 ("[A] judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.") (internal quotation marks and citation omitted). As the CMCR found in rejecting Hamdan's ex post facto argument, it must be "foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable." Pet. App. 75 (citation omitted).

Hamdan had fair notice that he would be subject to punishment for his conduct if and when he was caught. As CMCR Judge Sims, writing in the al Bahlul case, explained, our nation's longstanding practice with respect to offenses involving the provision of support to unlawful belligerents "serves as persuasive evidence of the view of the United States as to the state of the law of armed conflict." Al Bahlul v. United States, No. 09-001, 2011 WL 4916373, at *96 (C.M.C.R. Sept. 9, 2011) (en banc) (Sims, J., concurring), petition for review filed, No. 11-1324 (D.C. Cir. Sept. 14, 2011). "Accordingly, when a person . . . chooses to commit [such] acts against the United States, he or she should not be surprised to find themselves [sic] in the custody of the United States military facing trial by military commission for these long-standing violations of the law of war." Id.

The type of conduct engaged in by Hamdan, actively supporting terrorism as a member of an armed group engaged in unlawful hostilities against the United States, has been condemned as criminal, as explained above, not only by our nation's law-of-war precedents, but also by a series of international tribunal decisions, treaties, and other authoritative pronouncements by the international community that antedated Hamdan's active support of bin Ladin and al Qaeda. As a consequence, Hamdan had fair warning that he was engaged in criminal conduct. See United States v. Al Kassar, 660 F.3d 108, 119 (2d Cir. 2011) ("Fair warning

does not require that the defendants understand that they could be subject to criminal prosecution *in the United States* so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere."). As the CMCR observed, "[i]t strains credibility to contend that [Hamdan] would not recognize the criminal nature of the acts alleged in the indictment," Pet. App. 74, which involved the intentional or knowing rendering of assistance to individuals bent on committing extraordinary acts of violence against innocent civilians. See also Ayyash, supra, ¶ 136 ("Although the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation under customary international law, it may nevertheless be used to refute any claim by the Defence that it did not know of the criminal nature of the acts.") (internal quotation marks, emphasis, alteration, and citation omitted).

Indeed, Hamdan was convicted of four specifications that included findings that Hamdan knew at the time of his conduct that he was either "facilitating" or "directly facilitating" "communication and planning used for acts of terrorism." App. Ex. 1, at 6-7. The evidence at trial demonstrated that Hamdan was engaged in conduct that any reasonable person would have known was both wrongful and criminal. See, e.g., Tr. 3415 (testimony of federal law enforcement agent that Hamdan said he "believed in" the 1998 declaration "to kill Americans, regardless

of civilian or military, anywhere in the world, along with their allies, and as well as to steal their wealth"); Tr. 2159-60, 2722 (Hamdan repeatedly heard bin Laden lecture on the necessity for martyrdom missions and about terror operations); Tr. 3423 (evidence of Hamdan's knowledge that operations such as the al Qaeda attacks on the U.S. embassies in East Africa, the attack on the *U.S.S. Cole*, and, in particular, the 9/11 attacks, were "designed to strike fear in the heart of the enemy and, in particular, to show the United States that al-Qaeda . . . could hit it in the home-front"); Tr. 2712-13 (evidence of Hamdan's knowledge of the East Africa bombings and his and bin Ladin's flight from Kandahar to Kabul to avoid retribution); Tr. 2714, 3396 (evidence of Hamdan's arrangements to return to Afghanistan from Yemen following the *Cole* bombing because he feared being arrested due to his association with bin Ladin); Tr. 2175-76 (evidence that Hamdan had been present and was providing security when bin Laden, Khalid Sheik Mohammed, and others discussed plans for the 9/11 attacks).

Finally, Hamdan's contention (Pet. Br. 54-59) that the material support offense set forth in the 2006 MCA violates the Ex Post Facto Clause because it relies on a definition of "material support or resources" that was enacted by Congress in 2004 as part of a revision of the federal material support statute, 18 U.S.C. § 2339A, lacks merit. See 10 U.S.C. § 950v(b)(25)(B) (2006) (defining

"material support or resources" by reference to 18 U.S.C. § 2339A(b)). As an initial matter, the 2004 amendment[25] was merely a clarification of the definition of material support set forth in the 1996 statute, see HLP, 130 S. Ct. at 2715, and Hamdan's conduct clearly fell within the 1996 definition as he provided "personnel" and "transportation" to al Qaeda and its leaders. See 18 U.S.C. § 2339A(b) (Supp. II 1995-1997). In any event, Hamdan was not convicted under the domestic material support statute, but rather for a pre-existing common law offense codified by the 2006 MCA. The prohibition in the MCA against providing "services" to unlawful combatants engaged in terrorism, and the prohibition against providing personnel, including one's self, in support of terrorist activities, are not innovations resulting from the 2004 amendment to the federal material support statute; rather, they are based on longstanding precedents permitting trial by military commission of those who join in an unlawful belligerency – thereby providing themselves as "personnel" – and those who provide support and services to unlawful belligerents during an armed conflict. Whether Congress, in crystallizing these crimes triable by military commission in the 2006 MCA, borrowed a definition of material support from elsewhere in the

[25] See Pub. L. No. 108-458, tit. VI, § 6603(a)(2) and (b), 118 Stat. 3762 (2004).

U.S. Code or drafted a separate definition is inconsequential, so long as the codified offense is a crime traditionally triable by military commission. Because providing material support to unlawful belligerents such as terrorists in the context of an armed conflict is such a crime, Hamdan's conviction is consistent with applicable ex post facto principles.

III. SUBJECTING ONLY ALIEN UNLAWFUL ENEMY BELLIGERENTS TO TRIAL BY MILITARY COMMISSION DOES NOT VIOLATE THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE

A. Standard of Review

Whether the jurisdictional provisions of the MCA violate the equal protection component of the Fifth Amendment's Due Process Clause is a question of law subject to *de novo* review. United States v. Ferreira, 275 F.3d 1020, 1024 (11th Cir. 2001); see also American Bus Ass'n, 649 F.3d at 737. Nonetheless, since decisions involving disparate treatment between citizens and aliens "may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary." Ferreira, 275 F.3d at 1025.

B. Argument

As Hamdan acknowledges (Pet. Br. 61), his initial hurdle in bringing an equal protection challenge under the Fifth Amendment's Due Process Clause is this Court's determination, in several habeas cases involving alien enemy belligerents challenging their detention under the AUMF, that "detainees [at Guantanamo Bay] possess no constitutional due process rights." Al-Madhwani v. Obama, 642 F.3d 1071, 1077 (D.C. Cir. 2011) (quoting Kiyemba v. Obama, 561 F.3d 509, 518 n.4 (D.C. Cir. 2009)), petition for cert. filed, No. 11-7020 (Oct. 24, 2011). Accord Kiyemba v. Obama, 555 F.3d 1022, 1026-27 (D.C. Cir. 2009), vacated and remanded, 130 S. Ct. 1235 (2010), reinstated as amended, 605 F.3d 1046 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1631 (2011); Rasul v. Myers, 563 F.3d 527, 531 (D.C. Cir. 2009). This Court has not specifically addressed whether Fifth Amendment rights apply in the context of military commission proceedings against aliens detained at Guantanamo Bay.

Assuming, *arguendo*, that the equal protection component of the Due Process Clause applies to military commission proceedings against aliens held at Guantanamo Bay, Hamdan's equal protection argument fails on the merits. Section 948c of the 2006 MCA limits the jurisdiction of military commissions under that statute to the enumerated law-of-war violations committed by "[a]ny

alien unlawful enemy combatant." 10 U.S.C. § 948c (2006). Hamdan claims (Pet. Br. 66-70) that the equal protection component of the Due Process Clause forbids Congress from subjecting aliens but not citizens to military commission proceedings, but the caselaw makes clear that, particularly in the context of an armed conflict, Congress may differentiate between citizens and aliens without offending equal protection guarantees so long as a rational basis exists for doing so.

Congressional policies regarding the treatment of aliens are entitled to a great deal of deference. See, e.g., Nyquist v. Mauclet, 432 U.S. 1, 7 n.8 (1977). As the Supreme Court observed in Mathews v. Diaz:

> [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, *the war power*, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

426 U.S. 67, 81 n.17 (1976) (emphasis added; internal quotation marks and citations omitted); accord Johnson v. Eisentrager, 339 U.S. 763, 769 (1950) (holding that "our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and of enemy allegiance"). Legislatively-enacted distinctions between citizens and aliens "do not violate equal protection so long as they are rationally

related to a legitimate governmental interest." Ferreira, 275 F.3d at 1025-26 (rejecting the argument that the federal hostage-taking statute violates equal protection because it only subjects aliens to punishment); United States v. Lue, 134 F.3d at 87 (same); United States v. Lopez-Flores, 63 F.3d 1468, 1473-74 (9th Cir. 1995) (same). See also Heller v. Doe, 509 U.S. 312, 320 (1993) (requiring only "a rational relationship between the disparity of treatment and some legitimate governmental purpose," which the legislature "need not actually articulate" to support its classification) (internal quotation marks and citations omitted); Narenji v. Civiletti, 617 F.2d 745, 748 (D.C. Cir. 1979) ("As we have said, classifications among aliens based upon nationality are consistent with due process and equal protection if supported by a rational basis."). Moreover, in an equal protection challenge by an alien to national security legislation, it is error for a court "to evaluate the policy reasons upon which the [legislation] is based," as the political branches, rather than the courts, are vested with the foreign affairs powers on which alienage-based distinctions are made. Narenji, 617 F.2d at 748.

Hamdan relies on Graham v. Richardson, 403 U.S. 365 (1971), to argue that statutory distinctions based on alienage must generally be subject to review under a strict scrutiny standard. Pet. Br. 66-68. But Graham addressed the entirely different question of the protection of aliens against state laws pursuant to the

Equal Protection Clause of the Fourteenth Amendment. See 403 U.S. at 372; see also Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (citing Graham for the proposition that strict scrutiny applies to a Fourteenth Amendment challenge to a state's alienage-based classification). As the court of appeals explained in Ferreira, 275 F.3d at 1025, classifications based on alienage are subject to a strict scrutiny standard when enacted by a state, but not when enacted by the federal government. Legislation enacted by Congress that distinguishes between citizens and aliens is governed by the rational basis test because the express constitutional powers granted to Congress permit it to make such distinctions. Id.; cf. Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948) (holding that the federal government possesses "broad constitutional powers" over aliens, including "regulation of their conduct").

As the Ferriera court explained, rational basis review entails a two-step inquiry. The reviewing court first identifies a legitimate governmental purpose that Congress "*could* have been pursuing" when it enacted the challenged legislation. 275 F.3d at 1026. The reviewing court then asks "whether a rational basis exists for the enacting governmental body to believe that the legislation would further the hypothesized purpose." Id. The rational basis test is easily satisfied here.

In United States v. Duggan, 743 F.2d 59 (2d Cir. 1984), an alien advanced an argument, similar to Hamdan's, that the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1801 et seq., violated the equal protection component of the Due Process Clause because it afforded more procedural safeguards to United States persons than to aliens. The court of appeals rejected his claim, finding that

> [t]he fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship. . . . [A] host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other . . . .
>
> The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is "invidious."

743 F.2d at 75-76 (quoting Mathews, 426 U.S. at 78-80). The court upheld the distinction, noting that the Supreme Court has adopted "a stance of minimal scrutiny respecting federal regulations that contain alienage-based classifications." Id. at 76.

The treatment of alien enemy belligerents under the MCA, no less than the treatment of aliens under FISA, easily survives rational basis scrutiny. Congress had a vital national security interest in establishing a military forum in which to bring to justice foreign unlawful belligerents whose purpose it is to terrorize innocent U.S. citizens and to murder U.S. military personnel, see Pet. App. 87, and

Congress chose to do so in a way that does not necessitate admitting such aliens into the United States. Moreover, the MCA reflects the longstanding assumption that, in time of armed conflict, enemy aliens are, of necessity, subject to a different legal regime than citizens. See Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952) ("[w]ar, of course, is the most usual occasion for extensive resort to the power" to treat aliens differently); Eisentrager, 339 U.S. at 771 ("it is war that exposes the relative vulnerability of the alien's status"); Al-Bihani v. Obama, 590 F.3d 866, 877 n.3 (D.C. Cir. 2010) (noting that "the procedures to which Americans are entitled are likely greater than the procedures to which non-citizens seized abroad during the war on terror are entitled"), cert. denied, 131 S. Ct. 1814 (2011).

Hamdan claims that he was denied equal protection because he was "afforded inferior criminal procedures as a defendant before a military commission." Pet. Br. 63-64. But individuals who are properly subject to trial by military commission are not entitled to the same panoply of procedural rights as criminal defendants charged with offenses cognizable by Article III courts. See Quirin, 317 U.S. at 39-41. In any event, the 2006 MCA provided extensive procedural safeguards to Hamdan in connection with his military commission trial – safeguards that ensured his trial was fundamentally fair and that were, in many

respects, identical to those governing courts-martial. Hamdan was, for example, statutorily entitled to be represented by appointed counsel at no cost to himself or to retain counsel of his own choosing (10 U.S.C. § 949c); to be present at all proceedings (id. § 949d(b)); to challenge court members for cause or peremptorily (id. § 949f); to compulsory process to obtain witnesses and evidence (id. § 949j); to the discovery of exculpatory evidence (id. § 949j(d)); to protection against compulsory self-incrimination (id. § 948r); to the right to cross-examine adverse witnesses (id. § 949c(7)); and to protection against cruel or unusual punishment (id. § 949s).[26]

The practice of subjecting enemy aliens to trial in a forum different from that governing citizens for offenses committed in the context of armed conflict is not only rational, it is longstanding. The Supreme Court has repeatedly instructed that "a contemporaneous legislative exposition of the Constitution when the founders of our government and framers of our Constitution were actively

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[26] Hamdan notes (Pet. Br. 65 n.22) that Section 948r of the 2006 MCA permitted the admission, in some circumstances, of coerced statements. Hamdan does not claim, however, that any coerced statements were used against him; he complains only about the use of statements obtained from him without Miranda warnings. Pet. Br. 64-65. In any event, Congress deleted the provision permitting the admission of coerced statements when it enacted the 2009 MCA. See 10 U.S.C. § 948r(c) (2009) (allowing the admission of statements by the accused only if "voluntarily given" or "made incident to lawful conduct during military operations at the point of capture").

participating in public affairs long acquiesced in" informs "the construction to be given its provisions." J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 412 (1928) (internal quotation marks and citation omitted); see also McDonald v. City of Chicago, 130 S. Ct. 3020, 3037-38 (2010). As discussed above, legislation enacted by the Second Continental Congress over a decade before the adoption of the Constitution restricted prosecution by military tribunal for the crime of spying to "all persons, *not members of, nor owing allegiance to, any of the United States of America*." Winthrop, supra, at 765 (quoting 5 Journal of the Continental Congress 693) (Resolution of the Continental Congress, Aug. 21, 1776) (emphasis added). The Articles of War of 1806 similarly restricted the jurisdiction of military tribunals over the crime of spying in time of war to "all persons *not citizens of or owing allegiance to* the United States of America." Winthrop, supra, at 766 (citing the Articles of War of 1806, art. 101, § 2) (emphasis added); id. at 985 (reproducing the statute). As the Quirin Court explained, "This enactment must be regarded as a contemporary construction of both Article III, § 2, and the Amendments as not foreclosing trial by military tribunals, without a jury, of offenses against the law of war committed by enemies not in or associated with our Armed Forces." 317 U.S. at 41.

Similarly, the Fifth Congress enacted "An Act respecting Alien Enemies," 1 Stat. 577 (July 6, 1798), at the same time it passed the Alien and Sedition Acts. The Alien Enemies Act required the "apprehen[sion], restrain[t] . . . and remov[al]" of all adult males of a nation with which the United States was at war "who shall be within the United States, and not actually naturalized." Although the Alien and Sedition Acts triggered a firestorm of controversy, the Alien Enemies Act (while it would be considered a drastic measure today) encountered no comparable resistance, despite the fact that it "obviously denie[d] enemy aliens the constitutional immunities of citizens." Eisentrager, 339 U.S. at 775. Speaking to the Virginia House of Delegates, James Madison, a prominent member of the Constitutional Convention and author of the Virginia Resolution condemning the Alien and Sedition Act, raised no concerns about the Alien Enemies Act, observing that "no doubt has been intimated as to the federal authority over [enemy aliens]; the Constitution having expressly delegated to Congress the power to declare war against any nation, and of course to treat it and all its members as enemies." Id. at 774 n.6 (citation omitted). The Supreme Court later observed that, "if there had been the slightest question in the minds of the authors of the Constitution or their contemporaries concerning the constitutionality of the Alien Enemy Act, it would have appeared. None did." Id. As Justice Scalia observed in

the Hamdi case, "In more recent times . . . citizens have been charged and tried in Article III courts for acts of war against the United States, even when their noncitizen co-conspirators were . . . subjected to military process." Hamdi v. Rumsfeld, 542 U.S. 507, 560 (2004) (Scalia, J., dissenting); see id. at 559 (Scalia, J., dissenting) (distinguishing between the treatment of citizens and "enemy aliens" in time of war).[27]

In sum, because Congress had a rational basis for subjecting alien unlawful enemy belligerents to trial by military tribunal for crimes committed in the context of an armed conflict, and because the practice of distinguishing between citizens and aliens in a wartime context has long been accepted as legitimate when authorized by Congress, Hamdan's equal protection claim should be rejected.

[27] Hamdan relies (Pet. Br. 65-67) on Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886), and Plyler v. Doe, 457 U.S. 202 (1982), for the proposition that the Constitution prohibits discrimination in the enforcement of the law on the basis of alienage. JACL relies on Wong Wing v. United States, 163 U.S. 228 (1896), for the same proposition. JACL Amicus Br. 11-14. But none of these cases concerns equal protection constraints on alienage-based legislation passed by Congress.

CONCLUSION

Hamdan's convictions should be affirmed.

Respectfully submitted,

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DATED: January 17, 2012

/s/
John F. De Pue
Attorney for Respondent

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number 11-1257

I hereby certify that I electronically filed the foregoing Brief for the United States 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 January 17, 2012.

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DATED: January 17, 2012

/s/
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ADDENDUM

CONTENTS

Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006)

§ 948a. Definitions

In this chapter:

(1) UNLAWFUL ENEMY COMBATANT.-(A) The term "unlawful enemy combatant" means-

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

§ 948c. Persons subject to military commissions

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

§ 950p. 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.

§ 950v. Crimes triable by military commissions

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

. . .

(24) TERRORISM.--Any person subject to this chapter who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally

engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military 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.

(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 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.

(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.

(27) SPYING.-Any person subject to this chapter who with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign power, collects or attempts to collect information by clandestine means or while acting under false pretenses, for the purpose of conveying such information to an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished by death or such other punishment as a military commission under this chapter may direct.

Military Commissions Act of 2009, Pub. L. No. 111-84, div. A, tit. XVIII, 123 Stat. 2574 (Oct. 28, 2009)

§ 950c. Appellate referral; waiver or withdrawal of appeal

(a) AUTOMATIC REFERRAL FOR APPELLATE REVIEW.-Except as provided in subsection (b), in each case in which the final decision of a military commission under this chapter (as approved by the convening authority) includes a finding of guilty, the convening authority shall refer the case to the United States Court of Military Commission Review. Any such referral shall be made in accordance with procedures prescribed under regulations of the Secretary.

§ 950f. Review by United States Court of Military Commission Review

(a) ESTABLISHMENT.-There is a court of record to be known as the "United States Court of Military Commission Review" (in this section referred to as the "Court"). The Court shall consist of one or more panels, each composed of not less than three appellate military judges. For the purpose of reviewing decisions of military commissions under this chapter, the Court may sit in panels or as a whole, in accordance with rules prescribed by the Secretary of Defense.

(b) JUDGES.-(1) Judges on the Court shall be assigned or appointed in a manner consistent with the provisions of this subsection.

(2) The Secretary of Defense may assign persons who are appellate military judges to be judges on the Court. Any judge so assigned shall be a commissioned officer of the armed forces, and shall meet the qualifications for military judges prescribed by section 948j(b) of this title.

(3) The President may appoint, by and with the advice and consent of the Senate, additional judges to the United States Court of Military Commission Review.

(4) No person may serve as a judge on the Court in any case in which that person acted as a military judge, counsel, or reviewing official.

(c) CASES TO BE REVIEWED.-The Court shall, in accordance with procedures prescribed under regulations of the Secretary, review the record in each case that is referred to the Court by the convening authority under section 950c of this title with respect to any matter properly raised by the accused.

(d) STANDARD AND SCOPE OF REVIEW.-In a case reviewed by the Court under this section, the Court may act only with respect to the findings and sentence as approved by the convening authority. The Court may affirm only such

findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the military commission saw and heard the witnesses.

(e) REHEARINGS.-If the Court sets aside the findings or sentence, the Court may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If the Court sets aside the findings or sentence and does not order a rehearing, the Court shall order that the charges be dismissed.

§ 950g. Review by United States Court of Appeals for the District of Columbia Circuit; writ of certiorari to Supreme Court

(a) EXCLUSIVE APPELLATE JURISDICTION.-Except as provided in subsection (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 and, where applicable, the United States Court of Military Commission Review) under this chapter.

§ 950p. Definitions; construction of certain offenses; common circumstances

. . .

(c) COMMON CIRCUMSTANCES.-An offense specified in this subchapter is triable by military commission under this chapter only if the offense is committed in the context of and associated with hostilities.

(d) EFFECT.-The provisions of this subchapter codify offenses that have traditionally been triable by military commission. This chapter does not establish new crimes that did not exist before the date of the enactment of this subchapter, as amended by the National Defense Authorization Act for Fiscal Year 2010, but rather codifies those crimes for trial by military commission. Because the provisions of this subchapter codify offenses that have traditionally been triable under the law of war or otherwise triable by military commission, this subchapter does not preclude trial for offenses that occurred before the date of the enactment of this subchapter, as so amended.

§ 950t. Crimes triable by military commission

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) of this section), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization 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.

(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.

(27) SPYING.-Any person subject to this chapter who, in violation of the law of war and with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign power, collects or attempts to collect information by clandestine means or while acting under false pretenses, for the purpose of conveying such information to an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished by death or such other punishment as a military commission under this chapter may direct.

10 U.S.C. § 904. Art. 104.

§ 904. Art. 104. Aiding the enemy

Any person who-

(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or

(2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly;

shall suffer death or such other punishment as a court-martial or military commission may direct.

This section does not apply to a military commission established under chapter 47A of this title.

18 U.S.C. § 2339A

§ 2339A. Providing material support to terrorists

(a) OFFENSE.-Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section 32, 37, 81, 175, 229, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, or 2340A of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), section 46502 or 60123(b) of title 49, or any offense listed in section 2332b(g)(5)(B) (except for sections 2339A and 2339B) or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

(b) DEFINITIONS.-As used in this section-

(1) the term "material support or resources" means 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;

(2) the term "training" means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and

(3) the term "expert advice or assistance" means advice or assistance derived from scientific, technical or other specialized knowledge.

Manual for Military Commissions, Rule 1001(b)(1)(A) (2010)

Rule 1001. Presentencing procedure

. . .

(b) *Matter to be presented by the prosecution.*

(1) *Evidence of prior convictions of the accused.*

(A) *In general.* The trial counsel may introduce evidence of military or civilian convictions, foreign or domestic, of the accused. For purposes of this rule, there is a "conviction" in a military case when a sentence has been adjudged. In a civilian case, a "conviction" includes any disposition following an initial judicial determination or assumption of guilt, such as when guilt has been established by guilty plea, trial, or plea of nolo contendere, regardless of the subsequent disposition, sentencing procedure, or final judgment. However, a "civilian conviction" does not include a diversion from the judicial process without a finding or admission of guilt; expunged convictions; juvenile adjudications; minor traffic violations; or convictions reversed, vacated, invalidated or pardoned because of errors of law or because of subsequently discovered evidence exonerating the accused.