

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

**D-043
RULING ON
Defense Motion to
Reconsider Ruling on Personal
Jurisdiction (Equal Protection)**

15 July 2008

The Defense has moved this Commission to reconsider its Ruling on Personal Jurisdiction. The Defense argues that the Supreme Court decision in *Boumediene v. Bush*, 533 U.S. ____, (2008) requires dismissal of all charges and specifications because the jurisdictional provisions of the Military Commissions Act violate the Equal Protection component of the Fifth Amendment. The Government opposes the motion.

The Supreme Court recently determined that the Constitution's Writ of Habeas Corpus protected Boumediene and another petitioner held in Guantanamo Bay. *Boumediene v. Bush*, 533 U.S. ____ (2008)[hereinafter *Boumediene*]. The Court's holding was limited to that Writ, but offered some guidance for analyzing whether other constitutional provisions might also apply to detainees held here. The Court did not hold that every constitutional provision applies in Guantanamo, and has written in the past "The view that every constitutional provision applies wherever the Government exercises its power is contrary to this Court's decisions in the *Insular Cases*, which held that not all constitutional provisions apply to governmental activity even in territories where the United States has sovereign power." *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). In *Boumediene*, the Court wrote that extraterritorial application of the Constitution depends not on the rigid application of *de jure* sovereignty, which belongs to Cuba, or on *de facto* sovereignty and control, which belongs to the United States, but on a host of "practical obstacles inherent in resolving the petitioner's entitlement to the writ;" *Boumediene* at 37; "objective factors and practical concerns;" *Boumediene* at 26; "practical considerations and exigent circumstances;" *Boumediene* at 64-65; a "functional" approach, *Boumediene* at 34; an assessment whether "judicial enforcement of [a constitutional] provision would be 'impractical and anomalous.'" *Boumediene* at 30; and whether access to the provision is a necessity to prevent injustice; *Boumediene* at 69.

At least two other reasons for the Court's decision should be noted. First, the Court was influenced in part by the significance of habeas corpus as "an essential mechanism in the separation of powers scheme," one that "ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of government' that is itself the surest safeguard of liberty." *Boumediene* at 12, 13. Claims for Constitutional rights that do not implicate separation of powers are deprived of this rationale for extraterritorial application. In addition, the Court held the Writ to be available in part because it determined that the alternative provided by Congress and the Executive Branch were inadequate. Indeed, the

Court suggests that it may not have found the Privilege available had:

(1) there been suitable alternative processes in place for determining the petitioners' status. "Here, as is true with detainees apprehended abroad, a relevant consideration in determining the courts' role is whether there are suitable alternative processes in place to protect against the arbitrary exercise of governmental power" *Boumediene* at 5. "We hold that [the DTA] procedures are not an adequate and effective substitute for habeas corpus." *Boumediene* at 2. "Certain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ." *Boumediene* at 67.

(2) the D.C. Circuit been more prompt in resolving DTA appeals "The first DTA review applications were filed over a year ago, but no decisions on the merits have been issued." *Boumediene* at 66. "In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands . . . The cases before us, however, do not involve detainees who have been held for a short period of time while awaiting their CSRT determinations. Were that the case, or were it probable that the Court of Appeals could complete a prompt review of their applications, the case for requiring temporary abstention or exhaustion of alternative remedies would be much stronger." *Boumediene* at 66.

(3) the Executive Branch acted more promptly in making its determinations about these petitioners' status. "The Executive is entitled to a reasonable period of time to determine a detainee's status before a court entertains that detainee's habeas corpus petition. The CSRT process is the mechanism Congress and the President set up to deal with these issues. Except in cases of undue delay, federal courts should refrain from entertaining an enemy combatant's habeas corpus petition at least until after the Department, acting via the CSRT, has had a chance to review his status." *Boumediene* at 66, 67.

The Supreme Court has also addressed the extraterritorial application of the Constitution in a number of cases before *Boumediene*. In *Dorr v. United States*, 195 U.S. 138 (1902) the Court concluded that an American citizen in the Philippine Islands, then a U.S. possession ceded by Spain, was not entitled to the Fourth Amendment's guarantee of a jury trial. "We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in Article IV, § 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated." *Id.* at 149. The Court, in *Balzac v. Porto Rico*, 258 U.S. 298 (1922) later reached the same conclusion, i.e. that an American citizen in Puerto Rico was not entitled to a jury trial, writing "That the right to be indicted by a grand jury and be tried by a petit jury is not fundamental, that the Fifth and Sixth Amendments enforcing this right apply only to the Federal courts, and that a citizen of the United States in a criminal prosecution in a state court may be deprived of his life, liberty, or property, by due

process of law, without indictment by a grand jury and without unanimity in the verdict of a petit jury, is the established doctrine of this court.” In *Hawaii v. Mankichi*, 190 U.S. 197 (1903) the Supreme Court denied Mankichi a jury trial in Hawaiian territorial courts, permitting Congress a transition period during which it could legislate for the newly acquired territory.

In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Supreme Court held that the Fourth Amendment did not protect a Mexican citizen, being tried in the United States, against an allegedly unlawful search of his residence in Mexico by U.S. and Mexican agents. The Court also wrote there that “The claim that extraterritorial aliens are entitled to rights under the 5th Amendment has been emphatically rejected.” *Verdugo-Urquidez*, at 268-269. *Johnson v. Eisentrager*, 339 U.S. 763 (1950) held that German nationals, being held by the United States in Germany after conviction for war crimes, did not have recourse to the Writ of Habeas Corpus.¹ Thus, while the Supreme Court ultimately concluded that the *Boumediene* petitioners are entitled to the Writ, it did so after a long history of finding other Constitutional provisions generally inapplicable extraterritorially, and only after concluding that (1) separation of powers principles were implicated that threatened the Court’s ability to check the executive, and (2) the Executive’s alternative remedy was inadequate.

Distilling from the Court’s approach and analysis a set of factors to consider when analyzing the extraterritorial application of the Constitution in Guantanamo Bay, the Commission concludes that it should consider (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; (3) whether practical considerations and exigent circumstances counsel against application of the constitutional right; (4) whether the Executive has provided the accused an adequate substitute for the Constitutional right being sought; (5) whether there is “necessity” for the Constitution to apply to prevent injustice, and (6) whether application of the Constitutional right would be “impractical and anomalous.” Items that challenge the power of the judiciary or otherwise violate a separation of powers principle are subject to special scrutiny.

APPLICABILITY OF THE EQUAL PROTECTION CLAUSE

At the outset we note the Court’s determination that “Guantanamo . . . is no transient possession. In every political sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.” *Boumediene* at 34.

1. The citizenship and status of the detainee, and the adequacy of the process through which the determination was made:

Hamdan is a citizen of Yemen who has been determined to be an unlawful enemy

¹ United States Courts of Appeals have also held various provisions of the Constitution not applicable extraterritorially. See, e.g. *Cuban Am. Bar Ass’n v. Christopher*, 43 F.3d 1412 (11th Cir. 1995) cert. den. 516 U.S. 913 (1995); *DKT Mem’l Fund Ltd. v. Agency for Int’l Dev.*, 887 F.2d 275, 284 (D.C. Cir. 1989).

combatant. The determination was made after a two-day, adversarial hearing at which he was represented by counsel, presented evidence, called witnesses and cross-examined the government's witnesses. The hearing was attended by the world press and representatives of various agencies interested in Human Rights and International Humanitarian Law, including the International Committee of the Red Cross and the United Nations. The decision was made by a military judge, who considered not only the M.C.A.'s statutory definition of alien unlawful enemy combatant, but considered and evaluated the accused's claims under the Third Geneva Convention in an Article 5 Status hearing, held over Government objection. This factor weighs against application of the Constitution.

2. The site of his apprehension and detention:

The apprehension occurred in Afghanistan, and the sites of his detention have been in Afghanistan and Guantanamo Bay. While Guantanamo Bay is under the *de facto* sovereignty of the United States, the sites of his apprehension and detention are a "factor that weighs against finding that [he has] rights under the [Constitution]." *Boumediene*, at 38.

3. Practical Considerations and exigent circumstances

The Defense argues that there are "few practical barriers" to the enforcement of Constitutional provisions such as the Equal Protection Clause in light of the United States' "complete and total control" of Guantanamo Bay, citing *Boumediene* at 25, 41. Indeed, the United States clearly has the power and ability to guarantee all of the Constitution's rights to detainees held in its power should it choose to do so. The Commission also looks, however, to other practical considerations. A guarantee of the Equal Protection of the laws would frustrate and be inconsistent with the Law of International Armed Conflict's long-standing scheme for encouraging compliance by according greater protections to lawful combatants than to unlawful combatants. It would give unlawful combatants the complete protection of our Constitution and our criminal law, even when they are not entitled to the increased protections accorded to lawful combatants under the Geneva Conventions. The result of such a policy would discourage compliance with the laws of war, by protecting those who flaunt it from the consequences of their unlawful participation in hostilities. The United States has refused to ratify Additional Protocol I to the Geneva Conventions precisely because such ratification would give to terrorists and other unlawful combatants increased legal protections that the United States desires to preserve only for lawful combatants. Thus, providing the protections of the Equal Protection Clause to unlawful combatants would frustrate a long-standing foreign policy of the United States.

Neither party has urged the Commission to consider *exigent circumstances* that would affect analysis of whether the Equal Protection Clause could or should apply at Guantanamo Bay, and the Commission is unaware of any. Even so, this factor weighs against application of the right because of the significant practical barriers and strong and pre-existing national interests against providing these rights to unlawful combatants.

4. Adequacy of the alternative right provided:

The alternative right provided by Congress is a right to be tried by military commission, which in many ways is consistent with trial by court martial, but in which certain protections available in that forum are not applicable. The accused has the right to be represented by counsel; tried publicly by a panel of officer members, selected after a process of voir dire and challenge; before a military judge; to have compulsory process for the production of witnesses in his defense; by evidence largely compliant with the Military Rules of Evidence; to raise affirmative defenses such as are common in criminal trials; to be found guilty only if two thirds of the members present at the time of the balloting find him guilty beyond a reasonable doubt; to have the assistance of counsel in submitting a petition for clemency to the Convening Authority; to have the findings and sentence reviewed by a Convening Authority and her Legal Advisor, who in her sole discretion can grant clemency (including setting aside the findings of guilty, changing them to findings of guilty to a lesser offense, and reducing or setting aside the sentence) for any reason or for no reason at all; and an automatic appeal to the Court of Military Commission Review. This alternative right, however, permits the introduction of statements obtained under coercion if the military judge, in the exercise of his discretion finds them to be reliable and in the interests of justice, and permits the introduction of some hearsay that does not comply with the Military Rules of Evidence.

The alternative remedy Congress has provided for application in military commissions is admittedly less protective of the accused than the full Equal Protection of the laws, but not significantly so. But the same can be said of the Geneva Conventions themselves: the protections of Common Article 3 (for those not entitled to Prisoner of War Status), are minimal compared to the exhaustive and extensive protections and rights accorded to Prisoners of War in Articles 12 through 125 of the Third Geneva Convention. Thus, the international community and the United States Senate have already ratified procedures in which unlawful combatants are tried in forums less protective of their rights than the forums accorded to lawful combatants. The Commission finds that this is an adequate alternative to the Equal Protection of all the laws available under the Constitution. This factor weighs against application of the Equal Protection Clause.

5. Necessity for the Equal Protection Clause to prevent injustice:

The Commission has concluded that the alternative procedure in place for the trial of alien unlawful enemy combatants is largely consistent with the Uniform Code of Military Justice, and that the Law of Armed Conflict, as embodied by the Geneva Conventions, already provides for the trial of unlawful combatants in less protective tribunals than those accorded to Prisoners of War. In light of this substantial array of privileges and protections accorded to Mr. Hamdan, the Commission does not find that the Equal Protection Clause needs to apply at Guantanamo Bay to prevent injustice. This factor weighs against application of this clause at Guantanamo Bay.

6. Would application of the Equal Protection Clause be “impractical or anomalous”?

Applying the Equal Protection Clause to alien unlawful enemy combatants, whose conduct on the battlefield has not even qualified them for the protections accorded to Prisoners of War, but who have engaged in combat in violation the rules of war, who attack civilians and civilian objects, who engage in hostilities without being entitled to do so, and who commit other violations of the law of war, would be anomalous. Requiring the detaining forces to provide an alien unlawful enemy combatant with all the trial rights guaranteed in the Constitution, when he has violated the Laws of War and engaged in hostilities against the United States and its coalition partners without the status of a lawful combatant, would be anomalous. Lawful combatants are entitled to a trial in the same forum as the detaining power provides to its own troops. Giving unlawful combatants greater protections than lawful combatants are entitled to receive would be anomalous.

But would it be practical? What would be the effect of providing full Constitutional protection to a class of combatants whose conduct on the battlefield does not even entitle them to the status of prisoner of war? It would discourage compliance with the law of armed conflict by entitling unlawful combatants to many of the protections now accorded only to those who are entitled to engage in hostilities. This would likely reduce compliance with the Law of Armed Conflict, and thereby increase the harm to civilians and their property. Thus, it would seem impractical and anomalous to provide full Constitutional protections to those whose battlefield conduct does not even entitle them to the protections accorded a Prisoner of War.

This factor argues against the extraterritorial application of the Equal Protection Clause.

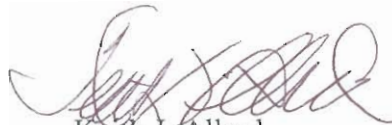
CONCLUSION AND RULING

In summary, the commission finds (1) that the accused has been found to be an alien unlawful enemy combatant by a full, fair, open and adversarial hearing, the determination having been made by a military judge; (2) that the site of his apprehension and detention “is a factor that weighs against a finding that he has rights under the [Constitution]” *Boumediene* at 38; (3) that there are substantial practical arguments against applying the Equal Protection Clause in Guantanamo Bay; (4) that the alternative remedy Congress has provided is less protective than the accused would receive were Equal Protection to apply, but not significantly so; (5) that there is no necessity for the Equal Protection Clause to apply to prevent injustice in the trial of detainees in Guantanamo, and (6) that application of the Equal Protection component of the Due Process Clause in Guantanamo Bay would be anomalous and impractical. All of the six factors analyzed weigh against application of the Equal Protection component of the Due Process Clause in Guantanamo Bay. Finally, the Commission notes that in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990), the Supreme Court wrote “This Court’s decisions expressly according differing protection to aliens than to citizens also undermine respondent’s claim that treating aliens differently under the 14th Amendment violates the Equal Protection component of the 5th Amendment.”

Conclusion: The Equal Protection component of the 5th Amendment does not apply to protect Mr. Hamdan.

DECISION:

The Motion to Dismiss for lack of Personal Jurisdiction is DENIED.



Keith J. Allred
Captain, JAGC, USN
Military Judge

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

Defense Motion

To Reconsider Ruling on Personal Jurisdiction
Based on Equal Protection Violation

2 July 2008

1. **Timeliness:** This motion is filed within the timeframe established by the Military Commissions Trial Judiciary Rules of Court.
2. **Relief Sought:** Pursuant to RMC 905(f), Defendant Salim Hamdan moves for reconsideration of the Commission's 19 December 2007 Ruling on Personal Jurisdiction (P-001), and requests that this case be dismissed for lack of personal jurisdiction. Dismissal is appropriate because the jurisdictional provision of the Military Commissions Act ("MCA"), § 948d(a), violates the Equal Protection Clause of the Fourteenth Amendment, applicable to the U.S. Government and these proceedings by virtue of the Fifth Amendment's Due Process Clause.
3. **Overview:** In December 2007, the Commission rejected Mr. Hamdan's Equal Protection challenge to the jurisdiction of this tribunal based solely on the D.C. Circuit's holding in *Boumediene* that Guantanamo detainees could not invoke the protections of the U.S. Constitution. The U.S. Supreme Court has now reversed the D.C. Circuit's *Boumediene* decision, and made clear that constitutional protections do extend to Guantanamo. Accordingly, the Commission should reconsider its 19 December 2007 jurisdictional ruling. "Equal Justice Under Law" is a defining principle of the American legal tradition. This principle is set forth in the Equal Protection Clause of the Fourteenth Amendment, and is incorporated in the Due Process Clause of the Fifth Amendment. Both of these provisions apply to all persons regardless of citizenship, whenever they appear as criminal defendants in an American court. The Commission should dismiss the charges against Mr. Hamdan because the MCA's jurisdictional provision, § 948d(a), violates Equal Protection in making aliens, but not U.S. citizens, subject to the lesser procedural protections afforded criminal defendants in a trial by military commission

under the MCA. This Commission has already noted that the MCA's procedures are "at odds with what would normally obtain under our law." (See 6 June 2008 D-030 Ruling on Motion to Suppress at 4.) Because "the central aim of our entire judicial system" is that "all people charged with a crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court," the MCA's discrimination between citizens and noncitizens violates Equal Protection principles. *Griffin v. Illinois*, 351 U.S. 12, 17 (1956).

4. **Burden and Standard of Proof:** The Prosecution bears the burden of showing that this Commission properly exercises personal jurisdiction over the Accused. The Prosecution must carry that burden by a preponderance of the evidence. RMC 905(c)(2)(B); *United States v. Khadr*, CMCR 07-001 (24 September 2007) at 24.

5. **Facts:**

- A. The current charges against Mr. Hamdan were referred by the Convening Authority on 10 May 2007.
- B. On 4 June 2007, the Military Judge granted a Defense motion to dismiss the charges due to lack of personal jurisdiction (D-001). Among the arguments presented by Mr. Hamdan on that motion was the contention that the MCA's jurisdictional provision, § 948d(a), violates Equal Protection by subjecting only aliens to trial by military commission, while excluding U.S. citizens from commission jurisdiction.
- C. On 8 June 2007, the Prosecution moved for reconsideration of the dismissal of charges (P-001).
- D. On 17 October 2007, following a decision by the Court of Military Commissions Review in *United States v. Khadr* (24 September 2007), the Commission ruled that it would hold an evidentiary hearing on the jurisdictional question.
- E. On 5-6 December 2007, the Commission held an evidentiary hearing on the jurisdictional question of whether Mr. Hamdan is an alien unlawful enemy combatant.

- F. On 19 December 2007, the Commission made a finding, based on a preponderance of the evidence, that Mr. Hamdan is an alien unlawful enemy combatant and therefore subject to the jurisdiction of this Commission. The Commission rejected Mr. Hamdan's arguments based on the Equal Protection Clause, relying on the decision of the Court of Appeals for the D.C. Circuit in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007). Specifically, the Commission stated that "[t]he accused's challenge to the exercise of jurisdiction as a violation of the equal protection clause must...fail," as the D.C. Circuit in *Boumediene* had "expressly ruled that the United States Constitution does not protect detainees at Guantanamo Bay." (19 December 2007 Ruling on Reconsideration at 10.)
- G. On 12 June 2008, the U.S. Supreme Court reversed the D.C. Circuit's *Boumediene* decision, holding that "[e]ven when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'" (*Boumediene v. Bush*, 553 U.S. ___, slip op. at 35 (2008), quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)). The Court further stated that "the Government of the United States [is] bound to provide to noncitizen inhabitants [of overseas territories under U.S. control] 'guaranties of certain fundamental personal rights declared in the Constitution.'" *Id.*, slip op. at 28 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)).

6. Law and Argument:

A. Fundamental Constitutional Protections Apply at Guantanamo

The U.S. Supreme Court has now clarified that fundamental constitutional protections – both individual rights and structural limits on the powers of the political branches – apply at the Guantanamo Bay Naval Station, and can be invoked by noncitizens detained there as alleged

enemy combatants. In *Boumediene v. Bush*, the Court held specifically that the Suspension Clause of the U.S. Constitution extends to Guantanamo, as "the United States has maintained complete and uninterrupted control of the bay for over 100 years." 553 U.S. ___, slip op. at 34-35, 39 (2008) ("Guantanamo...is no transient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States").

The Court emphasized that the writ of habeas corpus is not only a "vital instrument for the protection of individual liberty," it is also "an essential mechanism in the separation of powers scheme." *Id.* at 12-13. The Suspension Clause "ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty." *Id.* at 15 (citation omitted). The habeas right of recourse to an adequate judicial inquiry thus serves important separation-of-powers principles, reinforcing the essential design of our constitutional scheme. Indeed, the Court stated that the writ is "an indispensable mechanism for monitoring the separation of powers." *Id.* at 36.

The Court rejected the Government's argument, heard repeatedly in this case also, that "the Constitution [has] no effect [at Guantanamo] . . . because the United States disclaimed sovereignty in the formal sense of the term." *Id.* at 35. The Court made clear that the Government's reliance on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), for this proposition was misplaced, noting that the Government's "constricted reading of *Eisentrager* overlooks what we see as a common thread uniting the *Insular Cases*, *Eisentrager*, and *Reid*: the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 34.

Thus, in assessing whether the Constitution applies extraterritorially, the Court declined to apply a "rigid and abstract rule" such as *de jure* sovereignty, and focused instead on "whether judicial enforcement of [a constitutional] provision would be 'impracticable and anomalous.'" *Id.* at 30, quoting *Reid v. Covert*, 354 U.S. 1, 74-75 (1957) (Harlan, J., concurring). With respect to Guantanamo, the Court said "there are few practical barriers" to the enforcement of

constitutional provisions, as the United States "maintains *de facto* sovereignty over this territory" and the Naval Base "is under the complete and total control of our Government." *Id.* at 25, 41.

The Court relied on and reaffirmed its holdings in the *Insular Cases* that "[t]he Constitution of the United States is in force. . . wherever and whenever the sovereign power of that government is exerted" and that "fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property, without due process of law," applied in overseas territories under U.S. control, regardless of whether those territories were destined or intended for statehood. *Balzac*, 258 U.S. at 312-13. These principles were emphasized again in *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality op.) ("The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.") and in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) (noting that the *Insular Cases* established that "'fundamental' constitutional rights are guaranteed to inhabitants of those [unincorporated] territories" controlled by the United States); *see also id.* at 277-78 ("[T]he Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic. . . . [T]he Court has not decided[] that persons in the position of the respondent have no constitutional protection. The United States is prosecuting a foreign national in a court established under Article III, and all of the trial proceedings are governed by the Constitution. All would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant.") (Kennedy, J., concurring).¹

In short, *Boumediene* instructs that, as in the *Insular Cases* and *Reid*, "practical considerations, related not to the petitioners' citizenship but to their place of confinement and trial" are the key factors in assessing whether constitutional protections apply in criminal proceedings held at Guantanamo. *Boumediene*, 553 U.S. ___, slip op. at 30. The Court rejected

¹ Constitutional limitations on the powers of the political branches have also been recognized in military commission cases. *See, e.g., Ex parte Quirin*, 317 U.S. 1, 25 (1942) ("Congress and the president, like the courts, possess no power not derived from the Constitution").

the formalism urged by the Government in this case and embraced a "functional approach to questions of extraterritoriality." *Id.* at 34. Applying this approach led to the conclusion that there is nothing "impracticable and anomalous" about enforcing constitutional provisions at Guantanamo, where the United States exercises "plenary control." *Id.* at 30, 40 (citations omitted). Indeed, the Court cautioned that the alternative – "to hold the political branches have the power to switch the Constitution on or off at will" – "would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.'" *Id.* at 35-36. Thus, as noted above, separation of powers principles strongly reinforce the result of the functional analysis that fundamental constitutional protections apply at Guantanamo.

B. Equal Protection In Criminal Procedure Is a Fundamental Right and an Element of Due Process

The Equal Protection Clause of the Fourteenth Amendment applies to all "persons" regardless of citizenship and "directs that all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 217 (1982). "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . [Its] provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *see also Wong Wing v. United States*, 163 U.S. 228, 242-43 (1896) ("The contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the law was heard with pain on the argument at the bar – in face of the great constitutional amendment which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws.").

While the Fourteenth Amendment by its terms applies to the States, the Supreme Court has held that the Fifth Amendment's Due Process Clause (which applies to the federal government) also incorporates equal protection guarantees. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976) ("The concept of equal justice under law is served by the Fifth Amendment's

guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment.... [B]oth Amendments require the same type of analysis"); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995) ("the equal protection obligations imposed by the Fifth and Fourteenth Amendments [are] indistinguishable"); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment"); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n.2 (1975) ("This court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment").²

Under Equal Protection jurisprudence, laws that impinge on the exercise of fundamental rights are subject to strict scrutiny. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("classifications affecting fundamental rights, are given the most exacting scrutiny.") (internal citations omitted). The rights of a criminal defendant to a fair trial, which are expressly set forth in the Fifth and Sixth Amendments, have long been recognized as fundamental rights under any sense of the term. Indeed, in the *Insular Cases* relied on and cited by the Supreme Court in *Boumediene*, the due process rights of the Fifth Amendment were explicitly called out as an example of "fundamental" rights. *See, e.g., Balzac*, 258 U.S. at 312-13 (1922) ("The guaranties of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property, without due process of law, had from the beginning full application in the Philippines and Porto Rico"); *Downes v. Bidwell*, 182 U.S. 244, 282 (1901) (identifying "due process of law" and "equal protection of the laws" as "natural rights enforced in the Constitution by prohibitions against interference with them"); *see also Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 669 n.5 ("there cannot exist under the American flag any governmental authority untrammelled by the requirements of due process of law").

² While addressing separation of powers concerns in *Boumediene*, the Supreme Court again reiterated that noncitizens in American courts are entitled to the fundamental guarantees of the Fifth and Fourteenth Amendments: "Because the Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles." *Boumediene*, slip op. at 12 (citations omitted).

Moreover, the Supreme Court has held that "[p]roviding equal justice" has always been a "central aim of our entire judicial system":

Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal.... In this tradition, our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system – all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court.

Griffin v. Illinois, 351 U.S. 12, 16-17 (1956) (internal quotation marks and citation omitted); *see also id.* at 18 ("at all stages of the [criminal] proceedings the Due Process Clause and Equal Protection Clause protect persons like petitioners from invidious discrimination"); *Chambers v. Florida*, 309 U.S. 227, 238 (1940) ("This requirement – of conforming to fundamental standards of procedure in criminal trials – was made operative against the States by the Fourteenth Amendment"). Indeed, as early as the *Wong Wing* decision in 1898, the Supreme Court recognized that aliens are entitled to the same constitutional protections as citizens in criminal proceedings. In that case, the Court upheld a deportation order for four aliens, but invalidated a sixty day sentence of imprisonment and hard labor because it was imposed without the constitutional protections that citizens would have received under the Fifth and Sixth Amendments. 163 U.S. at 238.

Strict scrutiny is also appropriate in this case because the MCA's discrimination against aliens in the area of criminal proceedings employs a "suspect" classification. *See Graham v. Richardson*, 403 U.S. 365, 372 (1971) ("classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny"). While the Supreme Court has recognized that the national government may treat aliens differently in

conferring governmental benefits and in matters of immigration and naturalization,³ there is no authority or rationale whatever to discriminate in criminal proceedings based on the alien versus citizenship status of the accused. Indeed, as the Supreme Court noted in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), citizens as well as noncitizens may take up arms against the United States, and national security may be more threatened by the former than the latter.⁴ There is no national security reason to try one category of unlawful combatants in a civilian court, and the other in a military commission.

C. The MCA Violates Equal Protection By Making Only Aliens Subject to the Lesser Protections that the Statute Affords to Criminal Defendants

Strict scrutiny means that the Government has the burden of demonstrating that classifications resulting in different treatment of similarly situated criminal defendants must be "precisely tailored to serve a compelling governmental interest." *Plyler*, 457 U.S. at 217. The MCA – with its different levels of protection afforded to *alien* unlawful combatants as opposed to *citizen* unlawful combatants – cannot survive such scrutiny.

In this case, there can be no doubt about the different and inferior treatment afforded to alien defendants in front of a military commission under the MCA. Indeed, this Commission has already noted the different treatment in one crucially important area, the right against self-incrimination protected by the Fifth Amendment and the UCMJ. The Commission found that:

Congress did indeed intend that the MCA's protection against self-incrimination should apply only at the proceeding itself, and that

³ See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (while aliens are not necessarily "entitled to enjoy all the advantages of citizenship," "all persons, aliens and citizens alike, are protected by the Due Process Clause" of the Fifth Amendment). This distinction between governmental benefits and immigration issues on the one hand – where classifications based on alienage may be appropriate – and fundamental liberty interests on the other hand – where they are not – was neatly expressed in a recent case decided by the House of Lords in Great Britain, striking down a detention scheme that discriminated against noncitizens: "The Secretary of State was, of course, entitled to discriminate between British nationals on the one hand and foreign nationals on the other for all the purposes of immigration control.... What he was not entitled to do was to treat the right to liberty...of foreign nationals...as different in any respect from that enjoyed by British nationals." *A. v. Sec. of State for the Home Dept.* [2004] UKHL 56, [2005] 2 A.C. 68.

⁴ In *Hamdi*, the Court recognized that "a citizen, no less than an alien, can be...engaged in an armed conflict against the United States; such a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict." 542 U.S. at 519 (internal quotation marks and citation omitted).

there should be no remedy of suppression for pre-trial statements taken without the rights warnings that are common in American law. While the result is at odds with the balance of American jurisprudence, it clearly is what Congress enacted.

* * *

The result in this case is at odds with what would normally obtain under our law. It is true that in any other criminal trial held in American courts, an accused who was questioned before trial, without warning regarding his right to remain silent, could not later be prejudiced by the admission of those statements against him. Congress has expressly created military commissions that apply only to unlawful combatants, and denied to those unlawful combatants this level of protection.

D-030 Ruling on Motion to Suppress (6 June 2008) at 3. Of course, to be precise, what Congress did in the MCA is to deny that "level of protection" to *alien* unlawful combatants (the only persons subject to commission jurisdiction). By contrast, an unlawful combatant who happens to be a U.S. citizen would be tried in a civilian court, where the "level of protection" would be markedly greater, *i.e.*, the "remedy of suppression for pre-trial statements taken without the rights warnings" would be applied. *See, e.g., U.S. v. Lindh*, 212 F. Supp.2d 541 (E.D. Va. 2002) (citizen unlawful combatant captured in conflict in Afghanistan tried in federal district court).

The MCA provides disparate and inferior treatment in other areas of criminal procedure as well. For example, the MCA shifts the burden with respect to the use of hearsay evidence, placing on the party opposing admission of the evidence the burden of showing its unreliability. *See* 10 U.S.C. § 949a. This dramatically alters the rules of evidence normally applied in American courts, and gravely undermines the confrontation rights of a criminal defendant protected by the Sixth Amendment. *See Crawford v. Washington*, 541 U.S. 36, 49 (2004) ("it is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine") (quoting *State v. Webb*, 2 N.C. 103 (1794)).

Likewise, the MCA permits the use of evidence obtained through coercion, if deemed reliable and in the interests of justice. *See* 10 U.S.C. § 948r. This standard would not prevail in any other American court, where evidence that is the product of coercion is clearly inadmissible. *See, e.g., Chambers*, 309 U.S. at 238-41 (reversing a conviction and excluding evidence obtained

by interrogations over the course of five days "under circumstances calculated to break the strongest nerves and the stoutest resistance.")⁵

In addition, the MCA purports to strip from defendants in military commissions the ability to assert defenses or invoke rights based on the Geneva Conventions. *See* 10 U.S.C. § 948b(g). Similarly situated defendants in criminal proceedings in other American courts are not similarly deprived of potential defenses or substantive rights based on that body of international and domestic law. Accordingly, there can be no doubt that the MCA imposes serious burdens and disabilities on aliens that are not imposed on U.S. citizens.

If "the equal protection of the laws is a pledge of the protection of equal laws," then clearly the MCA fails to even come close to that standard. *Yick Wo*, 118 U.S. at 369. Far less intrusive impositions on rights in criminal proceedings have been subject to strict scrutiny under equal protection, and have failed to survive that analysis. For example, in *Douglas v. California*, 372 U.S. 353, 358 (1963), the Court struck down on equal protection grounds a California law that allowed the court to refuse to provide appellate counsel to indigent defendants wishing to pursue appeals. Similarly, in *Griffin*, 351 U.S. at 15-16, the Court invalidated a regulation that denied indigent defendants access to court transcripts necessary for appellate review. In *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), the Court held that Due Process and Equal Protection were violated by a statute requiring payment of a record preparation fee for the appeal of a custody termination decision. This came in the context of a proceeding that was not even criminal in nature, and while it did involve weighty interests and a unique kind of deprivation, it did not involve the potential loss of personal liberty.

Thus, Equal Protection jurisprudence reveals that in the area of judicial process, American courts are determined to place all comers "on an equality before the bar of justice in every American court." *Griffin*, 351 U.S. at 17. In this case, even if one readily acknowledges

⁵ *Chambers v. Florida*, 309 U.S. 227 (1940), deserves careful consideration by this Commission, as the regime of coercion described in that case – lasting five days – is no more harrowing than the regime endured by the Accused in this case, and significantly shorter in duration. Credible threats of death were present in both cases.

that the Government has a compelling interest in protecting the nation against terrorist attacks, the use of military commissions for alien, as opposed to citizen, enemies in the so-called "war on terror," is not narrowly tailored to promote national security. Indeed, it makes no sense whatever, except to allow for political posturing or to satisfy an unseemly desire for revenge at the expense of disfavored and disenfranchised groups. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (holding that certain classifications, including those based on alienage, are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy"). Such legislation aimed at the powerless attracts strict scrutiny "because such discrimination is unlikely to be soon rectified by legislative means." *Id.*

The fact that the MCA involves an effort to bring to justice those who launched a horrific terrorist attack on our country is no reason to abandon the great legal tradition that makes this country worth defending. Indeed, trial by a military commission at a location distant from the battlefield, in a conflict of such indefinite and ambiguous a nature as the "war on terror," represents a departure from our traditions and calls for particular caution. The Supreme Court, in reviewing the jurisdiction of a military commission in a more "traditional" war, has specifically noted the limitations imposed by the Constitution on the conduct of such tribunals. *Ex parte Quirin*, 317 U.S. 1, 29 (1942) ("We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial.") In this case, the conditions required by *Quirin* for the exercise of jurisdiction are not satisfied, as the acts charged are not offenses under the law of war and the trial of only aliens, not citizens, in the manner prescribed by the MCA violates the Equal Protection guarantee of the Due Process Clause.

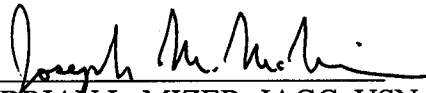
For these reasons, this Commission should reconsider its 19 December 2007 Ruling and dismiss the charges against Mr. Hamdan for lack of jurisdiction.

7. **Request for Oral Argument:** The Defense requests oral argument.

8. **Request for Witnesses:** The Defense does not anticipate the need to call witnesses, but reserves the right to do so should the Government Response raise issues requiring rebuttal by live testimony.

9. **Conference with Opposing Counsel:** The Defense has conferred with the Prosecution, who oppose the relief requested by this motion.

Respectfully submitted,

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UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

D-043

GOVERNMENT'S RESPONSE

To the Defense Motion to
Reconsider Ruling on Personal Jurisdiction
(Equal Protection)

10 July 2008

1. Timeliness: This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge's scheduling order of 7 July 2008.

2. Relief Requested: The Government respectfully submits that the Defense motion to dismiss all charges for lack of jurisdiction should be denied. In reaching that conclusion, the Government respectfully requests that the Military Judge rule *both* that the equal protection component of the Due Process Clause does not apply to the accused, *and* that, even if it does, the jurisdictional provision of the Military Commissions Act fully complies with such constitutional protections.

3. Overview:

a. As this Commission correctly held, the Supreme Court's holding in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), was "limited and narrow, and clearly based upon the most unusual circumstances that led to it." *United States v. Hamdan*, D-042 Ruling on Motion for Additional Continuance, at 1 (26 June 2008). This Commission further held that "[i]t is not clear, and the Court did not hold, that any other provision of the constitution will protect the detainees at Guantanamo Bay." *Id.* This Commission is correct that the Court's holding in *Boumediene* did not reach the equal protection claims that the accused would derive from it.

b. Moreover, even if the equal protection component of the Due Process Clause of the Fifth Amendment¹ does apply to the accused in this case, application of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) ("MCA"), only to

¹ Although the Fifth Amendment does not have an equal protection clause, the Supreme Court has held that its Due Process Clause contains an equal protection component. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding that "racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution"). Contrary to the accused's Motion to Dismiss, however, it is inaccurate to state that the Military Commissions Act could possibly "violate[] the Equal Protection Clause of the Fourteenth Amendment, applicable to the U.S. Government and these proceedings by virtue of the Fifth Amendment's Due Process Clause." Def. Mot. at 1. No case stands for the proposition that any "reverse-incorporation" principle extends the Fourteenth Amendment to the federal Government, particularly in light of the fact that section 1 of the Fourteenth Amendment applies only to "State[s]."

alien unlawful enemy combatants is a rational distinction when the United States is at war with foreign enemies. The United States has historically and appropriately drawn distinctions in our armed conflicts between citizens who assist our enemies and aliens who are not members of our political community and who owe no allegiance to the United States. In both World War I and World War II, the United States prosecuted alien enemies by military commissions under circumstances in which citizens assisting those enemies were prosecuted in the civilian courts. In a time of war, the federal Government must use force to prevent the enemy, whether a foreign state or a terrorist organization, from harming American lives and property. In doing so, it is rational for the Government to make distinctions between citizens and enemies in the use of force, as well as in detentions and punishment.

c. Finally, in enacting the MCA and amending Article 21 of the Uniform Code of Military Justice, Congress and the President—the political branches of the federal Government charged with defining our Nation’s international obligations—determined that the MCA itself satisfied the international obligations of the United States and therefore the accused could not directly invoke the Geneva Conventions before the commission. Congress and the President are entitled to define the extent of that treaty’s scope, and whether and to what extent it should have domestic force. In addition, even if international law required some system of military commissions different from that authorized by the MCA, the accused has not cited a single case standing for the proposition that an Act of Congress would yield to international law. Because Congress has unambiguously legislated on the subject at hand, any analysis of international law here is irrelevant. The motion to dismiss all charges for lack of jurisdiction should be denied.

4. Burden of Persuasion: The Prosecution bears the burden of demonstrating the factual basis for jurisdiction by a preponderance of the evidence. *See* Rule for Military Commissions (“RMC”) 905(c)(2)(B).

5. Facts:

a. Following a robust evidentiary hearing, this Commission on 19 December 2007 found the accused to be an alien unlawful enemy combatant, subject to the jurisdiction of this military commission under section 948c of the MCA. *See United States v. Hamdan*, On Reconsideration Ruling on Motion to Dismiss for Lack of Jurisdiction, at 8 (19 Dec. 2007) (“19 Dec. 2007 Reconsideration Ruling”); *see also* 10 U.S.C. § 948c (“Any alien unlawful enemy combatant is subject to trial by military commission under this chapter.”).

b. In its 19 December 2007 Reconsideration Ruling, the Commission also rejected the accused’s argument that the MCA’s jurisdictional provision violates the equal protection component of the Due Process Clause, holding instead that the Constitution does not protect alien detainees at Guantanamo, and relying on the D.C. Circuit’s decision in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007). *See* 19 Dec. 2007 Reconsideration Ruling at 10.

c. On 12 June 2008, the Supreme Court narrowly reversed the Court of Appeals' decision in *Boumediene*, and held that the *Boumediene*-petitioners—some of whom had been held for over six years without ever having been charged—had rights under the Suspension Clause. *See* 128 S. Ct. at 2277. The Court did not, however, consider whether the Constitution applied to other petitioners—such as those situated like Mr. Hamdan, who have been charged under the Military Commissions Act—nor did the Court consider whether other constitutional rights, beyond the Suspension Clause, applied to the *Boumediene*-petitioners (let alone to individuals such as Mr. Hamdan). *See id.* (“It bears repeating that our opinion does not address the content of the law that governs petitioners’ detention. That is a matter yet to be determined.”).

6. Discussion:

a. An alien enemy combatant, such as the accused, who has been charged under the MCA, has no rights under the equal protection component of the Due Process Clause.

i. In *Boumediene*, the Supreme Court addressed a narrow question—whether the Suspension Clause of the Constitution, art. I, § 9, cl. 2, applies to alien enemy combatants detained at Guantanamo Bay, who are being held based solely upon the determination of a Combatant Status Review Tribunal. The Court concluded that uncharged enemy combatants at Guantanamo Bay must, after some period of time, be afforded the right to challenge their detention through habeas corpus. In reaching that conclusion, the Court considered both the historical reaches of the writ of habeas corpus, *see id.* at 2244-51, and the “adequacy of the process” that the petitioners had received. The Court signaled no intention of extending the individual rights protections of the Constitution to alien enemy combatants tried by military commission.

ii. To the contrary, the Court emphasized that “[i]t bears repeating that our opinion does not address the content of the law that governs petitioners’ detention.” *Boumediene*, 128 S. Ct. at 2240; *see also id.* at 2277. The Court observed that the petitioners in that case had been held for over six years without ever receiving a hearing before a judge, *see id.* at 2275, and the Court specifically contrasted the circumstances of the petitioners with the enemy combatants in *Quirin* and *Yamashita* who had received a trial before a military commission (under procedures far more circumscribed than those applicable here). The Court noted that it would be entirely appropriate for “habeas corpus review . . . to be more circumscribed”—if the court were in the posture of reviewing, not the detention of uncharged enemy combatants, but those who had held a hearing before a judgment of a military commission “involving enemy aliens tried for war crimes.” *See id.* at 2270-71.

iii. *Boumediene* thus was a decision concerning the separation of powers under the Constitution and the role that the courts may play, under the unique circumstances of the detention at Guantanamo Bay, in ensuring judicial review of the detentions of individuals who had not received any adversarial hearing before a court or military commission. *See Boumediene*, 128 S. Ct. at 2259 (“[T]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers.”). In

considering whether the Suspension Clause would apply, *Boumediene* articulated a multi-factored test of which the first factor required consideration of “the detainees’ citizenship and status and the adequacy of the process through which status was determined.” *See id.* at 2237. In this case, there is no dispute that Hamdan is an alien, and he is being tried before a military commission established by an Act of Congress and with the panoply of rights secured by the MCA. The Commission has already determined Hamdan’s status, after a full and fair adversarial hearing before the military judge. Thus, under the test set forth in *Boumediene*, the accused could not claim any rights under the Suspension Clause. It goes without saying that he may not lay claim to any of the other individual rights secured by the Constitution.

iv. Indeed, even if the Defense could claim an entitlement under *Boumediene* to rights under the Suspension Clause, the Supreme Court’s decision did not, in any way, upset the well-established holding, recognized previously by the Commission, that the Fifth Amendment and other individual rights secured by the Constitution do not apply to alien enemy combatants lacking any voluntary connection to the United States. The Supreme Court has recognized that the writ of habeas corpus historically has had an “extraordinary territorial ambit.” *See Rasul v. Bush*, 542 U.S. 466, 482 n.12 (2004). By contrast, the Court has made clear—in precedents that *Boumediene* did not question—that the individual rights provisions of the Constitution run only to aliens with a substantial connection to our country and not to alien enemy combatants detained abroad. *See United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *see also Johnson v. Eisentrager*, 339 U.S. 763 (1950) (finding “no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses”).

v. The Defense, on this motion, claims a constitutional entitlement to the protection of the equal protection component of the Fifth Amendment that would preclude Congress from distinguishing between an alien and a citizen of this country. In *Verdugo-Urquidez*, 494 U.S. 259, however, the Supreme Court rejected a claim that was substantively identical to that of the Defense here, asserting that “treat[ing] aliens differently from citizens with respect to the Fourth Amendment somehow violates the equal protection component of the Fifth Amendment,” because “the result of accepting [this] claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries.” *Verdugo-Urquidez*, 494 U.S. at 273.

vi. Indeed, even when an alien is found within United States territory (as was the nonresident alien in *Verdugo-Urquidez*) the degree to which constitutional protections apply depends on whether the alien has developed substantial *voluntary* contacts with the United States. *Id.* at 271. The accused’s contacts with the United States, which consist solely of unlawfully waging war against the nation and being detained in a U.S. military base, “is not the sort to indicate any substantial connection with our country.” *Id.*; *see Eisentrager*, 339 U.S. at 783 (finding “no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses”). As the *Eisentrager* Court explained, “[i]f [the Fifth] Amendment invests enemy aliens in unlawful hostile action against us with immunity from military trial, it puts them in a more protected position than our own

soldiers” because “American citizens conscripted into the military service are thereby stripped of their Fifth Amendment rights and as members of the military establishment are subject to its discipline, including military trials for offenses against aliens or Americans.” 339 U.S. at 783.

vii. *Boumediene*’s holding was premised on the unique role of habeas corpus in policing the separation of powers in our constitutional system, *see Boumediene*, 128 S. Ct. at 2259, and on a factual difference between *Eisentrager*’s petitioners and those in *Boumediene*: the former did not contest their *status* as enemy combatants; the latter did so contest their status and thus required a remedy in habeas. *See id.* Nothing in *Boumediene*, however, casts doubt on *Eisentrager*’s well-established (and subsequently applied) denial that the Constitution applies *in toto* to nonresident aliens. *Boumediene* certainly does not extend the Constitution’s individual-rights protections, contrary to *Eisentrager*, *Verdugo-Urquidez* and other cases, to alien unlawful enemy combatants before congressionally-constituted military commissions. To paraphrase the *Boumediene* Court itself, “if the [petitioner’s] reading of [*Boumediene*] were correct, the opinion would have marked not only a change in, but a complete repudiation of” long-standing precedent. *Id.* at 2258. Accordingly, the equal protection component of the Due Process Clause remains inapplicable to the accused.

viii. The Commission previously recognized, relying on the D.C. Circuit’s decision in *Boumediene*, that under these established Supreme Court precedents, the Defense’s motion should be denied. *See United States v. Hamdan*, On Reconsideration Ruling on Motion to Dismiss for Lack of Jurisdiction, at 9-10 (19 Dec. 2007). Because the Supreme Court did not disturb those holdings in *Boumediene*, they remain binding precedent before this Commission. As the Court explained in *Agostini v. Felton*, 521 U.S. 203 (1997), “if a precedent of this Court has direct application in a case, yet appears to rest on reason rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” *Id.* at 237-38 (quotation omitted); *see also Public Citizen v. U.S. Dist. Court for Dist. of Columbia*, 486 F.3d 1342 (D.C. Cir. 2007) (“The Supreme Court has repeatedly cautioned that we ‘should [not] conclude [that its] more recent cases have, by implication, overruled an earlier precedent.’”) (quoting *Agostini*, 521 U.S. at 237) (alteration in original). Thus, the recognition that *Boumediene* did not overrule those cases is sufficient in and of itself to deny the Defense’s motion.

ix. Contrary to *Agostini*, however, the Defense would read *Boumediene* as, *sub silentio*, overruling the Court’s existing precedents and providing a multi-factored test for the analysis of other constitutional rights. It is clear, however, that the test enunciated by the Court to determine whether the Suspension Clause applied to the *Boumediene*-petitioners was specifically geared to measuring whether the Suspension Clause—and not any other constitutional provision—applies to those petitioners. *See id.* at 2237. That three-part test was clearly intended by the Court only to resolve the “limited and narrow,” *Hamdan*, D-042 Ruling on Motion for Additional Continuance, at 1, issue before it, and is therefore inapposite to the question of whether other portions of the Constitution apply to alien detainees at Guantanamo.

x. Even so, under that functional analysis endorsed in *Boumediene* for purposes of the Suspension Clause, it is clear that enemy aliens abroad do not come within the protection of the Equal Protection Clause (or the equal protection component of the Due Process Clause). The Government has broad latitude when it operates in the international sphere, where the need to protect the national security and conduct our foreign relations is paramount. *See Haig v. Agee*, 453 U.S. 280, 292, 307-308 (1981); *see also Palestine Information Office v. Schultz*, 853 F.2d 932, 937 (D.C. Cir. 1988) (holding that, in applying constitutional scrutiny to challenged Executive action within the United States, court must give particular deference to political branches' evaluation of our interests in the realm of foreign relations and selection of means to further those interests). In the international arena, distinctions based on alienage are commonplace in the conduct of foreign affairs. *See, e.g., DKT Memorial Fund, Inc. v. Agency for International Development*, 887 F.2d 275, 290-291 (D.C. Cir. 1989) (recognizing that the government speaks in the international sphere "not only with its words and its funds, but also with its associations"). Drawing a distinction between aliens abroad, on the one hand, and those who make up part of our political community, on the other hand, is a basic feature of sovereignty. *See Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982); *Foley v. Connelie*, 435 U.S. 291, 295-296 (1978); *cf. Mathews v. Diaz*, 426 U.S. 67, 80, 85 (1976) (recognizing that it is "a routine and normally legitimate part" of the business of the Federal Government to classify on the basis of alien status and to "take into account the character of the relationship between the alien and this country"). In this context, application of equal protection principles to limit the political branches' treatment of aliens abroad would improperly interfere with those branches' implementation of our foreign policy and their ability to successfully prosecute a foreign war.

b. Even if the accused were to possess constitutional rights under the equal protection component of the Due Process Clause, the Military Commissions Act's application only to alien unlawful enemy combatants is a rational distinction when the United States is at war with foreign enemies.

i. The Military Commissions Act provides that military commissions authorized thereby may try only "alien unlawful enemy combatants." 10 U.S.C. § 948d(a).² The MCA's distinction between citizens and aliens, and its extension of jurisdiction only to the latter, is a rational distinction in light of the Government's legitimate obligation to punish those who are at war with the United States or its allies.

ii. The Supreme Court has made clear that *federal* policies regarding aliens are subject to great deference. *See, e.g., Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8 (1977) ("Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States."); *Mathews v. Diaz*, 426 U.S. 67, 80 (1976) ("The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is 'invidious.'"); *id.* at 86-87

² The MCA defines an "alien" as "a person who is not a citizen of the United States." 10 U.S.C. § 948a(3).

“Contrary to appellees’ characterization, it is not ‘political hypocrisy’ to recognize that the Fourteenth Amendment’s limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization.”); *Graham v. Richardson*, 403 U.S. 365, 376-77 (1971) (“An additional reason why the state statutes at issue in these cases do not withstand constitutional scrutiny emerges from the area of federal-state relations. The National Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.”) (internal quotation marks omitted). As the Supreme Court has repeatedly observed:

[T]he responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. . . . “[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.”

Diaz, 426 U.S. at 81 & n.17 (third alteration in original) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589 (1952)); see also *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).³

iii. The Defense contends that distinctions between aliens and citizens under federal law should be subject to heightened scrutiny, citing *Graham v. Richardson*, 403 U.S. 365 (1971). *Graham*, however, stands for the unremarkable proposition that discrimination in administering state welfare programs based on the classification of *resident* aliens, voluntarily residing in the United States (legally or otherwise), will be strictly scrutinized. See also *Pylar v. Doe*, 457 U.S. 202 (1982) (same); *Yick Wo v.*

³ The accused cites *Wong Wing v. United States*, 163 U.S. 228 (1896), for the proposition that “aliens are entitled to the same constitutional protections as citizens in criminal proceedings.” Def. Mot. at 8. As an initial matter, it should be noted that—contrary to the accused’s contention that the MCA’s jurisdictional provision is subject to strict scrutiny—the Fifth Circuit in the recent case of *Rodriguez-Silva v. INS*, 242 F.3d 243 (5th Cir. 2001), employed only rational basis review in considering the level of scrutiny applicable to an equal protection challenge by an alien against the federal Government. See *Rodriguez-Silva*, 242 F.3d at 247 (“[E]ven though equal protection principles require the same type of analysis under the Fifth and Fourteenth Amendments, the scope of the two protections is not necessarily identical.”) (citation omitted). In any event, while it may ordinarily be the case that “an alien may not be punished criminally without the same process of law that would be due a citizen of the United States,” *id.* (citing *Wong Wing*), that view is inapposite with respect to punishing violations of the law of war and related offenses, just as it is inappropriate to require that citizens and aliens be treated identically under our immigration laws. Acts of war, unlike acts that are merely criminal, by definition have a foreign source, and it is both appropriate and necessary for the Government to make distinctions between aliens and citizens by the very act of defending our Nation from its enemies and punishing violations of the law of war and related offenses. As such, distinctions between citizens and aliens that might be inappropriate with respect to ordinary criminal matters are rational and appropriate in the context of punishing and deterring war crimes.

Hopkins, 118 U.S. 356 (1886) (same). Nothing in these or any other cases cited by the accused suggests that the Supreme Court meant to provide heightened scrutiny for the claims against the federal Government of nonresident alien enemy combatants captured on a foreign battlefield and held outside the sovereign borders of the United States. The Supreme Court has itself rejected the extension of these precedents to the claim advanced by this petitioner. *See Verdugo-Urquidez*, 494 U.S. at 271 (“These cases, however, establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.”); *see also In re Griffiths*, 413 U.S. 717, 722 n.11 (1973) (“We did not decide in *Graham* nor do we decide here whether special circumstances, such as armed hostilities between the United States and the country of which an alien is a citizen, would justify the use of a classification based on alienage.”). As *Verdugo-Urquidez* makes clear, nonresident aliens lacking substantial connection to the United States are *not* similarly situated to United States citizens, and the United States may properly distinguish them from citizens. Legislation may permissibly take into account such distinctions without meriting heightened scrutiny.⁴

iv. The basis for the Supreme Court’s deference to the federal political branches in this area—that “the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government,” *Diaz*, 426 U.S. at 81 & n.17—is magnified in the present case, which involves the regulation of aliens held as enemy combatants, thus implicating grave war powers, national security and foreign policy concerns. *See also Harisiades*, 342 U.S. at 586, 587 (“Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen. . . . So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure.”) (footnotes omitted). As the Court in *Eisenstrager* recognized,

even by the most magnanimous view, 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, nor between resident enemy aliens who have submitted themselves to our laws and nonresident enemy aliens who at all times have remained with, and adhered to, enemy governments.

⁴ The MCA’s jurisdiction does extend to both resident and nonresident aliens, but the accused, as a nonresident alien, has no standing to allege an equal protection violation on behalf of resident aliens. *See, e.g., Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004); *County Court of Ulster County v. Allen*, 442 U.S. 140, 154-55 (1979); *see also United States v. Salerno*, 481 U.S. 739, 745 (1987). Even if the accused’s equal protection challenge were considered on behalf of the broader class of resident aliens, it would still be subject only to rational basis review. *See, e.g., Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). Under that deferential standard, the jurisdictional provision of the MCA must be upheld as long as a court can identify a rational basis for it in service of a legitimate government objective. *See, e.g., Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83-84 (2000).

339 U.S. at 769 (footnote omitted); *see also id.* (“Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen’s claims upon his government for protection.”).

v. Distinctions between citizens and aliens drawn by Congress and the President are wholly appropriate when the United States is at war with foreign foes. In a time of war, the federal Government must use force to prevent the enemy, whether a foreign state or a terrorist organization, from harming American lives and property. To do so, the Government may properly draw distinctions between citizens and enemies in using force, as well as in detentions and punishment. Acts of war, unlike acts that are merely criminal, generally have a foreign source, and it is both appropriate and necessary for the Government to make distinctions between aliens and citizens by the very act of defending our Nation from its enemies.

vi. The United States can draw, and historically has drawn, distinctions between alien enemies and citizens who join and assist our enemies. As members of our political community, citizens who assist foreign powers are not identically situated to aliens lacking any duty of allegiance to the United States. The Constitution itself draws this distinction by defining the offense of treason, which as recognized under federal law, creates an offense with a penalty up to and including death, for citizens and others with a duty of allegiance to the United States, who levy war or provide aid and comfort to the enemy. *See* U.S. Const. art. III, sec. 3; *see also* 18 U.S.C. § 2381. In both the current and in our past armed conflicts, the United States has distinguished between citizen and enemy combatants, including in the use of federal courts or military commission trials. Justice Scalia described these historical distinctions in the course of dissenting in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004):

In more recent times, too, citizens have been charged and tried in Article III courts for acts of war against the United States, even when noncitizen co-conspirators were not. For example, two American citizens alleged to have participated during World War I in a spying conspiracy on behalf of Germany were tried in federal court. *See United States v. Fricke*, 259 F. 673 (S.D.N.Y. 1919); *United States v. Robinson*, 259 F. 685 (S.D.N.Y. 1919). ***A German member of the same conspiracy was subjected to military process. See United States ex rel. Wessels v. McDonald*, 265 F. 754 (E.D.N.Y. 1920). *During World War II, the famous German saboteurs of Ex parte Quirin*, 317 U.S. 1 (1942), *received military process, but the citizens who associated with them (with the exception of one citizen-saboteur . . .) were punished under the criminal process. See Haupt v. United States*, 330 U.S. 631 (1947); L. Fisher, *Nazi Saboteurs on Trial* 80-84 (2003); *see also Cramer v. United States*, 325 U.S. 1 (1945).**

Hamdi, 542 U.S. at 560 (emphasis added). Although a majority of the Court in *Hamdi* held that citizen enemy combatants could be subject to military detention (just as the Court in *Quirin* had held that a citizen could be subject to prosecution by military

commission, *see Quirin*, 317 U.S. at 37-38), no member of the Court disputed that citizens historically had been treated differently from alien enemy combatants or that such historical treatment was fully consistent with the equal protection principles of the Constitution. To the contrary, even with respect to the present armed conflict, the United States has drawn such distinctions since shortly after September 11, 2001, distinguishing between the alien enemy combatants detained at Guantanamo Bay from citizen enemy combatants, such as Yaser Hamdi, Jose Padilla, and John Walker Lindh, who were subject to military detention in the United States followed, in the latter two cases, by prosecution before Article III courts. Congress can, and did, appropriately draw similar established distinctions by providing that military commissions under the MCA shall be used for alien unlawful enemy combatants.

vii. These established distinctions are justified not only by history, but also by the practicalities of wartime circumstances. Were the armed conflict with al Qaeda and the Taliban not primarily foreign in nature, the threat it poses to public safety would be either a criminal problem or an insurrection. But the threat is ultimately a foreign threat, and distinctions between citizen and alien are no less inevitable in war than in immigration law. The equal protection component of the Due Process Clause requires only that Congress have a rational basis before drawing a distinction between citizen and alien in the MCA, and the distinction drawn by the MCA is indeed rational. Nothing in the Constitution requires that aliens and citizens be held to the same standard with respect to acts of war against the United States, *see Harisiades*, 342 U.S. at 586, 587 (“Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen. . . . So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure.”) (footnotes omitted), and the Constitution permits Congress to approach the trial of enemy combatants in a piecemeal fashion—by legislating only with respect to *alien* unlawful enemy combatants in the MCA and reserving any legislation with respect to citizen enemy combatants for a later day. *See Lee Optical*, 348 U.S. at 489 (“The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.”) (citation omitted).

viii. Congress enacted the MCA in the wake of the most serious aggression ever against the United States on its soil by aliens affiliated with a foreign-based terrorist organization. In balancing the national security interests of the United States against the interests of these alien enemy combatants, Congress thought it appropriate to use military commissions—which, as discussed, have traditionally been employed to try alien enemies—to bring those combatants to justice in appropriate cases. As the Supreme Court explained in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), such commissions have historically been “convened as an ‘incident to the conduct of war’ when there is a need ‘to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.’” *Id.* at 2776 (plurality op.) (quoting *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942)).

ix. The MCA authorizes rules of procedure and evidence that are adapted to the practicalities of trying combatants captured on a battlefield half a world away. By enacting the MCA, Congress drew a reasonable distinction between, on the one hand, civilian courts (which will often involve purely domestic crimes) and courts-martial (which will often involve witnesses within the control of the United States), and, on the other hand, military commissions, where rigid “chain of custody” rules for evidence would be unworkable. Similarly, the MCA’s rules on classified evidence, *see, e.g.*, 10 U.S.C. § 949d(f), reflect Congress’s legitimate concern that military commissions will frequently involve classified sources and methods, and Congress’s commitment that, in a time of war, our Nation’s intelligence sources and methods must be protected. The MCA is a reasonable accommodation and balancing of these important interests, and accordingly complies with the equal protection component of the Due Process Clause.⁵

x. In addition, notwithstanding the accused’s claim that he is somehow being targeted for inferior treatment before the law, the procedures under which he will be tried are robust, fair, and indeed, unprecedented in our Nation’s history. As noted above, the Supreme Court in *Boumediene* noted that the procedures that the alien enemy combatants in *Quirin* and *Yamashita* appropriately merited deference from the federal courts. *See Boumediene*, 128 S. Ct. at 2270-71. As the Commission is aware, however, the procedures under the MCA go well beyond those upheld in the World War II tribunals. The accused is entitled to the assistance of defense counsel, *see* RMC 502(d)(6), 506; a right to reasonable discovery, including a right to exculpatory evidence or an adequate substitute if such evidence is classified, *see* RMC 701; the right to take depositions, *see* RMC 702; the right to call witnesses, *see* RMC 703; and many other rights that are carefully described in the Rules for Military Commissions and the MCA, including, for example, the presumption of innocence until proven guilty beyond a reasonable doubt, *see* 10 U.S.C. § 949l(c)(1). In addition, the accused will have his case heard before an impartial judge, *see* RMC 902, and will have the right to challenge the impartiality of the members who will decide his guilt, *see* RMC 902. Should the accused be convicted, the convening authority will be authorized to set aside a finding of guilty or to reduce the severity of the offense or punishment; the convening authority may *never* increase the severity of the offense or punishment. *See* RMC 1107. If the accused is convicted, he has the right to have his case reviewed by the Court of Military Commission Review. *See* RMC 1201. Beyond that, the Rules for Military Commissions provide that the accused may petition for his case to be reviewed by the U.S. Court of Appeals for the D.C. Circuit, and even by the U.S. Supreme Court. *See* RMC 1205.

⁵ We note that Military Judge Brownback in the military commission of *United States v. Khadr* rejected the same arguments advanced by Hamdan, and held—without relying on *Boumediene*—that Khadr was not entitled to the benefit of the equal protection component of the Due Process Clause, and “that even if such detainee were entitled to assert the Equal Protection Clause, Congress was authorized under the ‘define and punish’ Clause to establish the M.C.A., despite the Equal Protection Clause.” *United States v. Khadr*, D-014 Ruling on Defense Motion to Dismiss for Lack of Jurisdiction (Equal Protection), at 2 (15 Mar. 2008).

c. Not only does the MCA not violate international law, the Supreme Court has never held that international law may invalidate an Act of Congress, such as the MCA.

i. The accused argues that Congress has violated the equal protection component of the Due Process Clause by denying alien enemy combatants being tried under the MCA the opportunity to invoke the Geneva Conventions. *See* Def. Mot. at 11; *see also* 10 U.S.C. § 948b(g) (“No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.”). As an initial matter, the point is moot, because the MCA fully complies with Common Article 3 of the Geneva Conventions and Congress has so declared. *See id.* § 948b(f) (“A military commission established under this chapter is a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions.”). In any event, the accused cannot claim a constitutional claim out of his appeal to international law, because for purposes of domestic law, the MCA would control over any countervailing international obligation and indeed, the Geneva Conventions themselves are not self-executing, and thus do not have the force of law in U.S. courts, absent implementing legislation.

ii. In *Hamdan v. Rumsfeld*, the Supreme Court held that the military commission authorized by the President to try the accused was *ultra vires* because it conflicted with the Uniform Code of Military Justice (“UCMJ”) and violated Common Article 3. *See Hamdan*, 126 S. Ct. at 2786-97. The Court held that Common Article 3 could be invoked as a source of rights because a statutory basis for the military commissions that the President had authorized was Article 21 of the Uniform Code of Military Justice (“UCMJ”), which provides that military commissions may try “offenses that . . . by the law of war may be tried by military commissions.”⁶ The *Hamdan* Court reasoned that the reference to the “law of war” in Article 21 incorporated principles of international law, including the Geneva Conventions and Common Article 3. *See* 126 S. Ct. at 2794.

iii. Congress responded sharply to *Hamdan*’s holding that Common Article 3 applied to the accused’s military commission by virtue of Article 21 of the UCMJ by amending Article 21 to provide that it would henceforth be *inapplicable* to military commissions authorized under the MCA: “[Articles 21, 28, 48, 50(a), 104, and 106 of the UCMJ] are amended by adding at the end the following new sentence: ‘This section

⁶ At the time of the Court’s decision in *Hamdan*, Article 21 read, in its entirety, as follows:

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

does not apply to a military commission established under chapter 47A of this title.” MCA § 4(a)(2). Thus, the mechanism by which the Court in *Hamdan* applied Common Article 3 to military commissions (i.e., via Article 21’s use of the term “law of war”) was deliberately and surgically removed by Congress. In amending Article 21 to make it inapplicable to military commissions, Congress and the President made clear that they did not regard the Geneva Conventions as self-executing. Had they believed the Conventions to be self-executing, the amendment to Article 21—which was a clear response to the *Hamdan* decision—would have been pointless.

iv. In addition, as early as *Eisentrager*, the Supreme Court commented that the Geneva Conventions are not self-executing and judicially enforceable. In explaining the available remedies for purported Geneva Conventions violations (which formed the basis for the underlying *habeas* petition in *Eisentrager*) the Supreme Court noted that

[w]e are not holding that these prisoners have no rights which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, 47 Stat. 2021, concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captive. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. *Rights of alien enemies are vindicated under it only through protest and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated by Presidential interventions.*

Eisentrager, 339 U.S. at 789, n. 14 (emphasis added). In other words, purported violations of the Geneva Conventions are not to be corrected by the judicial branch, but rather by the political branches of our Government.

v. Similarly, the Supreme Court in *Hamdan* assumed, for purposes of its decision, the correctness of the *Eisentrager* footnote:

[w]e may assume that “the obvious scheme” of the 1949 Convention is identical in all relevant respects to that of the 1929 Geneva Convention, and even that that scheme would, absent some other provision of law, preclude Hamdan’s invocation of the Convention’s provisions as independent source of law binding the Government’s actions and furnishing petitioner with any enforceable right.

126 S. Ct. at 2794. Accordingly, under *Agostini*, the *Eisentrager* footnote is still binding authority. See *supra* at 5.

vi. Likewise, the Supreme Court in the recent *Medellin* case noted that if treaties are judicially enforceable and interpreted by the judicial branch, “senators could never be quite sure what the treaties on which they were voting meant. Only a judge could say for sure and only at some future date. This uncertainty could hobble the United

States' effort to negotiate and sign international agreements.” *Medellin v. Texas*, 128 S. Ct. 1346, 1362-1363 (2008). Based on this, the *Medellin* Court concluded that:

Even when treaties are self-executing in the sense that they create federal law, the background presumption is that international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts. Accordingly, a number of the Courts of Appeals have presumed that treaties do not create privately enforceable rights in the absence of express language to the contrary.

Id. at 1357 n.3 (citation, alteration and internal quotation marks omitted).

vii. In enacting the MCA and amending Article 21 of the UCMJ, Congress and the President—the political branches of the federal Government charged with defining our Nation’s international obligations—determined that the MCA itself satisfied the international obligations of the United States and therefore provided that the accused could not directly invoke the Geneva Conventions before the military commissions. Congress and the President are entitled to define the extent of that treaty’s scope, and whether and to what extent it should have domestic force. *Cf. Medellin*, 128 S. Ct. 1346.

viii. Moreover, even if international law called for some system of military commissions different from that authorized by the MCA, there is absolutely no doubt that international law would yield to an Act of Congress. *See, e.g., TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 302 (D.C. Cir. 2005) (“Never does customary international law prevail over a contrary federal statute.”); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005) (“[C]lear congressional action trumps customary international law and previously enacted treaties.”); *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988) (“Statutes inconsistent with principles of customary international law may well lead to international law violations. But within the domestic legal realm, that inconsistent statute simply modifies or supersedes customary international law to the extent of the inconsistency.”); *see also The Paquete Habana*, 175 U.S. 677, 700 (1900) (explaining that international law is relevant to U.S. courts “where there is no treaty and no controlling executive or legislative act or judicial decision”).⁷

⁷ Similarly, even if Common Article 3 were found to contain an equal protection principle, the MCA would be fully consistent with that principle, just as it is with the Due Process Clause, and in any event, Common Article 3 could not trump the MCA, because Congress always retains the authority to abrogate or repeal a treaty by a later-enacted statute. *See, e.g., Edye v. Roberston (Head Money Cases)*, 112 U.S. 580, 599 (1884) (“A treaty is made by the President and the Senate. Statutes are made by the President, the Senate, and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate. . . . In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal.”); *see also Reid v. Covert*, 354 U.S. 1, 18 (1957) (“This Court has also repeatedly taken the position

ix. Nor does the canon of construction articulated by *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), stand to the contrary. There, the Supreme Court held that an ambiguous statute should be construed, to the extent possible, not to conflict with international law. *See id.* at 118. As the Court of Appeals has explained, however, “[t]his canon of statutory interpretation . . . does not apply where the statute at issue admits no relevant ambiguity.” *Oliva v. U.S. Dep’t of Justice*, 433 F.3d 229, 235 (2d Cir. 2005). As the accused readily concedes, the MCA unambiguously extends jurisdiction only to *alien* unlawful enemy combatants. *See* 10 U.S.C. § 948d(a). Thus, *Charming Betsy*’s canon of construction does not apply.

x. In the MCA, Congress unambiguously authorized the use of military commissions with respect to alien unlawful enemy combatants. The MCA’s jurisdictional provision meets any equal protection principles potentially immanent in international law. Moreover, because an Act of Congress would trump international law, any analysis of international law with respect to the present question is irrelevant. The motion to dismiss all charges for lack of jurisdiction should be denied.

d. Conclusion

i. Alien enemy combatants held outside the sovereign borders of the United States who have no connection to the United States other than their confinement possess no rights under the equal protection component of the Due Process Clause. Moreover, even if the accused were to possess constitutional rights, the MCA’s application only to *alien* unlawful enemy combatants is a rational distinction that the United States historically and properly has drawn when at war with foreign enemies. Finally, the MCA’s jurisdictional provision comports with international law and the Geneva Conventions, and, in any event, is enforceable regardless of international law.

ii. The Government respectfully requests that the Military Judge rule *both* that the equal protection component of the Due Process Clause does not apply to the accused, *and* that, even if it does, the jurisdictional provision of the Military Commissions Act fully complies with such constitutional protections.

7. Oral Argument: In view of the authorities cited above, which directly, and conclusively, address the issues presented, the Prosecution believes that the motion to dismiss should be readily denied. Should the Military Judge orders the parties to present oral argument, the Government is prepared to do so.

that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.”); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. . . . [B]ut, if the two are inconsistent, the one last in date will control the other . . .”). Thus, even if (contrary to the law and to the expressed declaration of both the President and Congress), Common Article 3 were in tension with the MCA’s jurisdictional requirement, the MCA would be lawful and enforceable, notwithstanding anything in Common Article 3, the Geneva Conventions or any other earlier-enacted treaty to the contrary.

- 8. Witnesses and Evidence:** All of the evidence and testimony necessary to deny this motion is already in the record.
- 9. Certificate of Conference:** Not applicable.
- 10. Additional Information:** None.
- 11. Attachments:** None.

Respectfully submitted,

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/s/
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OFFICE OF MILITARY COMMISSIONS
Prosecutor

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

D-043

PROSECUTION SUPPLEMENTAL
AUTHORITY

16 July 2008

1. **Timeliness:** This motion is filed by the request of the Military Judge during oral argument on 14 July 2008.
2. **Discussion:**
 - i. During oral argument on 14 July 2008, the Prosecution made reference to the evidentiary standard of the International Military Tribunal at Nuremberg, the International Military Tribunal in Tokyo, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court. The Military Judge asked for supplemental authority in support of the Prosecution's argument. The Prosecution referred the Military Judge to P-003 (the motion to pre-admit *The al Qaida Plan*) as containing the supplemental source material the military judge sought. Upon review, although the two international military tribunals following World War II were cited in P-003, the Prosecution has determined that the other referenced tribunals were not.
 - ii. To further clarify the Prosecution's position regarding the above-referenced tribunals, the Prosecution notes that nothing in the equal protection component of the Due Process Clause would authorize this Commission to consider, in assessing whether he has been denied equal protection of the laws, any rights the accused might otherwise enjoy in a foreign tribunal. The Prosecution was only illustrating that individuals accused of war crimes in international tribunals face substantially similar evidentiary standards as those provided in military commissions. As the Prosecution argued in its written pleading filed on 10 July 2008, the accused is not entitled to the benefit of the equal protection component of the Due Process Clause.
 - iii. Even if the accused were entitled to such protection, the federal Government—in the course of waging a war against foreign enemies that have attacked America and its allies at home and abroad—may properly consider the citizenship of those it seeks to punish for violating the law of war. The federal Government's distinction in the Military Commissions Act ("MCA") between citizen and alien is a reasonable and rational response posed by the foreign threat represented by al Qaeda and the Taliban, and easily satisfies the applicable rational basis standard,

as we have elaborated in greater detail in our written submission to the Commission.¹

Respectfully submitted,



CLAY TRIVETT
PROSECUTOR
OFFICE OF MILITARY COMMISSIONS

¹ The Government wishes to emphasize that the relevant comparison in this case for equal protection purposes is between the treatment accorded alien unlawful enemy combatants under the MCA and U.S. citizens, and *not* between the treatment accorded alien unlawful enemy combatants under the MCA versus such persons in foreign tribunals. The accused has cited no authority to the contrary and the Government is aware of none. Because the MCA's distinctions between citizen and alien are appropriate when prosecuting a war against foreign foes, even if the equal protection component of the Due Process Clause were to apply to Hamdan, only rational basis scrutiny would be appropriate.