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<tr><td>UNITED STATES OF AMERICA,

Appellee,

v.

SALIM AHMED HAMDAN,

Appellant.</td><td>IN THE COURT OF MILITARY COMMISSION REVIEW

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

CMCR Case No. 09-002

Tried at Guantanamo Bay, Cuba, on 4 Jun 2007 - 7 Aug 2008

Before a Military Commission convened by Hon. Susan J. Crawford

Presiding Military Judge
CAPT Keith Allred, JAGC, USN</td></tr>
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TO THE HONORABLE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

The National Institute of Military Justice ("NIMJ") respectfully moves for leave to file the instant brief as *amicus curiae* and to participate in oral argument in the case of *United States of America v. Salim Ahmed Hamdan.*

NIMJ is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and improve public understanding of the military law system. NIMJ has worked and written extensively in the relevant fields and seeks now to offer the results of recent and highly relevant research for consideration by this court.

NIMJ appears regularly as an *amicus curiae* before the U.S. Court of Appeals for the Armed Forces, and has appeared in the U.S. Supreme Court as an *amicus* in support of the government in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), and in support of the petitioners in *Rasul v. Bush*, 542 U.S. 466 (2004), *Hamdan v. Rumsfeld*, 548 U.S. 597 (2006), and in the U.S.

Court of Appeals for the District of Columbia Circuit in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

NIMJ is actively involved in public education through its website, www.wcl.american.edu/nimj, and through publications including the Annotated Guide to Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (LexisNexis 2002), four volumes of Military Commission Instructions Sourcebooks (2003-09), and the Military Commission Reporter (2009). NIMJ has also sought to improve public understanding of military law by seeking release of comments on the rules governing military commissions. *Nat'l Institute of Military Justice v. Dep't of Defense*, 512 F.3d 677 (D.C. Cir. 2008); *cert. denied*, 129 S. Ct. 775 (2008). NIMJ is independent of the government, and its programs rely exclusively upon private grants and donations.

ARGUMENT IN SUPPORT OF MOTION FOR LEAVE

The legal issues encompassed within this brief and that NIMJ could address at oral argument are novel and necessarily warrant additional explanation. The arguments presented herein have not been developed in the pleading of this case or in any related case. The arguments made here bear directly on the outcome appropriately to be reached by this court.

The present brief focuses on the offense of providing material support for terrorism and argues that military commissions, as tribunals constituted under the authority of Article I of the Constitution, cannot exercise subject-matter jurisdiction over such a charge. As the brief demonstrates, the subject-matter jurisdiction of military commissions is strictly limited to violations of the laws of war, a restriction repeatedly affirmed by the United States Supreme Court. There is no legitimate basis in either international law or the relevant jurisprudence to uphold the jurisdiction of the military commission in this case.

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December 4, 2009

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IN THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW
Before E. Biester, Jr., D. Conn, and E. Geiser

UNITED STATES OF AMERICA,	
Appellee,	BRIEF OF *AMICUS CURIAE* NATIONAL INSTITUTE OF MILITARY JUSTICE
v.	
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SUMMARY OF ARGUMENT

The military commission that convicted Salim Ahmed Hamdan lacked jurisdiction over the offense for which Hamdan was convicted. This Court should vacate his conviction.

The authority of military commissions comes from Article I of the United States Constitution. As such, their jurisdiction is confined to the implementation of the enumerated powers of Article I, Section 8, including the power to define and punish offenses against the law of nations. But Hamdan was not convicted of violating international law during an armed conflict. He was convicted under a provision of the Military Commissions Act of 2006 that prohibits individuals from providing a property or service (i) that they know or intend will be used for a terrorist act or (ii) that they provide to an international terrorist organization engaged in hostility against the United States. 10 U.S.C. § 950v(b)(25) (incorporating by reference 18 U.S.C. § 2339A(b)). This conviction cannot stand.[1] The statute's first prohibition relates to terrorism generally; it does not require any relationship to war at all, much less to violations of the law of war. The second prohibition is so broad that it encompasses activities such as providing food or shelter that are particularly far removed from the battlefield. No historical precedent treats those activities as violations of the laws of war. To do so would strain beyond recognition the constitutional language limiting Congress's authority.

Congress properly criminalized providing material support for terrorism as a violation of domestic law by passing 18 U.S.C. §§ 2339A and 2339B in 1996. If the United States had personal jurisdiction over Hamdan and his alleged offenses, the government properly could have charged him with violating these statutes in an Article III court—a court that, under the

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[1] In addition to the reasons address in this brief, the conviction also may be invalid because, as Hamdan argues, the application of the Military Commissions Act to hisconduct violates the Ex Post Facto Clause. U.S. Const. art. I, § 9.

Constitution, has subject-matter jurisdiction over all cases arising under the laws of the United States. U.S. Const. art III, § 2. Because the material support statute proscribes conduct that does not violate the laws of war, however, Congress lacked the authority to permit his prosecution for material support before an Article I court.

ARGUMENT

The Military Commissions Act of 2006 purports to give military commissions subject-matter jurisdiction over charges of "[p]roviding material support for terrorism." 10 U.S.C. § 950v(b)(25). The Act states:

> Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.

Id. § 950v(b)(25)(A). It defines "material support or resources" to mean "any property . . . or service . . . except medicine or religious materials." 18 U.S.C. § 2339A(b)(1); *see also* 10 U.S.C. § 950v(b)(25)(B) (incorporating this definition by reference). As the sections below demonstrate, the Act's purported jurisdictional grant is invalid because the Constitution limits the jurisdiction of military commissions to violations of the laws of war and material support, as defined in the Act, is not a violation of the laws of war.

I. THE CONSTITUTION STRICTLY CIRCUMSCRIBES THE SUBJECT-MATTER JURISDICTION OF ARTICLE I COURTS, INCLUDING MILITARY COMMISSIONS.

Congress's enumerated powers include the power "[t]o define and punish . . . offenses against the law of nations." U.S. Const. art. I, § 8, cl. 10. Military commissions have the limited purpose of carrying out this power to define and punish violations of the law of war; the commissions' subject-matter jurisdiction may not constitutionally extend beyond that narrow function.

A. To Protect the Separation of Powers, the Constitution Permits Congress to Grant General Jurisdiction Only to Article III Courts.

Article III states that "[t]he judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. Article III courts are courts of general jurisdiction over federal matters: their "judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." *Id.* § 2. The Supreme Court has long made clear that, although other tribunals may exercise judicial power, Article III ordinarily requires criminal trials to occur in Article III courts. *See Reid v. Covert*, 354 U.S. 1, 21 (1957) (plurality opinion) ("Under the grand design of the Constitution civilian courts are the normal repositories of power to try persons charged with crimes against the United States."); *Ex parte Bakelite*, 279 U.S. 438, 449 (1929) ("Those [courts] established under the specific power given in section 2 of Article III are called constitutional courts" and "exercise . . . the judicial power defined in that section.").

The status of Article III courts as the only courts of general subject-matter jurisdiction follows directly from the Constitution's commitment to separation of powers and the founders' skepticism towards the mingling of legislative, executive, and judicial functions. Preserving

general criminal jurisdiction in an independent Article III judiciary assuaged the two main fears animating that skepticism. *First*, it prevented the risk of tyranny created when one body can enact laws and then sanction non-compliance with them, or prosecute offenders and then determine their guilt. *See Reid*, 354 U.S. at 40 ("Ours is a government of divided authority on the assumption that in division there is not only strength but freedom from tyranny."); James Madison, "Federalist No. 47," *The Federalist Papers* 334 (Isaac Kramnick, ed. 1987) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny."). *Second*, it insulated decision-makers from public pressure. Article III courts "have judges who hold office during good behavior, with no power in Congress to provide otherwise." *Bakelite*, 279 U.S. at 449.

Article III courts are functionally independent from the political branches, not just formally independent. When a non-Article III court assumes jurisdiction over a criminal case, there is an undeniable commingling of the judicial function with that of the legislative, the executive, or both.[2]

B. Congress May Grant Article I Courts Jurisdiction Only Over Matters Directly Linked to an Enumerated Power.

That is not to say that Congress never can vest judicial power in tribunals other than Article III courts. Under Article I, Congress has the authority to create special-purpose courts of limited jurisdiction. These courts, however, may not have general jurisdiction. They can exist only if truly necessary to implement Congress's enumerated powers under Article I.

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[2] In some instances, such as courts-martial, Congress defines the jurisdiction of a tribunal and the executive staffs it. In other instances, such as military commissions before the 2006 statute, the executive alone defines the jurisdiction and staffs the tribunal.

The constitutional foundation for legislative courts is the clause permitting Congress "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." U.S. Const. art. I, § 8, cl. 18. The creation of special-purpose courts can be "necessary and proper for carrying into execution" the other powers specifically granted to Congress in the preceding clauses of Article I, Section 8. *See Bakelite*, 279 U.S. at 449. But the Court has required the existence of a genuine connection between an enumerated power and the statutorily defined offenses over which an Article I court has subject-matter jurisdiction.

The Supreme Court has carefully examined the connection in the context of military tribunals and articulated the principle that the jurisdiction of an Article I tribunal should be "limit[ed] to 'the least possible power adequate to the end proposed.'" *United States ex. rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955) (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 230–231 (1821)). Article I courts, the Court reasoned, exist only where they are truly necessary to the discharge of Congress's powers and, because of the threat they pose to the separation of powers, cannot be allowed to extend their jurisdiction further. *See id.* at 22 ("There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution."); *Reid*, 354 U.S. at 40-41 (plurality opinion) ("[U]nder our Constitution courts of law alone are given power to try civilians for their offenses against the United States."); *see also id.* at 25 ("The jurisdiction of military tribunals is a very limited and extraordinary jurisdiction [that,] at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law."). The Court's decisions assure that Congress does not

exceed Article I's limits on its enumerated powers, and thus respects Article III's reservation of general jurisdiction to Article III courts.

Thus, for example, while Congress may establish courts-martial pursuant to its enumerated power "[t]o make rules for the government and regulation of the land and naval forces," *Weiss v. United States*, 510 U.S. 163, 166-69 (1994) (citing U.S. Const. art. 1 § 8, cl. 14), "the Necessary and Proper Clause cannot operate to extend military jurisdiction to any group of persons beyond that class described in Clause 14—'the land and naval Forces.'" *Reid*, 354 U.S. at 20–21. In *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), the Supreme Court refused to sanction the military trials of civilians in Hawaii, even during wartime and despite the government's claim that exigencies required it. *Id.* at 314. In *Toth* the Court held that a discharged service member could not be tried by court-martial for a murder he allegedly committed while in the military. *Toth*, 350 U.S. at 23. And in *Reid*, the Court rejected the government's attempt to try the wives of service members stationed overseas in military courts. *Reid*, 354 U.S. at 32. In each of those cases, the defendants were not members of the military. The military courts, limited by the scope of Article I, Section 8, clause 14, had no jurisdiction over them. Jurisdiction could be exercised only by Article III courts.

II. THE SUBJECT-MATTER JURISDICTION OF MILITARY COMMISSIONS, AS ARTICLE I COURTS, IS LIMITED TO VIOLATIONS OF THE LAWS OF WAR AND DOES NOT COVER MATERIAL SUPPORT FOR TERRORISM.

The clause that in some cases supplies military courts with authority to try offenses of non-military members has no applicability here. A military commission, like any other Article I court, is a court of limited jurisdiction. It has authority only over defendants charged with violations of the laws of war. Because material support for terrorism is not a recognized

violation of the laws of war, the military commission lacked jurisdiction to try or convict Hamdan for that offense.

A. The Constitutional Underpinnings of Military Commissions Support Jurisdiction over Violations of the Laws of War Only.

Article I grants Congress the power to "define and punish . . . offenses against the law of nations." U.S. Const. art. I, § 8, cl. 10. Together with the Necessary and Proper Clause, this provision authorizes Congress to create Article I tribunals with jurisdiction over violations of the laws of war. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006); *Ex parte Quirin*, 317 U.S. 1, 28 (1942); *accord* William Winthrop, Military Law and Precedents 839 (2d ed. 1920). It does not, however, empower Congress to extend the jurisdiction of those Article I tribunals to cover offenses other than law of war violations. As the Supreme Court explained:

> We are concerned only with the question whether it is within the constitutional power of the national government to place petitioners upon trial before a military commission for the offenses with which they are charged. *We must therefore first inquire whether any of the acts charged is an offense against the law of war* cognizable before a military tribunal.

Quirin, 317 U.S. at 29 (emphasis added). And in *Hamdan*, a four-Justice plurality of the Supreme Court indicated that military commissions do not have jurisdiction over conspiracy charges because conspiracy is not a war crime under the traditional laws of war. Hamdan, 548 U.S. at 578. Any congressional attempt to give a military commission the authority to hear cases not involving war crimes would exceed Congress's enumerated power under Article I, Section 8, clause 10, and therefore would be invalid.

This is not a controversial or even a contested position. Testifying before Congress, the current head of the National Security Division of the Department of Justice affirmed: "The President has made clear that military commissions are to be used only to prosecute law of war offenses." Testimony of David Kris, Assistant Attorney General, before the Senate Armed

Services Committee 3 (July 7, 2009). In the otherwise sweeping Military Commissions Act of 2006, Congress stated that the jurisdiction of military commissions under the Act is limited to "any offense made punishable by this chapter or the law of war," 10 U.S.C. § 948d(a), and that the Act's provisions codify only "offenses that have traditionally been triable by military commissions," *id.* § 950p(a). If material support for terrorism is not a violation of the laws of war, the military commission lacked jurisdiction over Hamdan's prosecution for this crime.

B. Congress Cannot Evade Constitutional Limits by Labeling Material Support for Terrorism a Law of War Violation When It Is Not.

Article I, Section 8, clause 10 gives Congress authority to define and punish violations of the law of nations, but there are two critical limits on Congress's authority: (1) the defined violation must be about war, and (2) it must be generally recognized as a violation of the law of nations. The clause refers to offenses against the "law of nations," a concept grounded in international precedent. This language indicates that Congress cannot unilaterally control the scope of the defined offenses, but instead must act based on what is accepted internationally. An offense constitutes a violation of the law of nations only if recognized as such "by universal agreement and practice both in this country and internationally." *Hamdan*, 548 U.S. at 603 (quoting *Quirin*, 317 U.S. at 30). In the absence of historical precedent, Congress does not have the authority to make material support a violation of the laws of war by fiat. Just because the Military Commissions Act asserts that the crimes it lists as triable by military commissions, including material support, are "offenses that traditionally have been triable by military commissions," 10 U.S.C. § 948d(a), does not make it so.

Moreover, a law of war violation must obviously be one limited to war. *See, e.g.*, 1998 Rome Statute of the International Criminal Court, art. 8(b), UN Doc. A/CONF. 183/9 * (1998), *reprinted in* 37 I.L.M. 999 (1998) (defining "War Crimes" as grave breaches of the 1949 Geneva

Conventions and "other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law"). Congress may have the ability to influence the long-term development of the laws of war by instantiating a practice and promoting its adoption across other nations. But it cannot characterize an ordinary domestic criminal offense as a violation of the laws of war without international acquiescence.

The Supreme Court has carefully examined the use of military commissions to try war crimes. Its most notable decision is *Quirin*, where the Court upheld congressional legislation giving the President authority to set up military commissions to adjudicate charges against eight German spies who covertly entered the United States during World War II. Illegal entry into the United States with the intention of committing hostile acts, the Court reasoned, "has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government." *Quirin*, 317 U.S at 35-36. The Court went on to specifically cite the Hague Conventions of 1899 and 1907, *id.* at 37-38 ("Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war."), and numerous historical examples in which enemy spies had been tried and convicted by military tribunal, *id.* at 42-43 n.14. And it emphasized there was "*universal* agreement and practice" that the charge established a violation of the law of war. *Id.* at 30. The opinion's clear focus on documenting the historical basis for the charge as a law of war violation demonstrates the infirmity of the charge at issue in the case at bar, given that the United States has shown no precedent whatsoever for treating material support as a war crime.

The Court also carefully examined the historical pedigree of a war crime charge in *In re Yamashita*, 327 U.S. 1 (1946), which involved the capture of the commanding general of the Japanese army in the Philippine Islands during World War II. The case raised the question of whether the general could be prosecuted by military tribunal for permitting the members of his command to "commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies." *Id.* at 13-14. Concluding that the general was in fact prosecutable by military commission, the Court cited various conventions in international law establishing a duty on the part of commanders to ensure that their subordinates adhere to established rules of engagement. *Id.* at 15-16.

Most recently, in *Hamdan*, the plurality opinion made clear that "[a]t a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war." *Hamdan*, 548 U.S. at 603. The case involved a charge of conspiracy to commit terrorist acts, and the plurality looked past Congress's purported grant of military commission jurisdiction over conspiracy charges to examine "international sources" and "major treaties" in its assessment of whether Hamdan's alleged conspiracy violated the laws of war. *Id.* at 610. Determining that it did not, the plurality concluded that the military commission lacked jurisdiction.

These precedents confirm the common-sense conclusion that Congress lacks the power to declare unilaterally that activities that historically have not been treated as war crimes, that bear little or no relationship to war, and that occur far from a battlefield nonetheless violate the law of nations. To sanction such a unilateral claim would mean that Congress possessed the power to define any act that caused harm to the United States as a war crime and therefore give military commissions general jurisdiction over criminal cases. Such a result would be absurd.

The authority granted by the "define and punish" clause is restricted to placing within the jurisdiction of federal courts offenses that qualify as violations of existing international legal prohibitions. *See* Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 Nw. U. L. Rev. 149, 151 (2009) ("At most, Congress can legislate universally only when international law has made punishment of the regulated conduct universally cognizable."); *see also Hamdan*, 548 U.S. at 596–97 (2006) ("Not only is [military commission] jurisdiction limited to offenses cognizable during time of war, but its role is primarily a factfinding one—*to determine, typically on the battlefield, whether the defendant has violated the law of war*." (emphasis added)). Constitutional limits cannot be legislated out of existence, and Article I's restrictions on the jurisdiction of legislative courts preclude a military commission, even with purported congressional approval, from hearing cases that do not involve established violations of international law.

C. Historically and Substantively, Material Support for Terrorism Is a Domestic Crime, Not a Law of War Violation.

The offense of material support is a particularly compelling example of the danger of allowing Congress to define away constitutional limits. Terrorism has been defined in the U.S. code as a domestic criminal offense, as has material support for terrorism. Neither is specifically related to war. Terrorists are frequently prosecuted who have no possible connection to war. Moreover, the material support statute proscribes conduct that is far divorced from the terrorism itself, and thus far divorced from battlefield activities covered by the laws of war even in instances where the terrorism itself could be considered part of war. The United States has pursued numerous prosecutions under federal criminal statutes that proscribe material support against individuals or charitable entities that allegedly transferred funds to terrorist organizations, for example. *See, e.g., United States v. Rahmani*, 209 F. Supp. 2d 1045, 1047 (C.D. Cal. 2002);

Stephen Braun, *Texas Charity, Leaders Are Charged with Aiding Hamas*, L.A. Times, July 28, 2004, at A8; Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. Nat'l Sec. L. & Pol. 5, 8-9 (2005).[3]

The Military Commissions Act takes a domestic offense, unrelated to war, and redefines it without altering this fact. This cannot make it a law of war violation. The first clause of the material support provision, proscribing individuals from "provid[ing] material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism," appears to permit prosecutions for domestic terrorist activities wholly unconnected to war. The second clause, proscribing individuals from "intentionally provid[ing] material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism", appears to permit prosecutions even for providing food or shelter to members of an international terrorist organization regardless of whether that in any way aids specific terrorist acts, much less war. It does so by proscribing the provision of any property or service, excepting only medicine and religious materials. It also prohibits encouraging another person to join such an organization (by including "personnel" in the definition of "service"), or wiring money on behalf of such an organization (by including "financial services" in the definition of "service"). While Congress is well within its authority to criminalize those acts, none is a violation of the laws of war.

The history of the laws of war supports the same conclusion, as the government itself has recognized. A 2007 Congressional Research Service report found that "defining as a war crime the 'material support for terrorism' does not appear to be supported by historical precedent."

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[3] Constitutional challenges to aspects of this statute are now pending before the Supreme Court. *See Holder v. Humanitarian Law Project*, Nos. 08-1498 & 09-89 (U.S., cert. granted Sept. 30, 2009).

Jennifer K. Elsea, "The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice," Congressional Research Service Report for Congress 11-12 (Sept. 27, 2007). In congressional testimony, current Department of Defense General Counsel Jeh Johnson conceded that, "[a]fter careful study, the Administration has concluded that appellate courts may find that 'material support for terrorism'—an offense that is also found in Title 18—is not a traditional violation of the law of war." Testimony of Jeh Johnson, Department of Defense General Counsel, before the Senate Armed Services Committee (July 7, 2009). In fact, prior to the enactment of the Military Commissions Act, there was *no* case in which material support was charged or codified as a war crime, either domestically or internationally. *Cf. Hamdan*, 548 U.S. at 603 (requiring "universal consensus").

CONCLUSION

Article I courts have jurisdiction only over matters necessary to Congress's execution of its enumerated powers. Military commissions, created pursuant to Congress's power to define and punish violations of the laws of war, have jurisdiction only over offenses that are covered by the laws of war. Material support for terrorism is not such an offense, as the history and text of the material support provision under which Hamdan was convicted show. The military commission had no jurisdiction to hear this charge against him, and his conviction should be vacated.

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Dated: December 4, 2009

Marc A. Goldman

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via electronic mail to Mark Harvey, Clerk of the Court, at harveym@osdgc.osd.mil on this fourth day of December 2009

Dated: December 4, 2009

Marc A. Goldman