No. 05-184

In the Supreme Court of the United States

SALIM AHMED HAMDAN,

PETITIONER,

v.

DONALD H. RUMSFELD, *ET AL.*,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMICUS CURIAE BRIEF OF ARTHUR R. MILLER IN SUPPORT OF PETITIONER (Abstention and Mandamus)

David H. Remes
Counsel of Record
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-5212

Tara M. Steeley
Jeffrey C. Wu
Covington & Burling
1 Front Street
San Francisco, CA 94111

QUESTIONS PRESENTED

Amicus addresses two issues in this brief:

1. Whether abstention pending Petitioner's military trial is appropriate.

2. Whether the Detainee Treatment Act of 2005 affects the jurisdiction of this Court over a petition for writ of mandamus.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

MISCELLANEOUS

INTEREST OF AMICUS [1]

Professor Miller has devoted his entire career to the study and explication of federal civil procedure. He filed an amicus brief in this case, when it was still in the U.S. District Court for the Western District of Washington, opposing the government's motion to dismiss or transfer the case. The District Court noted Professor Miller's amicus brief in its decision granting the transfer motion. *Swift v. Rumsfeld*, No. C04-0777-RSL, slip. op. at 8 n. 3 (W.D. Wash. Aug. 9, 2004).

SUMMARY OF ARGUMENT

I. Abstention is not appropriate in this case. First, although abstention is normally a threshold question, in this case whether Petitioner has judicially enforceable rights is relevant to whether abstention is appropriate. If Petitioner has judicially enforceable rights, abstention is not appropriate for the reasons discussed below. If Petitioner has no such enforceable rights, dismissal, not abstention, is the appropriate course. No interest is served in delaying the resolution of *that* threshold issue.

Abstention is also not appropriate for more conventional reasons. Abstention is a tool of judicial self-restraint. Its use protects the federal-state structure of our system and the separation of powers among the three branches. The shared justification for its varied uses is the avoidance of unnecessary exercises of federal judicial power in matters that might be clarified or resolved in state judicial or administrative proceedings or through processes established by Congress or the Executive Branch.

Abstention in this case is not justified by either structural consideration. Federalism, of course, is not an issue here. Nor is abstention justified by separation of powers concerns, for three reasons. First, *Quirin* teaches that abstention is not appropriate in a case challenging proceedings of a military tribunal when the challenge poses urgent and substantial constitutional questions. Second, the justifications

---

[1] Letters of consent have been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus or his counsel made a monetary contribution to the preparation or submission of this brief.

recognized in *Councilman* for abstention in court-martial cases—enabling the military to maintain its "specialized society" and discipline within the ranks—do not apply to a military tribunal's trial of an enemy alien. Finally, *Toth* and similar cases instruct that abstention is not appropriate when a defendant challenges the authority or jurisdiction of the tribunal to try him at all. For all three reasons, abstention is not appropriate in this case.

II. The Detainee Treatment Act of 2005 does not affect the Court's jurisdiction to review this case on the basis of Petitioner's petition for an original writ of mandamus in this Court or the mandamus petition that Petitioner filed with his habeas petition in the district court.

Neither of the pertinent paragraphs of section 1005(e) of the Act applies to Petitioner's request for mandamus. Section 1005(h)(2) makes clear that section 1005(e)(1) does not apply to claims that were pending on the date of the enactment of the Act. Moreover, section 1005(e)(1) speaks only to habeas actions and other actions relating to aspects of the alien's *detention*. Petitioner seeks mandamus relief in addition to habeas relief, and his petition does not challenge an aspect of his detention, but rather the competence of a military commission to try him. Finally, the other pertinent paragraph, section 1005(e)(3), does not apply because a military commission has not rendered a "final decision" in Petitioner's case, and because his claims in any event would not be governed by that paragraph.

ARGUMENT

I. ABSTENTION IS NOT APPROPRIATE.

A. Abstention Is Not Appropriate in Court-Martial Cases Posing Questions of Urgent Moment.

The Court has recognized the need to address without delay threshold issues of national importance raised by military commissions. In *Ex parte Quirin*, 317 U.S. 1 (1942), the Court, although eventually denying relief to the petitioners, Nazi saboteurs, heard the merits of their challenges before the military commission proceedings had concluded, granting *certiorari* before the judgment of the Court of Appeals and hearing argument during a special term of the Court. *Id*. at 19. The petitioners were charged with violations of the laws of war; their challenges, like Petitioner's, were to the constitutional and statutory authority of the President to establish the military

commission. *Id*. at 24. The *Quirin* Court stated that it was hearing the case—

> in view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay * * *.

Id. at 19.

Indeed, the constitutional role of policing the limits of Executive Branch authority, a core issue in this case, is not a role that may be assumed by a tribunal created by another Branch. "The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III." *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982) (plurality opinion).

B. *Councilman*'s Justifications for Abstention Are Absent.

The Court summarized the three sources of its abstention doctrine in *Schlesinger v. Councilman*, 420 U.S. 738 (1975). First, abstention may be appropriate pending the conclusion of state proceedings. This strand of the abstention doctrine reflects "considerations of comity." *Id*. at 755-56. *See also* 17A Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4241 (2d ed. 1988).

Second, abstention may be appropriate pending final decision in federal agency proceedings. This strand of the abstention doctrine respects "the special competence of agencies in which Congress has reposed the duty to perform particular tasks." *Councilman*, 420 U.S. at 756.

Third, in the context of military justice, the Court in *Councilman* explained that abstention respects the fact that the military is "a specialized society * * * with laws and traditions of its own" that serve to engender the discipline required "to prepare for and perform [the military's] vital role." *Id*. at 757 (internal quotations omitted). The Court stated that abstention in this context also respects the fact that, in enacting the Uniform Code of Military Justice, 10 U.S.C. §§ 801 *et seq.*, Congress itself

> had attempted to balance these military necessities against the equally significant interest of ensuring fairness * * * and to formulate a mechanism by which these often competing inter-

> ests can be adjusted. To achieve these goals, Congress created an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals consisting of civilian judges 'completely removed from all military influence or persuasion' who would gain over time thorough familiarity with military problems.

Councilman, 420 U.S. at 757-58.

In the instant case, abstention is not warranted on either basis. The need to respect the military's ways of maintaining its "specialized society" and engendering military discipline is irrelevant to the military's treatment of a foreign national accused of crimes against the United States. Nor does respect for the scheme of military justice that Congress has established warrant abstention here: Petitioner claims that the military commission established to try him is not authorized by, and is inconsistent with, that scheme.

C. Abstention Is Not Appropriate When a Party Disputes a Military Tribunal's Jurisdiction to Try Him.

Abstention is inappropriate when "the complainant [] raise[s] substantial arguments denying the right of the military to try [him] at all." *Noyd v. Bond*, 395 U.S. 683, 696 n.8 (1969). In *Toth v. Quarles*, 350 U.S. 11 (1955), an airman who had been honorably discharged from the Air Force was later detained by the military in connection with a murder committed during his service. The former airman brought a habeas action challenging his detention. His claim was jurisdictional—that the military lacked jurisdiction to try a civilian, even for crimes committed during military service. The Court did not abstain but decided the case on the merits.

In *Reid v. Covert*, 354 U.S. 1 (1957), a civilian killed her husband, an Air Force sergeant posted in England, and the military sought to try her by court-martial. She challenged the jurisdiction of the court-martial on the basis that it failed to afford the full panoply of constitutional protections available to her in criminal proceedings in a civilian court. The Court did not abstain but decided the case on the merits. *Id*. at 4.

McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960), involved the court-martial of a civilian employee of the Air Force on charges of larceny. Guagliardo, like Mrs. Covert, challenged the jurisdiction of the court-martial, arguing that it did not afford him the

constitutional protections available in a civilian criminal proceeding. Again, the Court did not abstain, deciding the case on the merits without requiring Guagliardo to pursue his appellate remedies within the military system.

Like the petitioners in *Toth*, *Reid*, and *McElroy*, Petitioner raises "substantial arguments" that the military commission established to try him lacks jurisdiction to "try him at all." He asserts that the President lacked authority to establish the commission and that subjecting him to trial before the commission would violate his rights under the Constitution, federal statutory law, and international treaties, and would violate the separation of powers principle. Moreover, like the courts-martial at issue in *Toth*, *Reid*, and *McElroy*, the military commission established in this case lacks any particular expertise "to the consideration of constitutional claims of the type presented." *Noyd*, 395 U.S. at 696 n.8.

II. THE DETAINEE TREATMENT ACT DOES NOT AFFECT PETITIONER'S MANDAMUS PETITIONS.

Lieutenant Commander Swift, in the next-friend action that he filed on Petitioner's behalf on April 6, 2004, petitioned for a writ of mandamus pursuant to 28 U.S.C. § 1361 or, in the alternative, a writ of habeas corpus. Petition for Writ of Mandamus Pursuant to 28 U.S.C. § 1361 or, in the Alternative, Writ of Habeas Corpus, *Swift v. Rumsfeld*, C04-0777-RSL (W.D. Wash. Apr. 6, 2004). The case was later transferred to the U.S. District Court for the District of Columbia, which deemed Petitioner substituted for his next- friend. The District Court granted in part Petitioner's habeas petition. Its order did not mention his mandamus petition.

On December 19, 2005, Petitioner filed in this Court a petition for an original writ of habeas corpus under the Court's original mandamus jurisdiction. Petition for Writ of Habeas Corpus, *Hamdan v. Rumsfeld*, No. 05-790 (Dec. 19, 2005). The petition is scheduled for conference on January 13, 2006.

On December 30, 2005, the President signed into law the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Div. A, tit. X (2005). Section 1005(e) of the Act purports to govern judicial review of certain actions by aliens held by the Department of Defense at Guantanamo Bay Naval Station.

Section 1005(e) does not affect the Court's jurisdiction to decide Petitioner's petition for an original writ of mandamus. Section 1005(e) includes three paragraphs. Paragraph (e)(1) amends the federal habeas statute by adding a new subsection (e), as follows:

> (e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—
>
> (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or
>
> (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.

Section 1005(e)(1) does not affect the Court's jurisdiction over Petitioner's claims because it does not apply to "any claim that was pending" on the date of enactment, *see* Act, § 1005(h)(2), and the claims asserted by Petitioner in his district court petition and his petition in this Court for an original writ of mandamus were pending on the date of enactment. Moreover, paragraph (1) of the new section 2241(e) does not affect the Court's jurisdiction over either Petitioner's petition for mandamus in district court or his petition for mandamus under this Court's original jurisdiction because the paragraph speaks only to habeas actions.

Paragraph (2) of the new section 2241(e) does not affect the Court's mandamus jurisdiction for two reasons. The paragraph speaks only to actions "relating to [an] aspect of the detention." To be sure, the military is holding Petitioner in detention at Guantanamo. But Petitioner does not challenge either the fact of his detention or the conditions of his confinement. He challenges the President's authority to subject him to trial before a military commission established under Military Order No. 1 and the commission's jurisdiction

to try him. His claims do not depend on whether or where he is being detained.[2]

Section 1005(e)(2) is not pertinent to this case because it purports to govern judicial review of the validity of final decisions of a Combatant Status Review Tribunal (CSRT) that certain aliens are properly "detained" as enemy combatants.

Section 1005(e)(3) purports to govern judicial review of final decisions of a military commission rendered pursuant to Military Order No. 1, dated August 31, 2005, or any successor military order. This paragraph does not apply to Petitioner because there is no "final decision" of a military commission in his case.[3]

---

[2] In addition, paragraph (2) is inapplicable because Petitioner has not been "determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) * * * to have been properly detained as an enemy combatant."

[3] It appears that Petitioner's claims would not be governed by section 1005(e)(3) in any event. Subparagraph (D) of section 1005(e)(3) provides that the D.C. Circuit's review of a final decision of a military tribunal shall be limited to the consideration of

> (i) whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and
>
> (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.

Both clauses appear to speak to appeals that present "as applied" challenges to final decisions of a CSRT, not "facial challenges," such as those that Petitioner asserts, to the authority or jurisdiction of the military commission. Clause (i) speaks to whether the CSRT has followed the specified standards and procedures. Clause (ii) speaks to whether "the use" of the standards and procedures "to reach the final decision" is consistent with the Constitution and laws of the United States. Clause (ii) does not appear to speak to whether the standards and procedures themselves are consistent with the Constitution or laws of the United States, or whether the Military Order under which the standards and procedures were established is authorized or has jurisdiction to try a detainee.

CONCLUSION

For the reasons set forth above, abstention is inappropriate and the Court has jurisdiction to grant Petitioner's petition for an original writ of mandamus.

Respectfully,

DATED: January 6, 2005

David H. Remes
Counsel of Record
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
202-662-6000

Tara M. Steeley
Jeffrey C. Wu
1 Front Street
San Francisco, CA 94111
415-591-6000