No. 05-184

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,
Petitioner,
v.

DONALD RUMSFELD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Amici curiae address the following issues only:

1. Whether courts should abstain from interfering with ongoing military commission proceedings.

2. Whether the President has authority to establish military commissions.

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BRIEF OF WASHINGTON LEGAL FOUNDATION, AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal and state courts to ensure that the United States government is not deprived of the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004); *Rasul v. Bush,* 542 U.S. 466 (2004); *DeMore v. Kim,* 538 U.S. 510 (2003); *Zadvydas v. Davis,* 533 U.S. 678 (2001). WLF also filed briefs in this matter when it was before the court of appeals and the district court.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici believe that military commissions are an effective and constitutional means of bringing to justice enemy belligerents who violate the law of war, and that there are at least some instances in which the federal courts' criminal

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

justice system is not up to the task. *Amici* also believe that, regardless whether the Detainee Treatment Act removes federal court jurisdiction over this petition, in the interests of comity any challenge to the military commission system established by President Bush should be deferred until after the system has been allowed to operate.

STATEMENT OF THE CASE

During the course of its fighting in Afghanistan against al Qaeda and the Taliban, the American military captured Petitioner Salim Ahmed Hamdan, a citizen of Yemen. Hamdan admits that he was employed by and worked closely with Osama Bin Laden, the leader of al Qaeda, in Afghanistan from 1996 until his capture in 2001. February 9, 2004 Affidavit of Salim Ahmed Hamdan, at 1-2. Hamdan insists, however, that he is a "civilian," that he never has been a member of al Qaeda, that he is not a terrorist, and that he has committed no crimes. *Id.* at 4. Nonetheless, on July 3, 2003, President Bush determined that Hamdan was subject to trial pursuant to his November 13, 2001 order authorizing the establishment of military commissions to hear war crimes charges brought against those captured in connection with the war against al Qaeda (the "Military Order"). On July 9, 2004, Hamdan was charged with conspiracy to commit a variety of offenses, including attacking civilians, attacking civilian objects, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent, and terrorism.

Even before those charges were filed, Hamdan filed a petition in federal district court for a writ of mandamus or, in the alternative, a writ of habeas corpus. The petition sought, *inter alia*, an order preventing Hamdan's trial before a military commission and directing his release from pre-commission detention at Guantanamo Bay, Cuba. Hamdan contended that

the Military Order violates separation-of-power principles of the U.S. Constitution (because, he alleged, Congress has not authorized the establishment of military commissions) and violates both the 1949 Geneva Conventions and the Uniform Code of Military Justice (UCMJ) because it allegedly provides insufficient procedural protections to defendants.

The district court granted the habeas corpus petition in part. Pet. App. 20a-49a. The court largely rejected Respondents' contention that it should abstain from hearing Hamdan's petition until after Hamdan had raised those claims before a military commission. *Id.* 23a-24a. The court held that Hamdan was entitled to raise a pre-trial challenge to commission proceedings to the extent that his challenge questioned the commission's jurisdiction to try him. *Id.* 24a. It held that each of Hamdan's claims should be deemed jurisdictional in nature. *Id.* The court nonetheless deemed abstention proper with respect to two of Hamdan's claims: his claim that the proposed trial violated his rights under Common Article 3 of the 1949 Geneva Conventions, *id.* 36a-37a, and his claim that the military had violated his speedy trial rights under the UCMJ. *Id.* 47a-48a. The court ruled that the rights guaranteed by Common Article 3 have "no fixed, term-of-art meaning" and thus need not "be guaranteed in advance of trial." *Id.* 37a. It ruled that the record was insufficient to "permit a careful analysis of speedy trial issues," and that the "critical element" of whether Hamdan had been prejudiced by trial delay was "best evaluated post-trial." *Id.* 48a.

On the merits, the court rejected Hamdan's claim that the President exceeded his constitutional powers in seeking to establish military commissions to try alleged war criminals. *Id.* 25a-28a. It nonetheless held that the Military Order violated various aspects of the UCMJ and the Geneva Convention Relative to the Treatment of Prisoners of War of

August 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135 (the "Third Geneva Convention"). *Id.* 37a-48a. The court enjoined any trial of Hamdan before a military commission until the military came into full compliance with the UCMJ and the Third Geneva Convention. *Id*. 49a.

On appeal, the D.C. Circuit unanimously reversed. *Id.* 1a-18a. The appeals court upheld the district court's abstention rulings, relying on *Ex parte Quirin*, 317 U.S. 1 (1942), for the proposition that a pre-trial habeas corpus petition is a proper means of challenging the lawfulness of a military commission. *Id*. 3a-4a. The court held, however, that abstention was proper on the Common Article 3 claim because that claim raised the issue "not *whether* the commission may try him, but *how* the commission may try him" and thus was "by no stretch a jurisdictional argument." *Id.* 13a (emphasis in original).

On the merits, the D.C. Circuit reversed, holding *inter alia* that: (1) the Third Geneva Convention does not confer upon Hamdan a right to enforce its provisions in court, *id.* 10a; (2) Hamdan is not entitled to prisoner-of-war (POW) status under the Third Geneva Convention, *id.* 11a; and (3) the commission procedures established by the Military Order comply with the UCMJ. *Id.* 14a-15a.

In its opposition to Hamdan's certiorari petition, the federal government explicitly raised as one of the questions presented by the petition, "Whether the courts should abstain from interfering with ongoing military commission proceedings." The federal government raised that issue both in the district court and in the court of appeals, and the opinions of both courts addressed the issue. Because the federal government's abstention claim provides an alternative

basis for affirming the judgment below, it is properly before this Court.

SUMMARY OF ARGUMENT

Hamdan is asking the courts to enjoin a military commission from going forward with a scheduled war crimes proceeding. *Amici* do not doubt that federal courts possess jurisdiction to hear claims that the military commission is proceeding against Hamdan in a manner that exceeds its constitutional authority. But principles of comity and efficiency dictate that the Court stay its hand until after commission proceedings are complete. Federal courts do not step in to enjoin on-going state court criminal proceedings. *Younger v. Harris,* 401 U.S. 37 (1971). They do not step in to enjoin on-going military court-martial proceedings against members of our armed forces. *Schlesinger v. Councilman,* 420 U.S. 738 (1975). Similarly, they should not step in to enjoin proceedings before a military commission against alleged enemy belligerents.

Even accepting the D.C. Circuit's overly-generous standard for permitting pre-trial challenges to military commission proceedings – such challenges are permitted if they raise a "substantial" claim that the commission lacks jurisdiction over the defendant – the vast majority of Hamdan's claims do not meet that standard. Under that standard, only Hamdan's claim that the President violated constitutional separation-of-power principles by attempting to establish military commissions is arguably exempt from abstention requirements. Hamdan should be required to raise all remaining claims initially with the military commission and to bring them into federal court only in connection with a challenge to any criminal conviction.

ARGUMENT

I. Principles of Comity Require the Federal Courts to Abstain from Hearing Hamdan's Claims Until Those Claims Can Be Considered by the Military Commission and by the Review Panel

A. Hamdan Has Failed to Demonstrate Why the Normal Rule Against Interfering with Ongoing Criminal Proceedings Should Not Be Followed

Amici agree with Respondents that, as a result of passage of the Detainee Treatment Act of 2005 ("DTA"), Pub.L. No. 109-148, §§ 1001-1006 (2005), the Court no longer has jurisdiction and thus should dismiss the case. But even assuming that the court possesses subject-matter jurisdiction:

> There remains the question of equitable jurisdiction, a question concerned, not with whether the claim falls within the limited jurisdiction conferred on the federal courts, but with whether consistently with the principles governing equitable relief the court may exercise its remedial powers.

Schlesinger v. Councilman, 420 U.S. 738, 753 (1975). *Amici* respectfully submit that, under the equitable principles set forth in *Schlesinger,* the federal courts should abstain from hearing Hamdan's claims until after the military commission proceedings – including any post-trial reviews – have been allowed to run their course.

As a general rule, federal courts do not exercise their equitable powers to interfere with on-going criminal proceedings. "'The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty

experience in Anglo-American law.'" *Schlesinger*, 420 U.S. at 755 (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951)). Thus, the Court has admonished federal courts virtually never to enjoin state court criminal proceedings. *Younger v. Harris*, 401 U.S. 37 (1971). Similarly, *Schlesinger* warned against enjoining court-martial proceedings against members of the American military. *Schlesinger*, 420 U.S. at 758 ("[W]hen a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise."). Hamdan has failed to introduce any evidence demonstrating why a different rule should apply when, as here, the petitioner is seeking to enjoin criminal proceedings before a military commission. In all such situations, federal courts – even when they possess subject matter jurisdiction over a challenge to ongoing criminal proceedings – should abstain from hearing that challenge until *after* those proceedings are complete.

In denying the federal government's abstention defense, the D.C. Circuit analogized Hamdan's collateral attack on pending criminal proceedings to decisions permitting interlocutory appeal, under the collateral order doctrine, of orders denying a motion to dismiss federal court proceedings. Pet. App. 4a (citing *Abney v. United States*, 431 U.S. 651, 662 (1977)). But only last month, the Court reiterated that the collateral order doctrine should be interpreted extremely narrowly so as not to interfere with ongoing district court proceedings. The Court explained that it is not enough for a litigant seeking to invoke the doctrine to show that failure to permit an interlocutory appeal will burden the litigant by forcing him to endure legal proceedings that he should not have to endure. *Will v. Hallock*, 126 S. Ct. 952, 958 (2006). Rather, "it is not mere avoidance of a trial, but avoidance of a

trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *Id.* at 959.[2] Hamdan and the D.C. Circuit have failed to demonstrate how requiring that Hamdan's legal challenges be presented to the military commission in the first instance would "imperil a substantial public interest."

Military commissions have been a recurring part of the American legal landscape for more than 200 years, so there is no reason for the federal courts to accord such proceedings a lesser degree of respect that they accord state courts and military courts-martial. During the American Revolution, the Continental Army regularly convened military commissions to hear charges that enemy belligerents had violated the law of war. Most famously, British Major John Andre, Benedict Arnold's co-conspirator, was hanged in 1780 after being convicted of spying by a military commission. Military commissions were employed by American forces with similar frequency throughout the Mexican War, the Civil War, and World War II. *See, e.g.*, *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1, 11 (1946) ("An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to impede our military effort, have violated the law of war."). In light of that history, there is every reason to require Hamdan to raise his claims before the military commission before turning to the federal courts, in

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[2] Demonstrating that the challenged decision would "be effectively unreviewable on appeal from a final judgment" is one of the principal prerequisites for invoking the collateral order doctrine. *Id*. at 957.

the absence of a showing that such a requirement would imperil a substantial public interest.

B. *Schlesinger*'s Rationale Is Fully Applicable Here

The rationale underlying the Court's *Schlesinger* decision is fully applicable here and dictates a finding that federal courts should abstain from hearing Hamdan's claims until after completion of military commission proceedings. *Schlesinger* involved a U.S. Army captain who faced a court-martial based on allegations that he sold marijuana while off duty and away from his army base. Captain Councilman sought an injunction in federal court against the court-martial proceedings on the ground that the alleged drug sale was not "service connected" and therefore not within military court-martial jurisdiction. The Court overturned a lower court injunction, finding that federal court review should be delayed until after exhaustion of all military court proceedings. 420 U.S. at 757-61.

The Court explained that while, in general, criminal justice in the military is not subject to review in the federal courts, the judgment of a military court is subject to collateral attack (through the filing of a habeas corpus petition) based on claims that the judgment is void because the military court lacked jurisdiction to impose it. *Id.* at 746-48. But the question before the Court was the proper time for filing a habeas petition, not the right to file.[3] The Court determined that the equities weighed in favor of delaying federal court intervention until after all court martial proceedings had been

[3] "There remains the question of equitable jurisdiction, a question concerned, not with whether the claim falls within the limited jurisdiction of the federal courts, but with whether consistently with the principles governing equitable relief the court may exercise its remedial powers." *Id.* at 754.

completed. *Id.* at 757. The Court held that consideration of a habeas petition should be delayed until after military proceedings have been completed whenever, as here, the only injury that the petitioner would suffer as a result of such delay is that incident to any prosecution. *Id.* The Court explained:

> Of course, there is inevitable injury – often of serious proportions – incident to any criminal prosecution. But when the federal equity power is sought to be invoked against state criminal prosecutions, this Court has held that "[c]ertain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, [can]not by themselves be considered 'irreparable' in the special legal sense of that term." *Younger v. Harris,* 401 U.S., at 46. . . . These considerations apply in equal measure to the balance governing the propriety of equitable intervention in pending court-martial proceedings. . . . We hold that when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise.

Id. at 754-55, 757, 758.

The Court's discussion of the factors weighing against allowing immediate habeas corpus review of court martial proceedings is fully applicable here. The Court stated that requiring military defendants to exhaust all military remedies before seeking federal court relief served the same purposes of rules requiring exhaustion of remedies before administrative agencies. *Id.* at 756-57. Such rules are:

> [B]ased on the need to allow agencies to develop the facts, to apply the law in which they are particularly expert, and to correct their own errors. The rule ensures that whatever judicial review is available will be informed and narrowed by the agencies' own decisions. It also avoids duplicative proceedings, and often the agencies' ultimate decision will obviate the need for judicial intervention.

Id. The Court also held that exhaustion requirements are particularly important in the context of military proceedings and "counsel strongly" against premature federal court intervention in such proceedings. *Id.* at 757. The Court explained that such comity is required because "[t]he military is 'a specialized society separate from civilian society' with 'laws and traditions of its own [developed] during its long history.'" *Id.* (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)).[4]

Similarly, requiring Hamdan to exhaust all military remedies will allow the military to develop the facts of this case. It may obviate any need for federal court intervention if the military commission or any subsequent reviewer ends up

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[4] As the Court explained elsewhere, requiring exhaustion also serves to eliminate potentially needless friction between the military and the judicial branch:

> If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved.

Gusik v. Schilder, 340 U.S. 128, 132 (1950).

acquitting Hamdan. Many of the issues raised by Hamdan (such as whether he was in Afghanistan as a civilian or an enemy belligerent, and the requirements of the laws of war) are ones that the military – because of its particular expertise – is much better equipped to handle than are the federal courts. Most importantly, requiring exhaustion of all military remedies grants appropriate deference to the unique role of the military in American society. When military leaders determine that the application of "necessary and appropriate force" against al Qaeda operatives includes trying some of those operatives before military commissions as war criminals, it is wholly inappropriate for federal courts to step in and second-guess that determination without even permitting the military proceedings to run their course.

Abstention might be less appropriate if Hamdan could point to some harm that would befall him, other than being forced to stand trial, if federal court review of his claims were delayed. But he can point to no such harm. Although Hamdan remains incarcerated at Guantanamo Bay, Cuba pending trial, that status will not change even if he prevails in this petition. He is being detained for the duration of hostilities pursuant to a Combat Status Review Tribunal finding that he is an enemy combatant who is either a member of or affiliated with al Qaeda. That finding is not challenged in this proceeding, and thus Hamdan's continued detention is not dependent on the outcome of these proceedings.

The D.C. Circuit deemed *Schlesinger* inapplicable because it viewed that decision as based primarily on recognition of the military's need to maintain "a respect for duty and discipline" within its own ranks. Pet. App. 3a. While it is true that that particular rationale is inapplicable here – prosecuting Hamdan for war crimes has little to do with maintaining discipline among American soldiers – the D.C.

Circuit's decision overlooks *Schlesinger*'s numerous other rationales, cited above, for refraining from interfering with ongoing criminal proceedings being undertaken by the military. This Court has recognized that disciplining enemy combatants "who, in their attempt to impede our military effort, have violated the law of war" is "[a]n important incident to the conduct of war." *Yamashita*, 327 U.S. at 11. Yet, to allow federal courts to interfere in military commission proceedings before they have been allowed to run their course is a sure-fire way to tie the proceedings in knots.[5] Unless the Court believes that the federal judiciary is better equipped than the military to determine how best to engage in "the conduct of war," it should direct the federal courts to stay their hands until after the completion of military commission proceedings.

One of Hamdan's *amici* asserts that abstention is inappropriate because the military commission "cannot give a full and fair hearing to Hamdan's constitutional claims." *See* Brief of Professor Richard D. Rosen, *et al.* ("Rosen Br."), at 14-23. But pre-habeas exhaustion of all military remedies is appropriate so long as there is a realistic chance that the military will provide Hamdan the principal relief he seeks: clearing his name of all charges. *Schlesinger*, 420 U.S. at 754. Hamdan has presented no evidence that the commission (or the Review Panel, in the event of a conviction) will not give a full and fair hearing to his claims of innocence. Moreover, even if is unlikely that the commission would declare itself unconstitutional, there is no reason to believe that the commission would not give serious consideration to the

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[5] Cf. *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (by allowing premature judicial intervention into administrative proceedings designed to effect deportation of suspected Palestinian terrorists, lower federal courts improperly delayed those proceedings by more than a decade).

remainder of Hamdan's legal claims. For example, the district court's principal complaint regarding commission procedures was that the commission is empowered to exclude Hamdan (but not his attorney) from portions of commission proceedings in order to protect classified information. Pet. App. 46-47a. *See* 32 C.F.R. § 9.6(b). But the commission is not *required* to exclude Hamdan from any proceedings. It is certainly open to Hamdan to argue to the commission that exclusion would be inappropriate; and there is every reason to suppose that the commission, if persuaded by those arguments, would permit him to attend all proceedings.

Hamdan and his *amici* complain that the commission and the Review Panel cannot provide a fair review of his claims because, as organs of the Executive Branch, they lack the ability to render independent judgments. The Court has never accepted such arguments in the context of courts martial, even though all those involved in court martial proceedings (including the U.S. Court of Appeals for the Armed Forces, an Article I court) are similarly a part of the Executive Branch. Indeed, this Court barred Captain Councilman from raising claims in federal court until after pressing them in court martial proceedings, even though at the time federal law provided for *no* post-conviction appeal of his claims to an Article III court.[6] In contrast, if Hamdan is convicted and his conviction is upheld during the course of subsequent review proceedings, he will be entitled to extensive review of the conviction in the U.S. Court of Appeals for the District of Columbia Circuit, *see*

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[6] *Schlesinger* was decided in 1975. It was not until 1983 that Congress granted this Court certiorari jurisdiction over decisions of the U.S. Court of Appeals for the Armed Forces. *See* 10 U.S.C. § 867a. Before then, the only federal court jurisdiction over court martial proceedings was the power to consider post-conviction habeas corpus petitions raising claims that the military court had acted outside "the scope of its jurisdiction and duty." *Schlesinger,* 420 U.S. at 746.

DTA § 1005(e)(3), as well as whatever additional habeas corpus review to which the federal courts may deem him entitled at the time. Accordingly, the argument for abstention is far stronger here than it was in *Schlesinger*, and the alleged lack of independence of those Executive Branch officials who will be reviewing his claims provides no more basis for allowing Hamdan to bypass that review than did a similar alleged lack of independence in *Schlesinger*.[7]

Finally, *Schlesinger* requires rejection of Hamdan's claim that abstention is inappropriate because his challenges allegedly are "jurisdictional" in nature. As noted above, Captain Councilman's sole basis for seeking habeas relief was that the military lacked court martial jurisdiction over him (because the drug offense with which he was charged allegedly was not "service connected"),[8] yet the Court nonetheless held in *Schlesinger* that abstaining on that jurisdictional claim was appropriate until after completion of court martial proceedings. *Schlesinger*, 420 U.S. at 758.

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[7] It is worth noting that Hamdan and his *amici* readily concede that the military commission procedures prescribed by the Military Order and related documents provide at least the same level of procedural protections afforded by World War II-era military commissions. *See, e.g.*, Rosen Br. 18. This Court determined in *Quirin* and *Yamashita* that the Roosevelt-era procedures fully protected the rights of enemy combatants tried for war crimes by military commissions in that era. While Hamdan claims that subsequently enacted statutes and treaties mandate the provision of additional procedural protections, Hamdan's concession puts to rest any suggestion that the proposed commission procedures constitute a gross deviation from traditional notions of military justice.

[8] Indeed, challenges to a court martial's jurisdiction were, in 1975, the *only* basis for seeking federal court habeas review of court martial proceedings. *Schlesinger*, 420 U.S. at 746.

C. Permitting Hamdan to File a Pre-Trial Challenge Will Open the Door to Similar Challenges by Anyone Facing Charges Before a Military Commission

Both the district court and the D.C. Circuit attempted to cabin their rulings by limiting the right to file pre-trial habeas challenges to those military commission defendants whose jurisdictional arguments are "substantial." Pet. App. 24a, 4a. Each claimed that the distinction between "substantial" and "insubstantial" jurisdictional arguments derives from *Schlesinger* and that Hamdan's claims fall on the "substantial" side of the line. *See, e.g., id.* 4a (D.C. Circuit determines that "Hamdan's jurisdictional challenge, by contrast [to Captain Councilman's], is not insubstantial, as our later discussion should demonstrate.").

The lower courts' line-drawing efforts are ultimately unavailing and derive no support from *Schlesinger*. If the D.C. Circuit's abstention ruling is to be upheld by this Court, it can only be on the basis of a rule of law that permits *all* military commission defendants who dispute the commission's jurisdiction over them to file pre-trial habeas challenges in federal court. There simply no meaningful basis for distinguishing "substantial" and "insubstantial" jurisdictional challenges.

Schlesinger did not mandate abstention on the basis that Captain Councilman's claim (that the drug charges against him were outside court martial jurisdiction because they were not "service related") was not sufficiently "substantial." Indeed, the Court recognized that Councilman's claim raised an open question of military law. Rather, the Court simply established a blanket rule that a serviceman must initially raise such claims in connection with court martial proceedings before seeking

relief in the federal courts, unless he can demonstrate harm "other than that attendant to resolution of his case in the military court system." 420 U.S. at 758.

Of course, there will be abstention cases in which the parties dispute whether the petitioner is, in fact, a serviceman – just as in this case the parties dispute whether Hamdan affiliated himself with the al Qaeda military effort. When faced with just such a dispute in a separate case, the D.C. Circuit declined to allow the abstention issue to hinge on whether the petitioner raised a "substantial" question about his military status; rather, it held that exhaustion requirements are excused only where "it has been undisputed that the persons subject to the court-martials either never had been, or no longer were, in the military." *New v. Cohen*, 129 F.3d 639, 644 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1048 (1998).[9] Because the Army insisted that the petitioner was a member of the military at the time he allegedly committed the charged offense, the D.C. Circuit held that the issue should be addressed in the first instance by military courts, which "are capable of, and indeed may have superior expertise in, considering challenges to their jurisdiction over disciplinary proceedings." *Id.* at 645. The court explained:

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[9] *New* involved a man facing court martial proceedings for failing to obey an order. He sought to avoid the exhaustion of remedies requirement by claiming that he was not a member of the armed forces. He claimed in his habeas petition that the order given to him (to wear insignia for the United Nations Peacekeeping Force) not only was illegal but also had the effect of relieving him of all further commitments to the military – thereby making him a civilian. *New*, 129 F.3d at 645. The D.C. Circuit rejected that contention as a basis for avoiding abstention; it held that exhaustion requirements are excused only where "it has been undisputed that the persons subject to the court-martials either never had been, or no longer were, in the military." *Id.* at 644.

> For this court to hold otherwise would produce a rule allowing service members to circumvent the exhaustion requirement merely by contending, without reference to an applicable statute or regulation, that an action by the military "released" them from further service. This result would encourage premature federal judicial intervention in the affairs of the military, a scenario that was expressly rejected by the Court in [*Schlesinger*].

Id.

In *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 876-77 (1994), this Court rejected a standard that would have based a party's entitlement to immediate judicial review of a claimed right not to stand trial, on an evaluation of whether the claimed right had been clearly established.[10] The Court explained:

> To ground a ruling here on whether this settlement agreement in terms confers the prized "right not to stand trial" (a point [the plaintiff] by no means concedes) would flout our own frequent admonitions . . . that availability of collateral order appeal must be determined at a higher level of generality.

Id. (citation omitted). Recognizing the ease with which parties can assert that any settlement agreement constitutes a "right not to stand trial," the Court concluded that the plaintiff's claimed entitlement to immediate judicial review should be

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[10] At issue in *Digital Equipment* was whether the collateral order doctrine permitted interlocutory appeal from an order reinstating a lawsuit, an order entered despite the defendant's claim that the parties had executed a settlement agreement granting the defendant "an express right not to stand trial." *Id.* at 876.

decided based "on the assumption that if [the plaintiff] prevailed here, *any* district court order denying effect to a settlement agreement could be appealed immediately." *Id.* at 877.

New's and *Digital Equipment*'s logic dictates that, contrary to the D.C. Circuit's conclusion, Hamdan's right to immediate judicial review of his "jurisdictional" claims should not turn on whether those claims are "substantial" or "insubstantial." Rather, the right to immediate review must be judged at a higher level of generality; either *all* military commission defendants are entitled to immediate judicial review of challenges to a commission's right to try them, or *none* are. For all the reasons stated in earlier sections of this brief, *amici* respectfully submit that abstention is appropriate in *every* such case in which the government alleges in good faith that the defendant is an enemy combatant, regardless of the strength of the defendant's claim that he is not subject to trial before a military commission.

D. Cases Relied on by Hamdan and the Courts Below Are Distinguishable

In support of their contention that the federal courts should not abstain from pre-trial review of Hamdan's claim, Hamdan and the courts below rely heavily on this Court's decision in *Quirin*. *See, e.g.*, Pet. App. 3a (D.C. Circuit wrote, "*Ex parte Quirin*, 317 U.S. 1 (1942), in which captured German saboteurs challenged the lawfulness of the military commission before which they were to be tried, provides a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions.")

Quirin cannot bear that weight. Although it is true that the Court exercised jurisdiction in the case prior to completion of military commission proceedings, it did so without any objection from the federal government. Not surprisingly, therefore, the Court's decision contains absolutely no discussion regarding whether federal court intervention was premature. No one, of course, challenges the jurisdictional "power" of federal courts to entertain challenges such as those raised by the German saboteurs; as explained by *Schlesinger*, the only issue in such cases is "whether consistently with the principals governing equitable relief the court may exercise its remedial powers." *Schlesinger*, 420 U.S. at 754. Given that the Court granted no equitable relief to the German saboteurs, that its opinion contained no discussion of the appropriateness of such relief, and that the government never raised the issue, *Quirin* cannot properly be classified as "a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions."

Quirin's significance is further diminished when one considers the unusual time constraints under which the Court was operating. By the time the Court granted certiorari (from the district court's denial of a motion for leave to file a habeas petition) and began consideration of the case, the military commission had already finished taking testimony; and the Court's exercise of jurisdiction did not serve to delay commission proceedings. The Court was well aware that the saboteurs faced imminent execution. Indeed, by hearing the case before judgment had been rendered by the commission, the Court may well have been acting in the government's interests: it was able to complete its review and quickly issue a per curium decision denying relief on the day after oral

argument – thereby ensuring that post-conviction court review would not delay the defendants' execution.[11]

The D.C. Circuit's reliance on *Abney v. United States*, 431 U.S. 651 (1977), is similarly misplaced. Pet. App. 3a. *Abney* held that, under the collateral order doctrine, a criminal defendant may appeal a double jeopardy claim without waiting for the conclusion of his trial. The D.C. Circuit interpreted *Abney* as creating a generalized right to immediate judicial review of a claim of a "right not to be tried by a tribunal that has no jurisdiction." But as *Schlesinger*, *Digital Equipment*, and *Will* make clear, no such generalized right exists. Rather, the right to insist on immediate judicial review only arises when a party can demonstrate that "some particular value of a high order" is at stake. *Will*, 126 S. Ct. at 959. The party must demonstrate a compelling interest not in "mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest." *Id.* *Abney* holds that violation of a defendant's double jeopardy rights meets that standard. So too does an immunity claim. *See, e.g.*, *Harlowe v. Fitzgerald*, 457 U.S. 800 (1982). But Hamdan concedes that he "does not seek immunity from military trial." Hamdan Surreply Regarding Respondents' Motion to Dismiss at 7 n.11. He contends that if forced to endure a trial before a military commission, he "will suffer a harm comparable to that suffered" in *Schlesinger*. *Id*. If so, abstention in this case is fully appropriate: *Schlesinger* held that the federal courts should abstain from hearing Captain Councilman's challenge to the military court's jurisdiction, despite his claim (similar to Hamdan's) that he should not be forced to endure an unwarranted trial.

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[11] By the time that the Court issued its complete opinion in October 1942, six of the eight saboteurs had already been executed.

Equally unavailing to Hamdan are cases that permit *civilians* to assert pre-trial jurisdictional challenges to military proceedings. *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), and *Reid v. Covert*, 354 U.S. 1 (1957), stand for the proposition that U.S. citizens who (even the military concedes) are *not* members of the U.S. armed forces need not await completion of court-martial proceedings before seeking habeas relief.[12] *Toth* and *Reed* have no application here, because prosecutors contend that Hamdan is an enemy belligerent who, as an al Qaeda member, conspired to murder Americans. If that contention is correct, then Hamdan has no basis for objecting to the exhaustion requirement. Indeed, in light of their special expertise, military commissions are much better equipped than federal courts to make the initial determination on that issue.

Finally, *Parisi v. Davidson*, 405 U.S. 34 (1972), stands for the proposition that abstention is inappropriate in cases involving military personnel who seek relief (discharge from the Army) that a military court has no power to grant. Because military commissions are empowered to grant Hamdan the relief he seeks (dismissal of all charges), there is no similar rationale for exempting him from the exhaustion requirement.

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[12] In *Toth*, the petitioner was a man who had been discharged from the armed services before court martial proceedings had been initiated. In *Reed*, the petitioners were the wives of U.S. servicemen who faced court martials for having killed their husbands.

E. Congress Expressed Its Preference for Abstention by Adopting the DTA

Section 1005(e)(3) of the DTA, adopted by Congress in December 2005, grants the D.C. Circuit "exclusive jurisdiction" to determine the validity of final decisions issued in connection with military commission proceedings conducted with respect to detainees held at Guantanamo Bay, Cuba. Section 1005(e)(1) of the DTA purports to eliminate all federal court jurisdiction, including habeas corpus jurisdiction (except as provided for in § 1005(e)(2) & (3)), over claims filed by Guantanamo Bay detainees against the United States or its agents "relating to any aspect" of their detention.

The parties disagree regarding whether § 1005(e) deprives the Court of jurisdiction to hear this case. The government contends that the case should be dismissed for lack of subject matter jurisdiction; not surprisingly, Hamdan disagrees.

Regardless of how the Court resolves the subject matter jurisdiction issue, there can be little dispute that Congress's adoption of the DTA strengthens the argument that abstention is appropriate. By adopting a statutory scheme that attempts to channel judicial review of military commission proceedings into post-trial appeals to the D.C. Circuit, Congress has expressed its preference that the federal courts follow the abstention model in conducting such review.

The rationales articulated in *Schlesinger* for deferring judicial action in the area apply just that much more strongly now that Congress has made known its desire that the judiciary stay its hand. In particular, abstaining avoids potentially needless conflict between the legislative and judicial branches of the federal government, by permitting military officials to

decide legal issues in a manner that may obviate the need for further appeals. Moreover, by providing a congressional seal of approval for at least some form of military commission, the DTA undermines whatever argument Hamdan may have had that immediate judicial review is crucial to rein in unchecked Executive Branch activity that allegedly threatens civil liberties.

Amici do not mean to suggest that abstention requires retroactive application of the DTA and absolute judicial acceptance of § 1005(e)(3)'s limitations on appellate review of military commission proceedings. To the contrary, abstention speaks only to the timing of judicial review, not to the scope of review. *Amici* ask only that the Court direct the lower federal courts to defer their review of military commission proceedings until those proceedings are complete. At that point, anyone convicted of violating the law of war would be free to argue for an expansive scope of review.

II. At Most, Only Hamdan's Constitutional Challenge to the President's Authority Is Arguably Exempt from Exhaustion Requirements

A. Only Hamdan's Constitutional Challenge Qualifies as the Type of "Jurisdictional" Issue That Traditionally Has Been Cognizable in Habeas Review

Even accepting the D.C. Circuit's standard for permitting pre-trial challenges to military commission proceedings – such challenges are permitted if they raise a "substantial" claim that the commission lacks jurisdiction over the defendant – the vast majority of Hamdan's claims do not meet that standard. Under that standard, only Hamdan's claim that the President violated constitutional separation-of-power principles by attempting to

establish military commissions is arguably exempt from abstention requirements. Hamdan should be required to raise all remaining claims initially with the military commission and to bring them into federal court only in connection with a challenge to any criminal conviction.

As *Schlesinger* notes, Congress generally has not permitted *any* judicial review of military trial proceedings except for habeas claims that the military court acted outside the "scope of its jurisdiction." 420 U.S. at 746. Thus, in the absence of a statute providing otherwise, quite apart from the timing of a judicial challenge, Hamdan would normally be limited in the course of such challenges to raising issues going to the military commission's jurisdiction. The D.C. Circuit recognized that limitation in its treatment of Hamdan's claim under Common Article 3 of the 1949 Geneva Conventions. In ruling that abstention barred consideration of the Common Article 3 claim, the D.C. Circuit said that that claim could not be deemed jurisdictional:

> Unlike his argument that the military commission lacked jurisdiction, his argument here is that the commission's procedures – particularly its alleged failure to require his presence at all stages of the proceedings – fall short of what Common Article 3 requires. The issue thus raised is not *whether* the commission may try him, but *how* the commission may try him. That is by no stretch a jurisdictional argument. No one would say that a criminal defendant's contention that a district court will not allow him to confront the witnesses against him raises a jurisdictional objection. Hamdan's claim therefore falls outside the recognized exception to the *Councilman* doctrine. Accordingly, comity would dictate that we defer to the ongoing military proceedings. If Hamdan were convicted, and if Common Article 3

> covered him, he could contest his conviction in federal court after he exhausted his military remedies.

Pet. App. 13a.

Amici wholeheartedly endorse the D.C. Circuit's application of abstention to Hamdan's Common Article 3 claims. But what the D.C. Circuit failed to understand is that its rationale applies equally strongly to virtually all of Hamdan's claims. In particular, virtually all of Hamdan's claims under the Third Geneva Convention and the UCMJ challenge the manner in which the commission intends to try him (*e.g.*, the failure to require Hamdan's presence at all stages of the proceeding is alleged to violate the Third Geneva Convention in addition to violating Common Article 3) rather than the commission's power to try him.

Hamdan's efforts to dress up procedural challenges in the guise of jurisdictional challenges is transparent. For example, Hamdan contends (and the district court accepted) that the military is violating his rights under the Third Geneva Convention because: (1) under the Third Geneva Convention, he is entitled to the rights of a POW; (2) a POW is entitled to certain protections, including the right not to be subjected to a war crimes trial before a military commission that affords him fewer procedural rights than it affords American soldiers facing courts martial; and therefore (3) the military commission lacks jurisdiction to conduct its planned proceedings because it does not intend to afford him the same rights that would be afforded an American soldier facing a court martial. But that is no more a "jurisdictional" argument than is Hamdan's Common Article 3 claim. Once Hamdan concedes (as he must) that the Third Geneva Convention does not prohibit trials of POW before military commissions, his argument is exposed as nothing more than a dispute over the

procedures to be employed by his commission. As the D.C. Circuit explained, a claim cannot be deemed "jurisdictional" if it goes to "how the commission may try him" rather than "whether the commission may try him." Pet. App. 13a.

Amici concede that Hamdan's separation-of-powers claim is "jurisdictional" under the abstention standard adopted by the D.C. Circuit. If, as Hamdan contends, Congress has not authorized the President to operate military commissions to try enemy combatants charged with war crimes and the President lacks inherent authority to operate military commissions on his own, then the military commission lacks jurisdiction over Hamdan; and, under the D.C. Circuit standard, the federal courts should not abstain from addressing Hamdan's contention, but rather should hear that contention without waiting for the completion of military commission proceedings. But even accepting the D.C. Circuit's "substantial" jurisdictional challenge exception to *Schlesinger* abstention, the Court should order abstention for the remainder of Hamdan's claims.

B. Hamdan's Claim That the President Lacks Constitutional Authority to Establish Military Commissions Is Without Merit

In the lower courts, Hamdan downplayed his challenge to the President's authority to establish military commissions. That lack of emphasis is reflected in the district court's decision: while ruling strongly in Hamdan's favor on a number of key issues, the district court rejected Hamdan's separation-of-powers argument with a minimum of discussion. Pet. App. 25a-28a. Indeed, several of Hamdan's supporting *amici* in this Court concede that the President is authorized to create military commissions and focus their fire instead on the procedures governing the conduct of military commissions.

Although Hamdan's brief in this Court places significantly increased emphasis on the separation-of-powers arguments, the reason for his previous reluctance is readily apparent: the argument is quite weak. Respondents' brief thoroughly explains why *Quirin, Yamashita,* and *Eisentrager* fully support the constitutionality of the Military Order and why both the AUMF and Sections 821 and 836 of the Uniform Code of Military Justice demonstrate congressional authorization for/acquiescence to that Order. Rather than repeating all those arguments here, *amici* wish to highlight a few brief points.

First, the argument that President Bush is authorized to establish military commissions is considerably *stronger* than was the argument that President Franklin Roosevelt was authorized to do so in 1942, yet President Roosevelt's actions were upheld in *Quirin.* *Quirin* held that Article 15 of the Articles of War constituted "explicit" congressional authorization for the President to establish military commissions. *Quirin*, 317 U.S. at 28-29. When the UCMJ was adopted several years later in 1950, Article 15 was carried forward word for word and is now codified at 10 U.S.C. § 821, the principal statutory authority upon which President Bush premised the Military Order. As two leading constitutional scholars have explained, Congress's re-enactment of Article 15 against the background of *Quirin* strongly suggests that Congress accepted *Quirin*'s interpretation of the provision. Jack Goldsmith and Cass R. Sunstein, "Military Tribunals and Legal Culture: What a Difference Sixty Years Makes," 19 CONST. COMMENTARY 261, 275 (2002).

Second, Hamdan insists that he is not subject to trial by a military commission because he is a civilian. Although Appellants disagree with that characterization, it is undisputed that Hamdan never wore a military uniform and never was part

of a regularly constituted army. Nonetheless, the Supreme Court's military commission decisions, particularly *Quirin* and *Eisentrager*, make clear that military commission jurisdiction over enemy belligerents is not limited to the prosecution of those belligerents who are members of regularly constituted armies. For example, the petitioners in *Eisentrager* claimed to be civilian employees of the government of Nazi Germany who found themselves stranded in China at the end of World War II. *Eisentrager*, 339 U.S. at 765. The Supreme Court nonetheless held that their employment status was "immaterial" and declined their petition for relief from prison sentences imposed on them by a military commission. *Id.*

Finally, it is virtually impossible to square Hamdan's contention that Congress has not authorized military commissions with its recent adoption of the DTA. Section 1005(e)(3) provides detailed rules governing federal court jurisdiction over challenges raised by Guantanamo Bay detainees against any convictions imposed by military commissions. The adoption of such rules can only mean that Congress has accepted the existence and legitimacy of such commissions. Adoption of § 1005(e)(3) does not suggest, of course, that Congress approves of procedures adopted for the conduct of commission proceedings. But for all the reasons stated above, the Court should abstain from considering Hamdan's challenge to those procedures.

CONCLUSION

Amici curiae request that the Court affirm the judgment of the court of appeals.

Respectfully submitted,

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