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I. Interest of the Amicus[1]

The Office of Chief Defense Counsel, Office of Military Commissions was created by Department of Defense Military Commission Order No. 1, which the Secretary of Defense originally issued on March 21, 2002.[2] The Chief Defense Counsel is tasked with detailing "one or more Military Officers who are judge advocates of any United States armed force to conduct the defense for each case before a Commission."[3] This office is thus charged with providing representation in all current and future military commission cases.

II. Summary of the Argument

The certiorari petition raises systemic issues that challenge the military commission system's very existence. These issues affect every military commission case and will persist regardless of the outcome of petitioner's particular case.

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[1] This amicus brief is filed with the consent of the parties. The letters granting that consent have been lodged with the Clerk's Office. No counsel for a party authored this brief in whole or in part. No other person or entity made a monetary contribution to the preparation or submission of this brief.

[2] Dep't of Defense, Military Commission Order No. 1, para. 4.C (March 21, 2002), *available at* http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf (last visited Sept. 2, 2005).

[3] Dep't of Defense, Military Commission Order No. 1 (Revised), para. 4.C(2) (Aug. 31, 2005), *available at* http://www.defenselink.mil/news/Sep2005/d20050902order.pdf (last visited Sept. 3, 2005) [hereinafter MCO No.1].

The central constitutional defect in the system's creation is that the Executive Branch's unilateral prescription of the commission procedures and the substantive law the commissions apply violates the central principle of our federal government's structure: the separation of powers. Additionally, the procedures that the Executive Branch adopted are deficient, providing far less protection than comparable proceedings before courts-martial or federal district courts.

The issues presented in the certiorari petition should be resolved now, rather than after a commission's decision has become final. The final decision on a commission case is a discretionary Executive Branch function with no time limits. Waiting for such a final decision before providing habeas relief could effectively thwart the ability of those tried by military commissions to vindicate their liberty interest. The Executive Branch's record in carrying out a somewhat comparable discretionary task under the Uniform Code of Military Justice—presidential action on death penalty cases following completion of direct appeal—is notable for extraordinary delay. Two military death sentences are currently ripe for presidential action, one of which has been awaiting presidential review for four years and the other for nine years. This experience suggests that lengthy delay is likely when the Executive Branch is responsible for rendering a final decision in a criminal case. This Court's review of the issues this case presents should not be delayed, possibly for many years, until the Executive Branch makes a final decision in a commission case. Having already been confined for almost four years, petitioner and other individuals subject to trial by military commissions should not face further lengthy and indeterminate delay before this Court decides whether the

Executive Branch's creation of the military commission system was constitutionally permissible.

Finally, merely as a result of being designated as eligible for trial by commission, a detainee is barred from the administrative review procedures that have resulted in the release or transfer of almost one-third of the detainees held at Guantanamo Bay. The invalidation of the commission process could result in universal access to these review procedures.

III. Reasons for Granting the Writ

THIS COURT SHOULD RESOLVE THE SYSTEMIC CHALLENGE TO THE MILITARY COMMISSION PROCESS NOW RATHER THAN WAITING INDEFINITELY FOR A COMMISSION CASE TO BECOME FINAL.

This is one of those few "extraordinary cases" of "peculiar gravity and general importance" that merit a grant of certiorari even before the proceedings below are final.[4] In 1942, this Court heard *Ex parte Quirin* contemporaneously with the commission trial process, during a gap between the parties' presentation of their cases and closing argument.[5] This case is even more pressing than *Ex parte Quirin*, since the presidential order at issue there applied to only "a handful of known saboteurs" while President Bush's military order at

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[4] *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

[5] *Ex parte Quirin*, 317 U.S. 1, 23 (1942).

issue in this case may extend to "a large population of unknowns, not yet apprehended or charged."[6] Certainly no less than in 1942, the "public importance of the questions" presented by petitioner, as well as "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," suggest that "the public interest require[s] that [this Court] consider and decide those questions without any avoidable delay."[7]

A. The certiorari petition presents systemic issues affecting all military commission cases

The certiorari petition presents systemic issues. They apply not only to petitioner's case, but to all cases that have been or will be referred for trial by military commission. Even Petitioner's total acquittal would not eliminate the need to resolve these issues because they will continue to arise in every commission case. Justice O'Connor recently observed in the principal dissent in *Meddelin v. Dretke* that it seems "unsound to avoid questions of national importance when they are bound to recur."[8] The certiorari petition in this case presents questions that are certainly of national importance and that will recur in every military commission case.

Regardless of whether this Court's ruling would affirm or reverse the District of Columbia Circuit's opinion,[9] the

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[6] LOUIS FISHER, NAZI SABOTEURS ON TRIAL 160 (2003).
[7] *Ex parte Quirin*, 317 U.S. at 23.
[8] 125 S. Ct. 2088, 2096 (2005) (O'Connor, J., dissenting).
[9] *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2004).

military commission system's viability should be resolved at the threshold of its operation. The issues this case presents are unlike those that typically come before this Court in federal, state, or military criminal cases. Even watershed systemic rulings such as *Apprendi v. New Jersey*[10] and *Gideon v. Wainwright*[11] affected only discrete aspects of the judicial system. This case, on the other hand, deals with an entire system's validity. A ruling for the petitioner on the first question presented would eliminate the current commission system. A ruling for the petitioner on the second question presented could also lead to that result.

The military commission system is the flawed product of an unconstitutional process. The Executive Branch unilaterally created the "rules of substantive law as well as procedures"[12] for these commissions. Executive Branch officials also unilaterally hand-picked the presiding officer, members, and review panel[13] who will apply these substantive laws and procedural rules. The result is that the President "and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials."[14] As this Court warned in *Reid v. Covert*, "Such blending of functions in one branch of the Government is the

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[10] 530 U.S. 466 (2000).
[11] 372 U.S. 335 (1963).
[12] *Reid v. Covert*, 354 U.S. 1, 38 (1957).
[13] *Cf.* Uniform Code of Military Justice art. 142(b)(1), 10 U.S.C. § 942(b)(1) (2000) (providing that the judges of the Court of Appeals for the Armed Forces "shall be appointed from civilian life by the President with the advice and consent of the Senate").
[14] *Reid*, 354 U.S. at 38-39.

objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers."[15] By shunning Congress throughout the military commission system's creation and implementation, the Executive Branch failed to heed that warning. The Executive Branch's unilateral creation of the military commission system contrasts markedly with Congress's creation of and ongoing attention to the federal judicial structure and the court-martial system, as well as the substantive law that those two established systems apply.

The commission system that the Executive Branch created is inferior to the federal criminal justice systems that Congress created. One fundamental problem with the commission system's structure is it is subject to continuous revision—even after trials have already begun.[16] Indeed, during the brief interlude between the filing of the certiorari petition and the respondents' deadline for filing their brief in opposition, the Secretary of Defense has revised the principal order governing the commission process.[17] Such ad hoc and ex post facto revisions interfere with defense counsel's ability to prepare a defense and to advise clients concerning important matters. Tactical decisions that are sound one day may become unwise the next in light of some new change to the system.

But just as bad, or worse, than the process that created the military commission system's protean rules are those rules

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[15] *Id.* at 39.

[16] MCO No. 1, *supra* note 3, at para. 11 ("The Secretary of Defense may amend this Order from time to time.").

[17] *See generally id.*

themselves. Even after the August 31, 2005 modifications, military commissions remain markedly inferior to the United States district court proceedings that have tried both citizens and non-citizens for terrorism charges in the past, and even contemporaneously with the military commissions.[18] The Executive Branch's decision to create a new, and inferior, system to handle cases that could be tried by United States district courts cries out for review. As Chief Judge William G. Young of the United States District Court for the District of Massachusetts has observed, "the very act of creating the apparatus for trials before military tribunals . . . has the effect of diminishing the American jury, once the central feature of American justice, to nothing more than a 'parallel track.'"[19]

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[18] *See, e.g.*, *United States v. Reid*, 369 F.3d 619, 619 (1st Cir. 2004) (noting that on October 4, 2002, Richard Reid (the would-be "shoebomber") "pleaded guilty to eight terrorism-related offenses" and was sentenced to life in prison on January 30, 2003); *United States v. Lindh*, 227 F. Supp. 2d 565 (E.D. Va. 2002) (sentencing John Walker Lindh to, *inter alia*, 20 years of confinement for serving the Taliban in a manner that involved or intended to promote terrorism); *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 1670 (2005); *United States v. Bin Laden*, No. S7R 98 Cr. 1023 (KTD), 2005 U.S. Dist. LEXIS 1669, at *2 (S.D.N.Y. Feb. 7, 2005) (noting that on October 18, 2001, four defendants convicted of offenses involving the 1998 bombings of the U.S. embassies in Kenya and Tanzania were sentenced to life imprisonment).

[19] *United States v. Reid*, 214 F. Supp. 2d 84, 99 n.11 (D. Mass. 2002), *appeal dismissed*, 369 F.3d 619 (1st Cir. 2004).

Military commissions are also markedly inferior to the general court-martial proceedings that Congress has expressly authorized "to try any person who by the law of war is subject to trial by a military tribunal" and to "adjudge any punishment permitted by the law of war."[20] The military justice system—with its established procedures, expert appellate courts,[21] and opportunity for direct review by this Court[22]—provides a ready alternative to trial by military commission if petitioner were to prevail in this case.

The military commission system's flaws include the following:

- Non-disruptive defendants can be (and in two cases—petitioner's and *United States v. Hicks*—have already been) excluded from their own commission proceedings, in contrast to the rights that civilian and court-martial defendants receive under the Confrontation Clause and Article 39 of the Uniform Code of Military Justice.[23]

- The military commission system's orders, instructions,

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[20] Uniform Code of Military Justice art. 18, 10 U.S.C. § 818 (2000).

[21] *See Noyd v. Bond*, 395 U.S. 683, 695 (1969) (noting that Congress assigned the "primary responsibility for the supervision of military justice in this country and abroad" to the Court of Military Appeals, which has since been renamed the Court of Appeals for the Armed Forces).

[22] *See* 28 U.S.C. § 1259 (2000).

[23] 10 U.S.C. § 839(b) (2000) (providing that except for members' deliberation and voting, all proceedings "shall be in the presence of the accused").

and presiding officer's memoranda adopt neither the Federal Rules of Evidence nor the Military Rules of Evidence. These rules were developed through extensive inter-branch analysis and public comment to ensure "that the truth may be ascertained and proceedings justly determined."[24] Yet the commission system's creators jettisoned the wisdom of the Federal Rules' drafters, and even the common law rules of evidence, in favor of a seat-of-the-pants "probative value to a reasonable person" standard.[25] Additionally, the commissions' procedures allow a panel of lay members to overturn the presiding officer's rulings on the admissibility of evidence.[26] In 1920, Congress amended the Articles of War to provide "that the law member ruled finally on questions of admissibility of evidence."[27] So by parroting President Franklin D. Roosevelt's 1942 order establishing a military commission to try eight German saboteurs who had infiltrated the United States,[28] the President's 2001 Military Order

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[24] *See* Fed. R. Evid. 102; Mil. R. Evid. 102.

[25] President of the United States, Military Order of November 13, 2001 at § 4(c)(3), 66 Fed. Reg. 57,833, 57,835 (Nov. 16, 2001) [hereinafter PMO]; MCO No. 1, *supra* note 3, at para. 6.D(1).

[26] *Id.*

[27] *United States v. Weiss*, 36 M.J. 224, 228-29 (C.M.A. 1992), *aff'd*, 510 U.S. 163 (1994); *see also* Articles of War of 1920, ch. 227, art. 31, 41 Stat. 759, 793.

[28] President of the United States, Appointment of a Military Commission, Exec. Order No. 9185, 7 Fed. Reg. 5103 (July 2, 1942); *see generally* FISHER, *supra* note 6, at 159-60 (discussing similarities and differences between President Roosevelt's 1942 and President Bush's 2001 military commission orders).

adopted a method for determining the admissibility of evidence that Congress repudiated for court-martial practice within two years of World War I's end.

- Military commissions have no rule excluding statements obtained by torture or other coercive means. When it enacted the Uniform Code of Military Justice, Congress was so concerned about the prospect of coerced confessions that it adopted an exclusionary rule barring their introduction at courts-martial.[29] Congress enacted that legislation six years after this Court issued the following ringing condemnation of the use of coerced confessions:

> The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that

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[29] Uniform Code of Military Justice art. 31(d), 10 U.S.C. § 831(d) (2000) ("No statement obtained . . . through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against [the accused] in a trial by court-martial.").

kind of government.[30]

The commission system's design puts that pledge to the test.

- While no current commission case is death-eligible, in future commission cases the accused may be sentenced to death by a panel with as few as seven members.[31] This compares unfavorably with civilian practice: every civilian capital jurisdiction requires twelve-member juries in capital cases.[32] Additionally, Congress generally requires a minimum of twelve members for capital courts-martial.[33]

- In marked contrast to this Court's ruling in *Faretta v. California*[34] and Rule for Courts-Martial 506(d),[35] the

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[30] *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944).

[31] MCO No. 1, *supra* note 3, at para. 6.G ("Only a Commission that includes [the Presiding Officer and] at least seven other members may sentence an Accused to death.").

[32] *See* Fed. R. Crim. P. 23(b); Stanton D. Krauss, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing*, 64 IND. L.J. 617, 644 (1989) (noting that "[e]very state that delegates capital sentencing decisions to juries uses twelve person juries for this purpose").

[33] Uniform Code of Military Justice art. 25a, 10 U.S.C.A. § 825a (West Supp. 2005).

[34] 422 U.S. 806, 817 (1975) ("Forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.").

[35] Manual for Courts-Martial, United States (2005 ed.) ("The accused may expressly waive the right to be represented by counsel and may thereafter conduct the defense personally.").

commission system forbids *pro se* representation.[36] Despite the United States' express agreement that an individual being tried by military commission should have the right to represent himself *pro se* with the aid of stand-by counsel,[37] the Appointing Authority for military commissions has denied the request of one accused in a commission proceeding to represent himself.[38]

Invalidating the Executive Branch's unilateral creation of the current military commission system would allow Congress, in consultation with the Executive Branch, to develop a better system for trying suspected law of war violations—and one that is more in keeping with American concepts of justice.

B. Awaiting a final commission decision before resolving these issues may prove futile

Resolving the petition's systemic issues immediately, rather than awaiting a commission case's outcome, is

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[36] MCO No. 1, *supra* note 3, at para. 4.C(4).

[37] Prosecution Response to Defense Memo for Self-Representation and Right to Choice of Counsel, *United States v. al Bahlul* (Oct. 1, 2004), *available at* http://www.defenselink.mil/news/Oct2004/d20041006pro.pdf (last visited Sept. 1, 2005).

[38] Memorandum from Appointing Authority for Military Commissions to Chief Defense Counsel for Military Commissions (June 14, 2005), *available at* http://www.defenselink.mil/news/Aug2005/d20050811bahlul.pdf (last visited Sept. 1, 2005).

appropriate because the Executive Branch has complete discretionary control over when any commission's proceedings become final. This discretionary control is problematic because "federal courts normally will not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted."[39] By delaying resolution of those military remedies, the Executive Branch could effectively thwart habeas review. This danger is more than merely theoretical. The President's Military Order that established the commission system suggests antipathy toward habeas review. Under that order, the accused in a commission proceeding "shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in . . . any court of the United States."[40] While this language cannot actually foreclose habeas review,[41] it suggests a presidential intent to do so.

The President's Military Order provides that either the President himself or the Secretary of Defense, if designated by the President, will be the "final decision" authority.[42] If those officials were to act with the anti-habeas bias that Section 7(b) of the President's Military Order suggests, they could choose to delay a final decision until any deprivation of liberty

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[39] *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975).
[40] PMO, *supra* note 25, at § 7(b), 66 Fed. Reg. at 57,835-36.
[41] *See Ex parte Quirin*, 317 U.S. 1, 24-25 (1942) (upholding this Court's ability to resolve "petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission" despite language similar to *id*.).
[42] PMO, *supra* note 25, at § 4(8), 66 Fed. Reg. at 57,835.

arising from the commission proceedings is complete, thereby potentially foreclosing habeas review.[43]

Additionally, even in the absence of any such cynical manipulation, the delay required to exhaust remedies will likely be extreme. Consider the example of capital court-martial cases. Under Article 71(a) of the Uniform Code of Military Justice, "If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President."[44] There are currently two military death penalty cases in which appellate review is complete.[45] One has been awaiting presidential action since 1996[46] and the other since 2001.[47] With presidential approval of court-martial death sentences taking so many years to complete, it seems likely that individuals tried by military commission will be subject to post-trial deprivation of liberty for extensive periods before the decisions in their cases become final. Such delay is on top of almost four years that they have already spent in captivity. And, in stark contrast to the military justice system, which provides day-for-day sentence credit for any period of pretrial

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[43] *See Spencer v. Kemna*, 523 U.S. 1 (1998) (holding that once a confined habeas petitioner has been released, the habeas petition is moot unless the petitioner shows some concrete and continuing injury arising from the incarceration or conviction).

[44] 10 U.S.C. § 871(a) (2000).

[45] *See generally* Andrew Tilghman, *U.S. Military Executions Draw Closer*, HOUSTON CHRONICLE, May 1, 2005, at A1.

[46] *Loving v. United States*, 517 U.S. 748 (1996).

[47] *Gray v. United States*, 532 U.S. 919 (order denying certiorari), *reh'g denied*, 532 U.S. 1035 (2001).

confinement,[48] military commissions' sentences are not offset to account for pretrial detention.[49]

C. All detainees designated as eligible for trial by military commission have a liberty interest in immediate resolution of the issues in this case

Finally, granting certiorari is necessary to protect the liberty interests of those who have been and will be designated as eligible for trial by military commission. Almost one-third of the individuals who have been detained at Guantanamo Bay have been released or transferred.[50] The

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[48] *See United States v. King*, 58 M.J. 110, 113 (C.A.A.F. 2003) ("In *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984), this Court interpreted a Department of Defense Instruction as requiring day-for-day credit against confinement for time an accused spends in lawful pretrial confinement.").

[49] Dep't of Defense, Military Commission Instruction No. 7, para. 3.A (April 30, 2003) ("Detention associated with an individual's status as an enemy combatant shall not be considered to fulfill any term of imprisonment by a military commission."), *available at* http://www.defenselink.mil/news/May2003/d20030430milcominstno7.pdf (last visited Sept. 4, 2005).

[50] Dep't of Defense, News Release: Detainee Transfer Announced (Aug. 22, 2005), *available at* http://www.defenselink.mil/releases/2005/nr20050822-4501.html (last visited Sept. 2, 2005) (noting that 245 individuals who have been detained at Guantanamo Bay have been released or transferred while 505 remain detained there).

Department of Defense has created an annual administrative review procedure to identify those detainees who should be released or transferred.[51] But those administrative review procedures do not apply to individuals the President designates as subject to trial by military commission.[52] So merely by being designated as subject to the unconstitutional commission procedures, a detainee's ability to obtain relief through the administrative review procedures is abolished. If the commission system were to be declared unconstitutional, presumably the Executive Branch would then extend the same administrative review procedures to all Guantanamo Bay detainees. This highlights the importance of resolving the constitutionality of the Executive Branch's unilateral creation of the commission process sooner rather than later.

IV. Conclusion

The Queen of Hearts famously called for "Sentence first—verdict afterwards."[53] Military commissions should not be allowed to impose verdict and sentence first, with determination of the commission system's validity coming only afterwards. This Court should grant the petition for certiorari.

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[51] Dep't of Defense, Order: Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay, Cuba (May 1, 2004), *available at* http://www.defenselink.mil/news/May2004/d20040518gtmoreview.pdf.

[52] *Id.* at para. 2.E.i.

[53] LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 165 (Oxford University Press 1983).

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