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

BRIEF AMICUS CURIAE OF LOUISE DOSWALD-BECK, GUY S. GOODWIN-GILL, FRITS KALSHOVEN, VAUGHAN LOWE, MARCO SASSÒLI AND THE CENTER FOR INTERNATIONAL HUMAN RIGHTS OF NORTHWESTERN UNIVERSITY SCHOOL OF LAW IN SUPPORT OF PETITIONER

[Commissions – Fair Trial Standards]

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QUESTIONS PRESENTED

Amicus addresses two issues in this brief:

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

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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

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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-

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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]

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[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

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to their independence and impartiality.[37] They are subject to military performance evaluations,[38] and most have career aspirations within the military.[39] While the commissions are instructed to act "impartially,"[40] and officers' performance as commission members is not to be taken into account in their evaluations,[41] under international law these formal undertakings do not suffice to assure impartiality in fact or in appearance.[42]

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[37] *Cooper v. U.K.*, Eur. Ct. H.R., *supra* note 22, para. 117 (participation of civilians in key positions on British air force courts-martial found to be "one of the most significant guarantees of the independence of the court-martial proceedings"); *Incal v. Turkey*, App. No. 00022678/93, Eur. Ct. H.R. (June 9, 1998), para. 68 (independence and impartiality of Turkish National Security Courts were negated by fact that one of three members of these courts was a military judge, and such officers are "servicemen who still belong to the army, which in turn takes its orders from the executive." In addition, security courts' impartiality was open to doubt because they empowered members of one armed force to sit in judgment on their presumed enemies.); *Ocalan v. Turkey*, App. No. 00046221/99, Eur. Ct. H.R. (March 12, 2003), paras. 111-21 (even a single military judge on a three-judge tribunal, even for only a portion of the proceedings, tainted its impartiality and independence; among other factors, doubts were objectively justified by "the exceptional nature of the trial itself concerning a high-profile accused who had been engaged in a lengthy armed conflict with the Turkish military authorities . . . .").

[38] Military Commission Instruction No. 6, *Reporting Relationships for Military Commission Personnel* (Apr. 15, 2004), § 3(A)(8). Commission members "continue to report to their parent commands." *Id*. 3(B)(10), *available at* http://www.dod.mil/news/Aug2004/commissions_instructions.html (last visited Jan. 3, 2006).

[39] MCO No. 1, *supra* note 25, § 4(A)(3) requires that commission members be military officers, although they may include retired officers recalled to active duty.

[40] MCO No. 1, *supra* note 25, § 6(B)(2).

[41] MCI No. 6, *supra* note 38, § 3(B)(10).

[42] *Findlay v. U.K.*, App. No. 00022107/93, Eur. Ct. H.R. (Feb. 25, 1997), paras. 35, 75, 80 (Court expressed doubts as to whether impartiality was objectively justified even though British court-martial members were sworn to act "without partiality"); *Incal v. Turkey*, Eur. Ct. H.R., note 37 *supra*, paras. 27, 67, 73 (Court expressed doubts about impartiality even though Turkish military judges on National Security

(Continued on following page)

These pervasive structural defects are aggravated by public statements by the Commander-in-Chief, characterizing the prisoners at Guantanamo as "bad men,"[43] and by the Secretary of Defense, asserting that "the people in U.S. custody are . . . enemy combatants and terrorists who are being detained for acts of war against our country."[44] To counter these widely publicized statements would require strong structural guarantees of independence and impartiality. Yet the commissions are burdened by the opposite: strong structural interferences with their independence and impartiality.

The structural defects also mean that the lack of independence and impartiality cannot be cured by the particular composition of a commission or by disqualification of individual members. Doubts about the independence and impartiality of the commission trying petitioner Hamdan are objectively justified by its structural deficiencies. The military commission thus fails the international tests of independence and impartiality.

Courts were constitutionally guaranteed to be independent and to judge "according to their personal conviction, in accordance" with the law); *Grieves v. U.K.*, App. No. 00057067/00, Eur. Ct. H.R. (Dec. 16, 2003), paras. 84, 85, 88, 91 (career aspirations of British navy court-martial members were among the factors objectively justifying doubts about their independence and impartiality; although British government argued that naval Judge Advocate was "not reported on as regards his performance" in courts-martial, the European Court of Human Rights was unimpressed); *Polay Campos v. Peru*, U.N. Doc. CCPR/C/61/D/577/1994, U.N. H.R. Comm. (Jan. 9, 1998), para. 8.8 (Peruvian anti-terrorism tribunals violated a "cardinal aspect of a fair trial . . . that the tribunal must be, and be seen to be, independent and impartial," because they could include "serving members of the armed forces").

[43] *E.g.*, N. Watt, *Bush Aids Blair By Halting Trial of Britons in Guantanamo Bay*, The Guardian (London), July 19, 2003, at 8.

[44] Remarks by Secretary of Defense Donald Rumsfeld to Greater Miami Chamber of Commerce re: Prisoners being held at Guantanamo Bay, Miami, Fla., Feb. 13, 2004, *available at* www.defenselink.mil/transcripts/2004/tr20040213-0445.html (last visited Jan. 3, 2006).

The statutes referring to the jurisdiction of military commissions and authorizing the President to prescribe their procedures, 10 U.S.C. §§ 821 and 836(a), must be interpreted to contemplate only commissions which are independent and impartial. The commission trying petitioner Hamdan is neither.

2. The Military Commission Impermissibly Discriminates Against Non-U.S. Nationals.

Petitioner Hamdan is a citizen of Yemen. The President's Military Order authorizes trial by military commission of members of al Qaeda and other alleged international terrorists *only* if they are non-citizens of the U.S.[45] Thus, if a foreign national and an American both join al Qaeda, and both commit the same terrorist bombing, the foreign national can be tried by military commission, but the American cannot. The American would be entitled to trial either by a civil court with full judicial guarantees, or by a court-martial conducted in accordance with a whole panoply of fair trial rights set forth in the Uniform Code of Military Justice.[46]

This discrimination contravenes both international human rights and humanitarian law. ICCPR article 2.1 requires States Parties to recognize ICCPR rights "without distinction of any kind." Article 26 adds, "All person are equal before the law and are entitled without any discrimination to the equal protection of the law."[47] GC III as well as Protocol I are in accord.[48]

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[45] Presidential Military Order, *supra* note 18, § 2(a).

[46] Uniform Code of Military Justice, 10 U.S.C. §§ 831, 832, 839 and 846.

[47] Although a few ICCPR rights (such as the rights to residence within a country and to political participation) may be denied to non-citizens, "[t]he general rule is that each one of the rights of the [ICCPR] must be guaranteed without discrimination between citizens and aliens." U.N. H.R. Committee *General Comment No. 15: The position of aliens under the Covenant*, (April 11 1986), para. 2.

[48] "[A]ll prisoners of war shall be treated alike . . . , without any adverse distinction based on . . . nationality . . . ." GC III, *supra* note 6,

(Continued on following page)

Not all differences in treatment are discriminatory. Distinctions may be upheld "if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."[49] The President's Military Order, however, articulates no justification, let alone a "reasonable and objective" basis, for discriminating against foreign nationals. It justifies trial by military commission in order to "protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks," and because of the "danger to the safety of the United States and the nature of international terrorism."[50] But it makes no effort to explain why these rationales apply to foreign but not to American international terrorists, and none is apparent. On the contrary, where the subject matter jurisdiction of special courts for alleged terrorists "is not based on objective criteria but on the nationality of the suspected terrorists," the result is "discrimination based on nationality."[51]

Trial before a civil court with full judicial safeguards is not a right that may be afforded only to citizens. Under

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art. 16. Protocol I, *supra* note 10, states that "fundamental guarantees" must be provided "without any adverse distinction based upon . . . national origin . . . ." Art. 75.1.

[49] U.N. H.R. Committee *General Comment No. 18: Non-discrimination*, (Nov. 10, 1989), para. 13. The United States interprets articles 2.1 and 26 to permit distinctions "when such distinctions are, at minimum, rationally related to a legitimate governmental objective." 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992), Understanding II(1). It is not clear that this test differs from the "reasonable and objective" language used by the Committee. In any event, neither the President's Military Order nor logic explains why trying foreign but not American members of al Qaeda by military commission is "rationally related" to the legitimate objective of countering international terrorism.

[50] Presidential Military Order, *supra* note 18, §§ 1(e) and (f).

[51] U.N. Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, U.N. Doc. E/CN.4/2004/3 (Dec. 15, 2003) para. 67, *available at* http://www.ohchr.org/english/issues/detention/annual.htm (last visited Jan. 3, 2006).

ICCPR article 14.1, "[a]ll persons shall be equal before the courts and tribunals," and article 14.3 requires that each of its fair trial provisions must be provided "in full equality." The HRC elaborates: "Aliens shall be equal before the courts and tribunals . . . . Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights."[52]

A 2004 judgment of Britain's highest court confirms that the ICCPR prohibits discrimination against suspected terrorists who happen to be foreign nationals.[53] The Law Lords considered a British law which permitted prolonged detention without trial of suspected terrorists, but only if they were foreign nationals awaiting deportation, not British citizens.[54] The Lords ruled by an 8-1 vote that the law was "incompatible" with the European Convention on Human Rights ("ECHR"), as both disproportionate and discriminatory.[55] In an opinion endorsed by the clear majority, Lord Bingham ruled that article 14 of the ECHR and article 26 of the ICCPR, which Britain's Attorney General conceded are "to the same effect," are "inimical to the submission that a state may lawfully discriminate against foreign nationals by detaining them but not nationals presenting the same threat in a time of public emergency."[56]

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[52] *General Comment 15*, *supra* note 47, para. 7.

[53] *A(FC) and others (FC) v. Secretary of State*, and *X (FC) and another (FC) v. Secretary of State*, House of Lords, [2004] UKHL 56 (U.K.) accessible in LEXIS International Law Library, Cases file (last visited Jan. 3, 2006).

[54] *Id*. paras. 2, 3, 12, 14 and 46.

[55] *Id*. at 73 (Lord Bingham), 85 (Lord Nicholls), 139 (Lord Hope), 160 (Lord Scott), 190 (Lord Rodger), 234-39 (Baroness Hale), 240 (Lord Carswell). Lord Hoffman joined in the judgment on the separate ground that there was no emergency sufficient to justify Britain's derogation from the right to liberty. *Id*. at 50-53.

[56] *Id*. para. 63; *see also* paras. 73, 76, 136 and 139.

International humanitarian law likewise prohibits discrimination in trial procedures for foreign citizens. GC III grants foreign prisoners of war the right to trial before the "same courts" using the "same procedures" as apply to soldiers of the Detaining Power.[57] And the fundamental guarantees of article 75 of Protocol I must be provided "without any adverse distinction" based upon, among other grounds, "other status, or on any other similar criteria."[58] This prohibition of discrimination based on "other status" includes discrimination based on nationality.[59]

The use of military commissions exclusively against foreign nationals such as petitioner Hamdan, then, discriminates in violation of international humanitarian and human rights law, and thus also exceeds any authority under the statutes, as interpreted in light of minimum international standards.

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[57] GC III, *supra* note 6, art. 102.

[58] *Id.* art. 75.1.

[59] *See Gueye v. France*, U.N. H.R. Committee, Comm. No. 196/1985, Decision of the Human Rights Committee, 6 April 1989, CCPR/C/35/D/196/1985, para. 9.4 (nationality discrimination constitutes discrimination based on "other status" under art. 26 of the ICCPR); *A v. Sec'y of State*, House of Lords, note 53 *supra*, at para. 49 (Attorney General accepted that "other status" includes immigration status). *See also* Inter.-Am. C.H.R., Adv. Op. OC-18, *Juridicial Condition and the Rights of Undocumented Migrants* (2003), paras. 110 (principle of non-discrimination is *jus cogens*) and 121 (due process must be guaranteed to all without discrimination based on migratory status).

3. The Military Commission Procedures Impermissibly Deny Access to Secret Trial Proceedings and Documents.

(a) Exclusion from Secret Hearings Violates Petitioner Hamdan's Rights to Be Tried in His Own Presence and to Assistance of Counsel.

The procedures of the Hamdan military commission permit the exclusion of the accused from portions of his own trial. While generally the accused may be present at every stage of the trial, his presence must be "consistent with Section 6(B)(3)."[60] That section authorizes the commission's presiding officer – or the Appointing Authority – to close proceedings. Closure may be for such purposes as protecting classified information or intelligence sources, methods or activities, or "other national security interests." And it "may include a decision to exclude the Accused, [and] Civilian Defense Counsel . . . ."[61]

Such exclusion violates petitioner Hamdan's right under international humanitarian and human rights law "[t]o be tried in his presence . . . ."[62] The International Committee of the Red Cross ("ICRC") Commentary explains that "the important thing is that the defendant is present at the sessions where the prosecution puts its case, when oral arguments are heard, etc. In addition, the defendant must be able to hear the witnesses and experts,

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[60] MCO No. 1, *supra* note 25, § 5(K).

[61] *Id.* § 6(B)(3).

[62] ICCPR, *supra* note 3, art. 14.3 (d). Accord, Protocol I, *supra* note 10, art. 75.4 (e): "Anyone charged with an offense shall have the right to be tried in his presence." This includes, at minimum, all hearings in which the prosecutor participates. *E.g*. *Belziuk v. Poland*, App. No. 00023103/93, Eur. Ct. H.R. (Mar. 25, 1998) para. 39, *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=3675449&skin=hudoc-en (last visited Jan. 3, 2006).

to ask questions himself and to make his objections or propose corrections."[63]

By allowing prosecutors to present and argue secret evidence in the absence of the accused and civilian defense counsel, the military commission procedures breach not only this "important" element of the right to be tried in one's presence, but also the right to assistance of counsel under ICCPR article 14.3(d). Even though military defense counsel may be present at all sessions of the trial, this fails to cure the violation, because military counsel "may not disclose any information presented during a closed session to individuals [such as the accused and civilian defense counsel] excluded from such proceeding."[64]

The statute authorizing the President to prescribe procedures for military commissions, 10 U.S.C. § 836(a), can, and therefore must, be construed to require procedures that meet these minimum international standards for trial in one's presence and to assistance of counsel. Thus the procedures for the commission trial of petitioner Hamdan violate the statute.

(b) Denial of Access to Secret Documents Violates Petitioner Hamdan's Rights to Adequate Facilities for the Defense and to Equality of Arms.

The military commission procedures deny the accused and his counsel access to documents containing "protected information" – broadly defined – even if that evidence would be exculpatory. While the prosecution is directed to provide the defense with access to evidence that the prosecution intends to introduce at trial, as well as other evidence known to the prosecution that tends to exculpate

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[63] Claude Pilloud *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August* 1949 (Yves Sandoz et al. eds., International Committee of the Red Cross, 1987), art. 75, para. 3110.

[64] MCO No. 1, *supra* note 25, § 6(B)(3).

the accused, there are caveats to these requirements that substantially undercut them.[65] Such access is only to be granted where it is consistent with subsequent provisions relating to broadly defined "protected information."[66]

With respect to evidence the prosecution intends to introduce, the Presiding Officer may direct the deletion of "protected information" from documents before they are made available to the accused and his military and civilian defense counsel, "or" the substitution of either a "portion or summary" of the information or a statement of the facts that the omitted information tends to prove.[67] But even where a deletion is accompanied by a substitution, it is no cure, since neither the accused nor his counsel has any way to know whether the substitute fairly and adequately compensates for the denial of access to the original.

The accused and his civilian defense counsel are further excluded from access to protected information. Although military defense counsel must have some access to protected information actually admitted into evidence, at least through the kind of substitutes described above, neither the accused nor his civilian counsel are guaranteed even that much.[68]

With respect to exculpatory evidence – evidence the accused could use to demonstrate his innocence – the denial of access is even more severe. So long as the prosecution does not intend to introduce the evidence at trial, the prosecution is not required, and indeed is not allowed, to disclose to the accused or his counsel any protected

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[65] *Id.* § 5(E).

[66] This includes information which is "classified or classifiable;" or which is protected from disclosure by "law or rule;" or whose disclosure "may" endanger witnesses or participants in commission trials; or which concerns "intelligence and law enforcement sources, methods, or activities;" or which concerns "other national security interests." *Id*. § 6(D)(5)(a). *See also id*. § 9 (no unauthorized disclosure of "state secrets").

[67] MCO No. 1, *supra* note 25, § 6(D)(5)(b).

[68] *Id.*