IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA No. 1:04-cv-01519-JR
Judge James Robertson

Lieutenant Commander CHARLES SWIFT,
as next friend for SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD, United States Secretary of Defense;
JOHN D. ALTENBURG, Appointing Authority for Military Commissions,
Department of Defense; Brigadier General THOMAS L. HEMINGWAY,
Legal Advisor to the Appointing Authority for Military Commissions;
Brigadier General JAY HOOD, Commander Joint Task Force, Guantanamo, Camp Echo,
Guantanamo Bay, Cuba; and GEORGE W. BUSH, President of the United States,

Respondents.

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS' CROSS-MOTION TO DISMISS

Daniel J. Popeo
Richard A. Samp
(D.C. Bar No. 367194)
David Price
(D.C. Bar No. 426022)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

Page

Statutes, Regulations and Constitutional Provisions:

Page

Miscellaneous:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHARLES SWIFT,	)	
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INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* Washington Legal Foundation (WLF) and Allied Educational Foundation (AEF) are set forth more fully in the accompanying motion for leave to file this brief. Both WLF and AEF are non-profit organizations committed to ensuring that the federal government is not deprived of the tools necessary to wage an effective war against international terrorism. They 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 justice system is not up to the task. WLF and AEF also believe that, in the interests of comity and efficient administration of the courts, 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

The United States has been at war with al Qaeda since September 11, 2001, when al

Qaeda's murderous and unprovoked attack on American civilians resulted in nearly 3,000 deaths. Immediately thereafter, Congress enacted a resolution expressing its support of the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force ("AUMF"), Pub.L. No. 107-40, 115 Stat. 224 (2001). President Bush has determined that al Qaeda is such an organization; he has authorized the use of force against al Qaeda and its operatives in Afghanistan and throughout the world. The military campaign against al Qaeda continues unabated, and al Qaeda continues to pose a substantial threat to national security. Based in part on the authority granted him by the AUMF, the President on November 13, 2001 issued an order authorizing the establishment of military commissions to hear war crimes charges brought against those captured in connection with the war against al Qaeda. "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 5733 (Nov. 13, 2001). (This "Military Order" is attached as Exhibit B to the April 5, 2004 Declaration of Petitioner Charles Swift ("Swift Decl.")).

During the course of fighting in Afghanistan, the American military captured 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. Hamdan has been detained by the American military as an "enemy combatant" at Guantanamo Bay, Cuba since June

2002. *Id.* at 2-3.

On July 3, 2003, the President determined that Hamdan was subject to trial pursuant to the Military Order, based on his determination that there was reason to believe that Hamdan was a member of al Qaeda or was otherwise involved in terrorism directed against the United States. *See* Swift Decl., Exh. A. On December 18, 2003, Petitioner Swift was appointed as Hamdan's attorney in connection with all military commission proceedings. *Id.*, Exh. H. On July 9, 2004, Hamdan was charged with conspiracy to commit a variety of offenses triable by military commission, including attacking civilians, attacking civilian objects, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent, and terrorism. Hamdan's trial before a military commission will not occur for at least several more months.

On April 6, 2004, Swift filed this petition (as next friend for Hamdan) in U.S. District Court for the Western District of Washington for a writ of mandamus or, in the alternative, a writ of habeas corpus. The petition seeks, *inter alia*, an order preventing Hamdan's trial before a military commission and directing his release from Camp Echo at Guantanamo Bay. Swift contends that the Military Order violates separation-of-power principles of the Constitution (because, he alleges, Congress has not authorized the establishment of military commissions) and violates the Fifth Amendment because it singles out aliens for adverse treatment. On August 9, 2004, the district court in Washington transferred the case to this Court.

On July 23, 2004, Respondents moved to dismiss the petition, claiming *inter alia* that Swift lacks standing to sue on behalf of Hamdan and that only a writ of habeas corpus, not a writ of mandamus, is available to someone (like Hamdan) who is challenging the lawfulness of

his confinement.[1] On August 6, 2004, Respondents filed their consolidated return to the petition and also filed a cross-motion to dismiss. The August 6 motion asserts that the petition is premature until after completion of Hamdan's trial before a military commission, and denies the validity of each claim raised by the petition. *Amici* are filing this brief in support of Respondents' August 6 motion.

SUMMARY OF ARGUMENT

Amici agree with Respondents that the petition should not be permitted to go forward until after completion of Hamdan's trial before a military commission. *Amici* also agree that the Military Order establishing a system of military commissions violates neither separation-of-power principles nor the equal protection component of the Fifth Amendment. *Amici* do not address other issues raised by the petition and the return thereto.

Swift is asking this Court to enjoin a military commission from going forward with a scheduled war crimes proceeding. *Amici* do not doubt that the federal courts possess habeas corpus 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 military 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

[1] The Seattle district court granted Respondents' alternative motion to transfer without ruling on those portions of the motion that sought dismissal.

against alleged enemy belligerents.

President Bush's order establishing a system of military commissions does not infringe on Congress's constitutional prerogatives. Presidents throughout our nation's history have relied on their Commander-in-Chief powers to bring charges against alleged war criminals before military commissions. The existence of such a long-standing tradition is entitled to great weight in determining the extent of the President's powers. In any event, the claim that the President is acting without Congress's blessing is without merit. Several provisions of the Uniform Code of Military Justice (UCMJ), adopted by Congress in 1950, explicitly recognize the President's right to convene military commissions in appropriate circumstances. Moreover, in adopting the AUMF in 2001, Congress authorized the President to use "all necessary and appropriate force" against those involved in the September 11 attacks. Given our long history of using military commissions in dealing with enemy belligerents, there is every reason to believe that Congress contemplated that the President would deem the creation of such commissions to be "necessary and appropriate."

Finally, the President's decision to limit the jurisdiction of military commissions to charges against noncitizens does not violate Hamdan's Fifth Amendment rights. First of all, as a nonresident alien, Hamdan possesses few if any Fifth Amendment rights. Moreover, whatever constitutional rights he does possess most certainly do not include a right to receive the same treatment afforded similarly situated American citizens facing criminal charges. As Supreme Court decisions throughout our nation's history make clear, the Constitution and laws afford numerous protections to "We the people of the United States" without any expectation that those same protections will be afforded to those not a part of our community.

ARGUMENT

I. THE COURT SHOULD DISMISS THE PETITION AND STAY ITS HAND UNTIL AFTER COMPLETION OF MILITARY COMMISSION PROCEEDINGS

Swift filed his petition on behalf of Hamdan on April 6, 2004, asserting that trying Hamdan before a military commission violates the Constitution. Yet, it was not until July 9, more than three months later, that prosecutors first filed charges against Hamdan, and any trial before a commission is still months away. Moreover, any verdict against Hamdan is subject to elaborate post-trial review. Any guilty verdict and sentence are to be reviewed initially by a Review Panel, to determine whether material errors of law occurred. 32 C.F.R. § 9.6(h)(4). Further review is conducted by the Secretary of Defense and (unless the President has designated the Secretary of Defense as the final decisionmaker) by the President himself. 32 U.S.C. § 9.6(h)(5) and (6). Because any one of those reviews could result in Hamdan being exonerated, it makes little sense to permit Hamdan simultaneously to pursue this parallel effort to prevent his conviction by a military commission.

Schlesinger v. Councilman, 420 U.S. 738 (1975), is almost precisely on point, and requires that any federal court challenge by Hamdan/Swift to military commission proceedings must await completion of those proceedings. *Councilman* involved a U.S. Army captain who faced court martial proceedings 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 Supreme Court overturned a lower court injunction, finding that federal court review should be delayed until

after exhaustion of all military court proceedings. *Id.* 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.[2] The Court determined that the equities weighed in favor of delaying federal court intervention until after all court martial proceedings had been 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

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[2] "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.

corpus review of court martial proceedings are 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)).

Similarly, requiring Swift/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 acquitting Hamdan. Many of the issues raised by Swift/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. One major advantage of bringing alleged war criminals before military commissions instead of federal criminal courts is that historically military commissions have been able to complete their work far more quickly than can federal courts, with their far more elaborate procedural rules.[3] 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, thereby eliminating one of the perceived advantages of military commissions. 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).

Swift may be correct that "[i]t is highly unlikely that a military commission would declare itself unconstitutional." Pet. Br. 22. But pre-habeas exhaustion of all military remedies is required 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. As *Councilman* explained, "[E]ven if one supposed that Councilman's service-connection contention almost certainly would be rejected on any eventual military review, there was no reason to believe

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[3] *See, e.g., United States v. Moussaoui*, 365 F.3d 292 (4th Cir. 2004) (criminal proceedings delayed for several years over issues related to defense requests for access to al Qaeda witnesses in federal custody).

that his possible conviction inevitably would be affirmed." *Councilman*, 420 U.S. at 754.

Swift's reliance on *Parisi v. Davidson,* 405 U.S. 34 (1972), in this regard is misplaced. Pet. Br. 22. *Parisi* involved a habeas petition filed by a member of the Army who sought a discharge as a conscientious objector. After exhausting all administrative procedures established by the Army for seeking such a discharge, Parisi sought relief in federal court by filing a habeas corpus petition. The army then brought court martial proceedings against him for violating an order to go to Vietnam, an order he would not have been given had he been granted a discharge. The Supreme Court ruled that the habeas petition should not have been stayed pending completion of court martial proceedings, because the military court had no power to grant him the relief he sought: discharge from the Army. *Parisi*, 405 U.S. at 44. Even if he had been acquitted of the charge against him (disobeying an order), Parisi would still have been a member of the armed services. 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.

Swift contends that exhaustion should not be required unless, as in *Councilman*, there is absolutely no dispute that the petitioner is a noncivilian. Pet. Br. 20-21, 70. Because Hamdan insists that he has never been a member of al Qaeda and has never participated in its military operations, Swift argues that he ought to be permitted to pursue habeas corpus relief without Hamdan first being subjected to military proceedings. That argument is without merit, and no case so holds. *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.[4] *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 Swift/Hamdan have 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.

Moreover, the D.C. Circuit has explicitly rejected Swift's contention that exhaustion is not required when the parties disagree regarding whether a habeas petitioner is a civilian. In *New v. Cohen*, 129 F.3d 639 (D.C. Cir. 1997), a man facing court martial proceedings for failing to obey an order 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; 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. Because the Army insisted that New was still a member of the military at the time he disobeyed the order, 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

[4] 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.

superior expertise in, considering challenges to their jurisdiction over disciplinary proceedings." *Id.* at 645. The court explained:

> 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 *Councilman*.

Id. Similarly, were this Court to adopt the rule espoused by Swift, *any* alleged war criminal could avoid exhaustion requirements by simply denying that he is an enemy belligerent.

In sum, the Court should dismiss the petition and stay its hand until after the completion of military commission proceedings. Requiring Hamdan to forgo federal court review until after completion of those proceedings is mandated by case law and will not impose any injury on Hamdan other than that incident to every criminal proceeding.

II. BY ESTABLISHING A SYSTEM OF MILITARY COMMISSIONS, PRESIDENT BUSH HAS NOT VIOLATED SEPARATION OF POWERS

Swift argues that the American military lacks authority under the Constitution to try Hamdan before a military commission. Swift argues that military commissions are impermissible under the Constitution unless authorized by Congress and that Congress has not provided such authorization. He argues that President Bush's attempt to establish a system of military commissions without obtaining authorization from Congress violates the separation of powers doctrine. Pet. Br. 41-61.

Swift's argument is without merit. It gives short shrift to the President's Commander in Chief powers and ignores 230 years of American history, during which military commissions have been a significant component of military justice with or without explicit

congressional approval. Moreover, it incorrectly assumes that Hamdan has standing to assert that the President has exceeded his constitutional powers, despite Hamdan's status as a nonresident alien.[5]

The use of military commissions to try war criminals has a pedigree in this country that pre-dates the Constitution. 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. *Ex Parte Quirin*, 317 U.S. 1, 31 n.9 (1942). There is no record that General George Washington ever sought or received permission from the Continental Congress to convene military commissions.

The United States continued to use military commissions to try war criminals on a regular basis following adoption of the Constitution. In 1818, General Andrew Jackson resorted to military proceedings to try two Englishmen accused of inciting Creek Indians to wage war against the United States. Gary D. Solis, "Military Commissions and Terrorists," in *Evolving Military Justice,* 199 (Eugene R. Fidell and Dwight H. Sullivan, eds.). Military commissions tried numerous war crimes cases -- both on and off the battlefield -- during the

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[5] The D.C. Circuit has held repeatedly that "non-resident aliens . . . plainly cannot appeal to the protection of the Constitution or laws of the United States." *Pauling v. McElroy,* 278 F.2d 252, 254 n.3 (D.C. Cir. 1960). *See also People's Mojahedin Org. v. Dep't of State,* 182 F.3d 17, 22 (D.C. Cir. 1999) (a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise"); *32 County Sovereign Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002); *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003), *rev'd on other grounds sub nom., Rasul v. Bush*, 124 S. Ct. 2686 (2004). Because Hamdan is not entitled to assert rights under the Constitution, he lacks standing to press his claim that President Bush has acted in excess of his constitutional powers.

Mexican War and the Civil War. *Quirin*, 317 U.S. at 31 & n.10. Such trials of enemy belligerents continued unabated for several years after the end of fighting and even though civilian courts were open to hear any criminal charges that the Executive Branch chose to file.[6] For example, after the end of the Civil War, Captain Henry Wirz, the head of the Confederate prison camp at Andersonville, Georgia, was convicted by a military commission on charges of violating "the laws and customs of war." Lewis L. Laska and James M. Smith, "'Hell and the Devil': Andersonville and the Trial of Captain Henry Wirz, C.S.A., 1865," 68 MIL. L.REV. 77, 95-98 (1975).

Most recently, the United States made extensive use of military commissions to try enemy belligerents during and after World War II. The authority of those commissions to punish enemy belligerents was ringingly endorsed by the Supreme Court in three separate decisions: *Quirin*; *In re Yamashita,* 327 U.S. 1 (1946); and *Johnson v. Eisentrager*, 339 U.S. 763 (1950).[7]

The scope of the President's authority to establish military commissions to try enemy belligerents must be assessed in light of that history. The Supreme Court has explained that

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[6] The Supreme Court held in *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), that U.S. citizens who are not enemy belligerents are not subject to the law of war and, "where the courts are open and their process unobstructed," may not be brought before military commissions. *Milligan,* 71 U.S. (4 Wall.) at 121. But, contrary to Swift's contention, the Court did not hold that the President has no authority to convene military commissions in the absence of explicit authorization from Congress.

[7] *See also, Hirota v. MacArthur,* 338 U.S. 197, 208 (1948) (Douglas, J., concurring) (The President's Commander-in-Chief power "is vastly greater than that of troop commander. He not only has full power to repel and defeat the enemy; he has the power to occupy the conquered country . . . and to punish those enemies who violated the law of war.") (citing *Quirin* and *Yamashita*).

"traditional ways of conducting government . . . give meaning to the Constitution." *Mistretta v. United States*, 488 U.S. 361, 401 (1989); *see, e.g., American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (invoking "the historical gloss on the 'executive Power' [over the conduct of foreign relations] vested in Article II of the Constitution"); *The Pocket Veto Case,* 279 U.S. 655, 689 (1929) ("Long settled and established practice is a consideration of great weight in the proper interpretation of constitutional provisions . . ."). In applying that principle, the Court stated that "a practice of at least twenty years' duration 'on the part of the executive department, acquiesced in by the judicial department, is entitled to great regard in determining the true construction of a constitutional provision.'" *Id.* at 690. Here, the military has been conducting trials of enemy belligerents before military commissions for *230 years* without objection from Congress. Under those circumstances, there is every reason to conclude both that the President does not need explicit congressional authorization before mandating military commissions and that existing statutes are more than sufficient to provide the President with whatever authorization is arguably required.

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.* As two

leading constitutional scholars have explained:

> The Bush Order was premised on 10 U.S.C. § 821, which states that the creation of statutory jurisdiction for court martials does not "deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offense that . . . by the law of war may be tried by military commissions." Roosevelt's order was premised on the identically-worded predecessor to this statute, Article 15 of the Articles of War -- the very statute that a unanimous Supreme Court in *Quirin* held was "explicit[]" congressional authorization for the President to establish military commissions. *Quirin*, 317 U.S. at 28-29.
>
> Far from being on more tenuous ground than the Roosevelt Order, one could plausibly argue that the Bush Order is on firmer legal ground in light of the relevant precedents. When Roosevelt created his Military Commission, the leading precedent was *Milligan*. Bush's military commissions, by contrast, could rely on the more recent, more supportive, and probably more relevant *Quirin* precedent. Because *Quirin* was on the books when Bush created his commissions but not when Roosevelt created his, Bush's commissions have stronger grounding in Supreme Court precedent.
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> In addition, although *Quirin* held that Congress had affirmatively authorized military commissions in Article 15 of the Articles of War, Article 15 is probably best read merely as a congressional refusal to abrogate a prior non-statutory jurisdiction for military commissions. The *Quirin* Court thus may have erred in concluding that Congress had, at the time of the *Quirin* decision, authorized the President to establish military commissions. But Congress re-enacted Article 15 in 1950, recodifying it at 10 U.S.C. § 821 against the background of the *Quirin* interpretation. The legislative history to this reenacted provision suggests that Congress was aware of, and accepted, *Quirin*'s interpretation of the provision. And this, in turn, makes it more plausible today than at the time of *Quirin* that Congress has in fact authorized the President to establish military commissions.

Jack Goldsmith and Cass R. Sunstein, "Military Tribunals and Legal Culture: What a Difference Sixty Years Makes," 19 CONST. COMMENTARY 261, 274-75 (2002).

Second, Swift insists that Hamdan is not subject to trial by a military commission because Hamdan is a civilian. Pet. Br. 70. Although Respondents 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.* Similarly, several of the alleged Nazi saboteurs in *Quirin* denied that they were members of the military. Petitioner Herbert Haupt claimed to be an American citizen. Although the government asserted that Haupt had abandoned his citizenship by professing allegiance to Germany at age 21, his attorney "insisted that Haupt had never taken an oath of allegiance to Germany, joined the German army or the Nazi party, or done anything else that constituted renunciation of his U.S. citizenship." Michael R. Belknap, "Alarm Bells from the Past: The Troubling History of American Military Commissions," 28 J. S. CT. HIST. 300, 306 (2003). The Court "d[id] not find it necessary" to resolve Haupt's citizenship and military status, because it held that Haupt -- by virtue of his status as an enemy belligerent -- could be tried before a military commission even if he was an American citizen and even if he was not a member of the German army. *Quirin,* 317 U.S. at 20, 37-38.

Finally, Swift repeatedly complains about allegedly deficient procedural protections afforded to Hamdan under the Military Order and its implementing regulations. But while the regulations do not provide all the protections afforded to criminal defendants in federal court, the regulations are generous to defendants by any objective measure. Among other things,

they create a presumption of innocence, impose a beyond-a-reasonable-doubt burden of proof on the prosecution, require appointment of counsel for the accused, require that he be furnished with all exculpatory evidence, permit the accused to obtain witnesses and documents, and require that (with certain exceptions) any trial be open to the public. 32 C.F.R. § 9.5. Commentators generally agree that the regulations "provide far greater procedural safeguards than any previous commission, including Nuremberg." Goldsmith and Sunstein at 288. Given the centuries-long acceptance in this country of military commissions that provided far fewer procedural rights to defendants than do the current commissions, there are no legitimate grounds for challenging their constitutionality.

III. THE MILITARY ORDER DOES NOT VIOLATE EQUAL PROTECTION BY SINGLING OUT ALIENS FOR MORE STRINGENT TREATMENT

Swift also contends that the Military Order violates the equal protection component of the Fifth Amendment's Due Process Clause by singling out aliens for harsher treatment. He notes that the Military Order does not permit U.S. citizens to be tried before military commissions. Arguing that alienage is a "suspect classification" for purposes of equal protection analysis, Swift argues that the military cannot meet its "heavy burden" of justifying its discriminatory treatment of aliens.

Swift's argument is without merit. To the extent that the Supreme Court has ever displayed solicitude toward aliens, it has been concerned with only a subset of the class: permanent resident aliens. *See, e.g., Graham v. Richardson,* 403 U.S. 365 (1971). As noted above, nonresident aliens have been afforded few if any constitutional protections. The Supreme Court stated in *United States v. Verdugo-Urquidez,* 494 U.S. 259, 269 (1990), that

"we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States."[8] The Court recently cited *Verdugo-Urquidez* for the proposition that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders." *Zadvydas v. Davis,* 533 U.S. 678, 693 (2001). Because Hamdan is a citizen of Yemen being detained in Cuba who does not claim ever to have set foot in the U.S., he derives no rights from the Fifth Amendment.

While *Verdugo-Urquidez*'s discussion of Fifth Amendment rights is arguably *dicta* (the case raised questions regarding the scope of Fourth Amendment protections), the D.C. Circuit has incorporated that *dicta* into its holdings in several Fifth Amendment cases. *See Harbury v. Deutch*, 233 F.3d 596, 604 (D.C. Cir. 2000) (dismissing Fifth Amendment claims of a nonresident alien in reliance on *Verdugo-Urquidez*), *rev'd in part on other grounds sub nom., Christopher v. Harbury*, 536 U.S. 403 (2002); *Al Odah v. Rumsfeld,* 321 F.3d at 1141; *People's Mojahedin Org. v. Dep't of State*, 182 F.3d at 22.

Even if Hamdan were entitled to invoke Fifth Amendment protections and to demand some sort of scrutiny into President Bush's decision to confine military commissions to noncitizens, his claim would still fail. Swift asserts that there is no rational reason for the Military Order's distinction between citizens and aliens; he asserts that "nothing in the

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[8] Indeed, *Verdugo-Urquidez* explicitly rejected a contention that *Graham* stands for the proposition that the equal protection component of the Fifth Amendment requires noncitizens to be afforded the same constitutional rights as citizens. *Id.* at 273. *See also Demore v. Kim,* 538 U.S. 510, 521 (2003) ("'In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.'") (quoting *Mathews v. Diaz,* 426 U.S. 67, 79-80 (1976)).

Military Order suggests that military tribunals are *more necessary* [for protecting Americans from terrorist attacks] for aliens than for citizens suspected of terrorist activities." Pet. Br. 64. Swift may well be correct on that point, but there are several other rational reasons for the President's decision to distinguish between citizens and aliens. In particular, while the Supreme Court in *Quirin* upheld the government's right to try U.S. citizens before a military commission, the Court has been especially solicitous of the rights of *citizens* detained and/or prosecuted outside the regular criminal justice system. *See, e.g., Milligan*; *Hamdi v. Rumsfeld,* 124 S. Ct. 2633 (2004). It is entirely rational for the President to decide to avoid an increased risk of having convictions overturned on habeas review, by keeping citizens out of the military commission justice system. Nonresident aliens being held overseas, who have little or no claim to the protections of the Constitution, should not be permitted to concoct an equal protection claim by bootstrapping onto the President's decision to go the extra mile in respecting the rights of citizens.

IV. MILITARY COMMISSIONS SERVE VITAL NATIONAL SECURITY INTERESTS

Amici are not filing this brief based simply on a desire to protect the military's prerogatives to conduct the war against terror as it sees fit. Rather, *amici* believe that military commissions are an important component of the war effort and often are the best means of bringing war criminals to justice without risking information disclosures that could materially assist our enemies.

Indeed, despite the best efforts of prosecutors to prevent the release of confidential national security information, recent criminal proceedings against international terrorists have

set back our fight against terrorism. In a 2001 defense of military commissions, Robert Bork wrote:

> The conclusive argument, however, is that in open trials our government would inevitably have to reveal much of our intelligence information, and about the means by which it is gathered. Charles Krauthammer notes that in the trial of the bombers of our embassies in Africa, the prosecution had to reveal that American intelligence intercepted bin Laden's satellite phone calls: "As soon as that testimony was published, Osama stopped using the satellite system and went silent. We lost him. Until Sept. 11." Disclosures in open court would inform not only Middle Eastern terrorists but all the intelligence services in the world of our methods and sources.

Robert Bork, "Having Their Day in (a Military) Court," *Nat'l Review* (Dec. 17, 2001), available at http://www.nationalreview.com/17dec01/bork121701.shtml. While the Military Order contemplates military commissions that are largely open to the public, the implementing regulations grant the commissions greater flexibility than that possessed by federal courts to close portions of a trial when national security concerns so dictate. 32 C.F.R. § 9.6(b)(3) & (d)(5), § 9.9.

Overly open criminal trials often can cause public relations problems as well. As Bork explains, "An open trial and proceedings [that last many years on appeal], covered by television, would be an ideal stage for an Osama bin Laden to spread his propaganda to all the Muslims in the world. Many Islamic governments would likely find that aroused mobs make it impossible to continue cooperating with the U.S." *Id.* A trial before a military commission in Guantanamo Bay followed by a streamlined review process -- even when the trial is fully open to the press -- would be less easily exploited by our enemies for public relations purposes. Certainly, the safety of trial participants would be much less of a concern at Guantanamo Bay than in a major American city.

Finally, judges sitting on military commissions have much more experience with military matters than do federal court judges and juries, and thus are likely to do a superior job in determining whether the defendant has violated the law of war. A key issue at Hamdan's trial will be whether his services for Osama Bin Laden were simply those of a driver for hire, or whether he also participated in the conspiracy to murder Americans. *Amici* have little doubt that military officers sitting on a military commission could do a far better job of sorting through the evidence on that issue than could 12 jurors who lack military experience.

In sum, the President's decision to authorize military commissions is based on sound practical reasoning, not a desire to deny meaningful judicial review to those charged with war crimes. *Amici* respectfully request that the Court give that system an opportunity to operate before passing judgment on its legality.

CONCLUSION

Amici curiae Washington Legal Foundation and Allied Educational Foundation request that the Court grant Respondents' cross-motion to dismiss the petition.

Respectfully submitted,

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Daniel J. Popeo

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Richard A. Samp
(D.C. Bar No. 367194)

_____
David A. Price
(D.C. Bar No. 426022)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

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Counsel wish to thank Everett Day, a student at Texas Tech University School of Law, for his assistance in the preparation of this brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of September, 2004, copies of the foregoing Brief of Washington Legal Foundation, *et al.,* as well as their motion for leave to file the brief, were deposited in the U.S. Mail, first-class postage prepaid, addressed to the following:

Jonathan L. Marcus
Assistant Solicitor General
U.S. Department of Justice
Washington, DC 20530

Neal Katyal
600 New Jersey Avenue, NW
Washington, DC 20001

Harry H. Schneider, Jr.
Joseph M. McMillan
David R. East
Charles C. Sipos
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099

Charles Swift
Office of the Chief Defense Counsel for Military Commissions
1851 S. Bell Street, Suite 103
Arlington, VA 22202

_____
Richard A. Samp