ORAL ARGUMENT SCHEDULED FOR MARCH 8, 2005

No. 04-5393

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SALIM AHMED HAMDAN,

Petitioner-Appellee,

v.

DONALD H. RUMSFELD, U.S. SECRETARY OF DEFENSE, ET AL.,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF MILITARY LAW PRACTITIONERS AND ACADEMICIANS KEVIN J. BARRY, DAVID W. GLAZIER, ELIZABETH L. HILLMAN, JONATHAN LURIE, DIANE H. MAZUR, DAVID P. SHELDON, GARY D. SOLIS, CHRISTOPHER F. WILSON, AND DONALD N. ZILLMAN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER-APPELLEE URGING AFFIRMANCE

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December 29, 2004

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

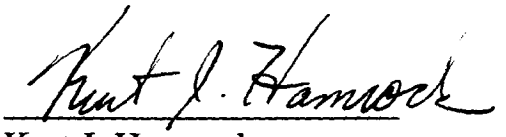
(A) Parties and Amici: All parties, intervenors and *amici* appearing before the district court or in this Court are listed in the brief for Petitioners-Appellees.

(B) Rulings Under Review: Respondent-Appellant seeks review of the district court's order in *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. Nov. 8, 2004) (Robertson, J.). The respondent-appellant filed its notice of appeal on November 12, 2004.

(C) Related Cases: There are several related cases which have been brought by detainees currently held at the Guantanamo Bay Naval Base ("GTMO") pending in the United States District Court for the District of Columbia. The Brief of Respondents-Appellants includes a complete listing of these cases.

CIRCUIT RULE 29 CERTIFICATION

Pursuant to Circuit Rule 29, the undersigned counsel certifies that it was not practicable for all *amici curiae* supporting the appellee in this matter to file a single brief because of the myriad legal issues raised in this case. A separate brief is necessary for counsel to raise arguments before this Court not made elsewhere by the parties or other *amici*. Counsel certifies that it coordinated with counsel representing other *amici* to reduce any overlap or duplication to the extent practicable. Counsel also certifies that all parties consent to the filing of this brief and the participation of Kevin J. Barry, David W. Glazier, Elizabeth L. Hillman, Jonathan Lurie, Diane H. Mazur, David P. Sheldon, Gary D. Solis, Christopher F. Wilson, and Donald N. Zillman as *amici curiae* in this matter.



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INTERESTS OF THE AMICI CURIAE

Kevin J. Barry, David W. Glazier, Elizabeth L. Hillman, Jonathan Lurie, Diane H. Mazur, David P. Sheldon, Gary D. Solis, Christopher F. Wilson, and Donald N. Zillman, who respectfully submit this brief as *amici curiae*, currently practice in the field of military law, either as practitioners or scholars. Many of these *amici* have served on active duty in the military, either in the operational field or as military lawyers. They include several of the nation's leading experts on military law. *Amici* are qualified to file this brief on the basis of their extensive military experience, knowledge of the legal issues in this field, and commitment to upholding the rule of law as part of American military operations.

Kevin Barry retired as a U.S. Coast Guard Captain after a 25-year career as a line officer and legal officer, during which he served as a staff judge advocate, trial and defense counsel, trial judge, and as an appellate military judge. He now practices law in Chantilly, Virginia. He is a founder and director of the National Institute of Military Justice ("NIMJ").

David Glazier served 21 years as a Navy surface warfare officer, culminating with command of the U.S.S. George Phillips, a guided missile frigate; he is a research fellow at the University of Virginia School of Law's Center for National Security Studies.

Elizabeth Hillman served as an active-duty U.S. Air Force officer for seven years. She holds a Ph.D. in history from Yale University, and is now an associate professor of law at Rutgers University. She currently serves on the NIMJ Board of Directors.

Jonathan Lurie is a professor of history at Rutgers University, where he teaches legal history and military legal history; he has authored a two-volume history of the military appellate system and lectured on military legal history in numerous fora, including the U.S. Supreme Court.

Diane Mazur served on active duty as a U.S. Air Force officer. She is now the University of Florida Research Foundation professor of law at the University of Florida Law School and a member of the NIMJ Board of Advisors.

David Sheldon served as a Navy judge advocate general officer, representing servicemembers before military appeals courts and the Supreme Court; he now practices military law in Washington, D.C., and he is a member of the NIMJ Board of Advisors.

Dr. Gary D. Solis retired as a Lieutenant Colonel after 26 years on active duty in the U.S. Marine Corps. He spent 18 of those years as a judge advocate, during which time he tried 433 criminal cases and presided over 330 trials as a general courts-martial judge. He currently teaches the law of war at the U.S.

Military Academy at West Point and also has taught at Georgetown University and the London School of Economics.

Christopher F. Wilson served as a U.S. Army Judge Advocate General Corps officer from 1981-1985, with duty in Germany and at Fort Ord; he currently practices military law in California.

Donald N. Zillman teaches Constitutional law, national resources law, and national security law at the University of Maine School of Law. He previously served as dean of that law school from 1991-1998, and he was the Distinguished Visiting Professor of Law at the United States Military Academy in 1990. He is a member of the NIMJ Board of Advisors.

Amici express no opinion as to the guilt or innocence of Salim Ahmed Hamdan, the petitioner-appellee in this matter, as to the offenses with which he is charged. Nor do they dispute the authority of the President of the United States to establish military commissions to adjudicate the charges against Hamdan under the proper circumstances. However, *amici* agree with the district court's ruling that the procedures set forth for these military commissions, as constituted by the President, are unlawful.

At this point in our nation's history, it is vitally important to reaffirm our commitment to the rule of law, in order to secure key moral and legal terrain in the global war on terrorism. To permit these military commissions to go forward as currently constituted would indelibly stain the nation's reputation and undermine its larger efforts in the war on terrorism.

SUMMARY OF THE ARGUMENT

The district court held that the military commissions being used to adjudicate the claims against Hamdan were inconsistent with Article 36 of the Uniform Code of Military Justice ("UCMJ") and consequently unlawful. The military commissions established by the President here are both contrary to and inconsistent with established federal law, military law, and the common law of war. Although the government historically has used military commissions to adjudicate charges against persons falling outside the statutory jurisdiction of courts-martial, such commissions were courts of necessity, and they generally conformed to court-martial practice. By contrast, the commissions at issue represent a significant departure from the way such tribunals have been used throughout U.S. history.

This departure is not excused by the President's determination that it would be impracticable to apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts. The

President's determination is fatally defective because it is both conclusory and unsupported by the evidence. In any event, the President's determination does not extend to those procedures and protections mandated by the UCMJ.

ARGUMENT

I. RULES PROMULGATED FOR MILITARY COMMISSIONS ARE SUBJECT TO REVIEW UNDER TRADITIONAL STANDARDS OF ADMINISTRATIVE LAW

In our nation's history, the political branches repeatedly have asserted their power to act outside the scope of judicial review, especially in time of war. Indeed, "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 305 (1981). The courts thus have given great deference to the President in the exercise of his duty as Commander-in-Chief under Article II of the Constitution and to Congress in furtherance of its duties "[t]o raise and support Armies," "[t]o provide and maintain a Navy," and "[t]o make Rules for the Government and Regulation of the land and naval Forces." *See Dames & Moore v. Regan*, 453 U.S. 654, 668-669 (1981); *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981).

Deference, however, is not acquiescence. "The government of the United States has been emphatically termed a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. 137, 163; 1 Cranch 137, 163 (1803). Judicial review of executive and legislative action forms the cornerstone of this rule of law. The

courts historically have exercised meaningful judicial review of executive action. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

Even when executive action has been committed by law to the agency's discretion, the courts have exercised meaningful judicial scrutiny. *See Webster v. Doe*, 486 U.S. 592 (1988); *see also Crager v. United States*, 25 Cl. Ct. 400, 407 (1992). Courts have reviewed the actions of Congress and the President in spheres where those actors enjoy substantial deference. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-320 (1936) (subjecting the President, "as the sole organ of the federal government in the field of international relations," to judicial review because every Presidential act "must be exercised in subordination to the applicable provisions of the Constitution"). Courts have been especially vigilant when the President's foreign affairs power intersects with the power to detain individuals and deprive them of their liberty. *See Rasul v. Bush*, 124 S. Ct. 2686, 2700 (2004) (Kennedy, J., concurring) (courts maintain the power and the responsibility to protect persons from unlawful detention even when military affairs are implicated); *see also I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001) (upholding judicial review over immigration decisions).

Courts reviewing executive actions in the field of military justice frequently apply traditional principles of administrative law. *See United States v. Scheffer*, 523 U.S. 303, 312 (1998) (holding that Rule 707 of the Manual for Courts-Martial was a "rational and proportional means of advancing the [government's] legitimate interest" and that the President did not act "arbitrarily or disproportionately" in promulgating this rule); *Loving v. United States*, 517 U.S. 748, 758-769 (1991) (applying the non-delegation and intelligible principle doctrines to Rule 1004 of the Rules for Courts-Martial). The application of administrative law norms to military justice finds additional support in the Supreme Court's most recent national security jurisprudence. *See Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2646-2649 (2004). The Court in *Hamdi* applied norms of procedural due process to determine that a citizen detained as an enemy combatant was denied due process of law; consequently, he was entitled to notice of the factual basis for his classification and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker. *Id.*

The nation's most prominent scholars of military law agree that administrative law norms should apply to rules promulgated for military courts-martial and military commissions. *See* Capt. Gregory E. Maggs, *Judicial Review of the Manual for Courts-Martial*, 160 Mil. L. Rev. 96, 105-111 (1999); Kevin J. Barry, *Military Commissions: American Justice on Trial*, 50-Jul. Fed. Law. 24

(2003). Historically, military courts of appeal have employed administrative law in their review of Presidential actions creating rules for the military justice system. *See, e.g.*, *United States v. Ettleson*, 13 M.J. 348, 360 (C.M.A. 1982) (reviewing drug use provision in Manual for Courts-Martial under an "arbitrary and capricious" standard); *United States v. Prescott*, 6 C.M.R. 122, 124-25 (1952) (upholding a Manual for Courts-Martial sentencing provision as not "an unreasonable or arbitrary exercise of executive power"); *United States v. Firth*, 37 C.M.R. 596, 600 (A.B.R. 1966) (upholding a Manual for Courts-Martial provision on grounds it was "not arbitrary or capricious, but [ ] based on reasonable considerations and [ ] in keeping with established precedent and the administrative needs of the Armed Forces"). Thus, to survive judicial review, the rules for military commissions and other tribunals must not be arbitrary, capricious, or otherwise offend basic notions of administrative law.

II. THE PRESIDENT MAY NOT ESTABLISH MILITARY COMMISSIONS WHICH ARE "CONTRARY TO OR INCONSISTENT WITH" THE UNIFORM CODE OF MILITARY JUSTICE

As recognized by various federal courts, Article 36 of the UCMJ limits Presidential discretion to establish military tribunals and to create the rules for them. *See Loving*, 517 U.S. at 772; *see also United States v. Curtis*, 32 M.J. 252, 263-264 (C.M.A. 1991). Article 36 first requires such military commissions to

comply with "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts," unless the President determines such compliance would be impracticable. However, Article 36 separately mandates that tribunals and rules created under Article 36 "may not be contrary to or inconsistent with this chapter." 10 U.S.C. § 836.

The words "this chapter" in Article 36 refer to Title 10 (Armed Forces) of the United States Code, Subtitle A (General Military Law), Part II (Personnel), Chapter 47. Chapter 47 contains the UCMJ. Throughout Title 10, "this chapter" is used in a similar manner. *See, e.g.*, 10 U.S.C. § 803 (relating to jurisdiction of courts-martial); 10 U.S.C. § 1073 (relating to servicemembers' medical care); 10 U.S.C. § 12741 (relating to military retirements). The plain language of the statute thus circumscribes Presidential discretion and prohibits the use of procedures under Article 36 which are inconsistent with or contrary to other parts of the UCMJ.

The phrases "contrary to" and "inconsistent with" in Article 36 deserve separate analysis. The term "contrary" means "[a]gainst; opposed or in opposition to; in conflict with." Black's Law Dictionary 328 (6th ed. 1990). A new rule or procedure thus is contrary to the UCMJ if it contradicts an existing code provision. *See United States v. Price*, 23 C.M.R. 54, 56-57 (C.M.A. 1951) (striking manual provision which directly conflicted with Article 31).

By contrast, the phrase "inconsistent with" sweeps more broadly, nullifying any rule which is materially different than a code provision, or which seeks to occupy the same legal terrain. *See United States v. Rodriguez*, 54 M.J. 156 (C.A.A.F. 2000) (holding civilian psychotherapist-patient privilege should not be imported into military practice because it differed materially from existing Military Rules of Evidence for privileges). The term "inconsistent" therefore also applies to provisions "where the acceptance or establishment of the one implies the abrogation or abandonment of the other," where the contradiction is implied by fact or law rather than explicitly stated. *See* Black's Law Dictionary 766 (6th ed. 1990).

This final clause of Article 36 clearly limits the President's power to depart from U.S. traditional norms of justice and the requirements of the UCMJ via his impracticability determination. *Cf. Noyd v. Bond*, 395 U.S. 683, 692 (1969) (stating the Manual for Courts-Martial had the force of law "unless it [was] 'contrary to or inconsistent with' the Uniform Code Congress has enacted"). *See also Application of Yamashita*, 327 U.S. 1, 63 (1946) (describing the "contrary to or inconsistent with" language in Article 36's antecedent as an "unqualified limitation" on the president's power to establish military commissions); *United States v. Kelson*, 3 M.J. 139, 140-41 (C.M.A. 1977).

The military commissions at issue here deviate substantially from U.S. district and courts-martial practice in ways that are *both* contrary to and inconsistent with the UCMJ. The district court described these many deviations in detail and focused on the departure from UCMJ Article 39 (requiring the presence of the accused in accordance with the Confrontation Clause of the Sixth Amendment). *See Hamdan v. Rumsfeld*, 344 F. Supp. 2d 144, 166 n.12 (D.D.C. 2004), *citing* David Glazier, *Kangaroo Court or Competent Tribunal? Judging the 21st Century Military Commission*, 89 Va. L. Rev. 2005, 2015-2020 (2003). Cumulatively, these deviations from courts-martial practice make it clear that the President's order is both contrary to and inconsistent with the UCMJ. The government argues that such a conclusion is inconsistent with the historical use of military commissions; however, as demonstrated below, historical precedent suggests a close tie between the procedures used in military commissions and those used in courts-martial.

III. MILITARY COMMISSION PROCEDURES HISTORICALLY HAVE MIRRORED PROCEDURES FOR COURTS-MARTIAL

The government acknowledges the importance of history to military commission legitimacy, Brief for Appellants, December 8, 2004 (hereinafter "Govt. Brief"), at 60, but its officials have erred in describing that history. For example, the government publicly traced the roots of this tribunal to the 1776

"trial" of American spy Nathan Hale. John Altenburg, Jr., Defense Department Briefing on Military Commissions Hearings, Aug. 17, 2004 (available at: http://www.dod.mil/transcripts/2004/tr20040817-1164.html). Hale, however, was never tried. Hale was brought before British General William Howe on the evening of his capture; after Hale candidly admitted his identity and mission, Howe ordered his execution without pretense of trial. *See, e.g.*, Henry Phelps Johnston, NATHAN HALE 1776 89-126 (1901); Jean Christie Root, NATHAN HALE 71-87 (1915).

As support for its argument that military commissions flow from the President's inherent power as Commander-in-Chief, the government also cites the 1780 American "trial" of Major John André following Benedict Arnold's defection. Gov't Brief at 58-59. The government claims that "[a]t the time, there was no provision in the American Articles of War providing for jurisdiction in a court-martial to try an enemy for the offense of spying." *Id.* at 58. There are two problems with this assertion. First, a careful reading of the government's own primary source reveals that the proceeding, called a "Board of General Officers,"[1] was a court of inquiry empowered only to find facts and report to General

[1] The term "Board of General Officers" is not common in U.S. military usage but was part of contemporary British vocabulary. These assemblies were "non-judiciary" in character and their findings were not binding. Robert B. Scott, THE MILITARY LAW OF ENGLAND 164-65 (1810).

Washington. *See Proceedings of A Board of General Officers Respecting Major John Andre*, 5-6, 13, Sept. 29 1780 (Francis Bailey, ed. 1780). Unlike the commission at issue, it had no power to convict and sentence.[2]

Secondly, the government's claim that the American Articles of War contained no provision authorizing the court-martial of spies is, at best, incomplete, and at worst, misleading. Although the 1776 Articles of War did not provide for court-martialing spies, it is not true that authority was lacking. In August 1776, Congress provided that aliens "found lurking as spies in or about the fortifications or encampments of the armies of the United States . . . shall suffer death . . . by sentence of a court martial . . . ." Resolution of the Continental Congress, August 21, 1776, in 1 Journals of the American Congress: From 1774 to 1778, at 450 (1823). This resolution was not a numbered Article of War *per se*, but specifically directed that it "be printed at the end of the rules and articles of war." *Id.*[3] 228 years later, the essence of this language, updated to reflect modern realities, remains recognizable in the UCMJ. *See* 10 U.S.C. § 906.

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[2] Washington's letter to the Board states André would be brought before it for "examination," not trial, and directs the panel to "report a precise state of his case, together with *your opinion* of the light in which he ought to be considered and the punishment that ought to inflicted." *Proceedings* at 5-6 [emphasis added].

[3] The decision to refer André for examination before a fact-finding panel thus was incorrect as a matter of law – he should have been tried by general court-martial. In apparent recognition of his mistake, the day after André's examination,

(Footnote cont'd on next page.)

Of greater importance than these specific errors, however, is the larger government assertion that "the President has inherent power to convene military commissions" in his role as Commander-in-Chief. Govt. Brief at 56-58. At best, the President historically has exercised such authority in foreign territory occupied during the course of military action, such as post-World War II Germany. The vast majority of these military commissions actually substituted for local courts, both criminal and civil. These commissions, unlike those used to try war criminals, did not necessarily follow the rules and procedures of courts-martial, but adopted processes and procedures and applied law familiar to those under occupation. *See Madsen v. Kinsella*, 343 U.S. 341, 348 (1952).

Because such tribunals were necessary to police the civilian population of occupied nations, they fell within the impracticability section of Article 36 (and its antecedent, Articles of War Article 38). *Id.* Analogous use of military commissions theoretically could have been conducted in Iraq by U.S. occupying forces prior to the restoration of Iraqi sovereignty. There is no plausible claim, however, that such authority applies today at Guantanamo Bay, in territory leased

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(Footnote cont'd from previous page.)

Washington ordered alleged co-conspirator Joshua Smith court-martialed on charges including "acting as a spy." *See Record of the Trial of Joshua Hett Smith, Esq.* 1-2 (Henry B. Dawson, ed. 1866).

from Cuba, which falls within the "special maritime and territorial jurisdiction" of the United States. *See* 18 U.S.C. § 7(9); *see also Rasul*, 124 S. Ct. at 2696.

A. The "original understanding" from the time of the founding of this country was that authority to conduct any U.S. military trial must come from specific Congressional delegation

The Founding Fathers inherited from Britain a clear sense that authority to subject individuals to military trials belonged to the legislature (Parliament) and not the executive. Beginning in 1689, Parliamentary approval was required both to maintain a standing army "within the Kingdom in time of peace" and to subject individuals to military justice. *See* O. Hood Phillips et al., CONSTITUTIONAL AND ADMINISTRATIVE LAW § 19-002 (8th ed. 2001); William Winthrop, MILITARY LAW AND PRECEDENTS 18-20 (2d ed. 1920). The King continued to promulgate the detailed articles of war but had to conform them to the Mutiny Acts passed annually by Parliament, which increasingly limited the crown's power. The Acts both authorized continuation of the standing army and provided statutory authority for military trials. Stephen P. Adye, CONSIDERATIONS ON THE ACT FOR PUNISHING MUTINY AND DESERTION 2-3 (1772).

The American founders clearly shared Parliament's concerns. Beginning in 1775, Congress enacted standing Articles of War that remained in effect until superseded or amended. *See* Winthrop at 21-24. Limitations on a standing army were achieved through Art. I, § 8, cl. 12 of the Constitution, which limited military

appropriations to two years, thereby requiring each session of Congress to reauthorize the military and fund it.

Throughout the first half of the 19th century, U.S. military justice commentators - all of whom were serving military officers - agreed military trial jurisdiction extended only over those persons specifically made subject to it by act of Congress. *See, e.g.*, Major (later Major General) Alexander Macomb, A TREATISE ON MARTIAL LAW AND COURTS-MARTIAL 19-20 (1809); Captain William C. De Hart, OBSERVATIONS ON MILITARY LAW AND THE CONSTITUTION AND PRACTICE OF COURTS MARTIAL 36 (1846). When Andrew Jackson wished to try Louisianan Louis Louaillier for disloyal acts during Jackson's 1815 imposition of martial law in New Orleans, he was informed of these limits in no uncertain terms by his deputy, Edmund P. Gaines. Gaines wrote Jackson that, while the "common law of the army" would permit Jackson to order persons who came within the limits of his camp to obey army rules, authority to actually "try and punish" violations was strictly limited to the personal and subject matter jurisdiction enacted by Congress. *See* letter from Edmund P. Gaines to Andrew Jackson of 3/6/1815 in 2 THE PAPERS OF ANDREW JACKSON 301-03 (Harold D. Moser ed. 1991). When Jackson nevertheless persisted in ordering a military trial of Louaillier, the court first eliminated all charges not specifically based on the two

articles applicable to civilians (Articles 56 and 57) and then acquitted him on the remaining count. Moser at 305.

Jackson started another political firestorm by ordering the trial and subsequent execution of two British citizens for aiding the Seminoles and Creeks in 1818 - another action the government erroneously cites as precedent for today's commissions. Govt. Brief at 59. The majority of the House Committee on Military Affairs found that no "law of the United States" authorized the trial ordered by Jackson. *Report of the Committee on Military Affairs, to whom was referred . . . the proceeding of the Court Martial, in the trial of Arbuthnot and Armbrister . . . .*, 15th Cong. 2 (1819). Neither Jackson nor his supporters made any effort to cite statutory or common law authority for those tribunals. Instead, led by John Quincy Adams, they simply declared that international law permitted Jackson to order the two men's summary execution, so the whole issue of a trial was irrelevant. *See, e.g., Memoirs of General Andrew Jackson Together with the Letter of Mr. Secretary Adams in Vindication of the Execution of Arbuthnot & Armbrister* 37-40 (1824).

B. From its 1847 inception, the military commission's sole *raison d'etre* has been to fill jurisdictional gaps in statutory court-martial authority through application of the "common law" of war

The government makes two key misstatements to this Court about the historic purpose and function of the military commission. First, the government

claims military commissions "have tried enemy combatants since the earliest days of the Republic under such procedures as the President has deemed fit." Govt. Brief at 53. Second, the government further asserts that the commissions' "raison d'etre is to provide the President with a flexible war-time forum in which to prosecute enemy fighters." *Id.* at 52. Both are contradicted by history.

The Articles of War historically defined only actual military offenses and provided no authority to try or punish typical civilian offenses. During the war with Mexico, for example, the Secretary of War held that an American soldier committing murder in Mexico could not be court-martialed; rather, he could only be discharged and sent home. *See* Glazier at 2027-28. General Winfield Scott recognized the need to correct this oversight to maintain order in Mexico, so in response, he unilaterally promulgated martial law to try offenders before common law tribunals he named "military commissions."[4] His actions were designed to discipline U.S. servicemen and ensure the success of the military campaign. Winfield Scott, 2 MEMOIRS OF LIEUT-GENERAL SCOTT 392-394 (1864); *see also* Glazier at 2027-34.

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[4] As a legal matter, such basis for military commissions no longer exists. Courts-martial now exercise statutory jurisdiction over virtually every conceivable offense that can be brought against U.S. servicemembers, and the old "service connection" requirement for military prosecution of offenses no longer exists. *See* 10 U.S.C. § 802; *see also Solorio v. United States*, 483 U.S. 435 (1987).

Scott, a lawyer as well as soldier, clearly acknowledged that his authority to establish such commissions originated in the laws passed by Congress. Neither the Secretary of War nor Attorney General was willing to claim any executive authority for Scott's actions. *See* Scott at 392-394. The orders' text, the actual observed practice, and the subsequent writings of U.S. military justice commentators make clear that Scott's commissions were based on court martial procedure. *See* Stephen V. Benét, A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL 13-16 (1862); Henry Coppée, FIELD MANUAL OF COURTS-MARTIAL, at iii-iv (1863); Glazier at 2029-32, 2034. A few common law trials subsequently were held for Mexicans who victimized soldiers or violated laws of war, but the vast majority of those tried by commissions were Americans.[5]

Military commissions were most widely employed during the Civil War and Reconstruction era. At least 5,700 individuals were tried from 1861 to 1869. *See* Mark E. Neely, Jr. THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 168-73, 176-77 (1991). The four most salient lessons from this period are:

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[5] Records of 117 individual defendants examined found that only 19 were identified as Mexicans while 86 were specifically listed as Americans. *See* Glazier at 2029-33.

1. With few exceptions, military commissions continued the practice of close conformance to court-martial procedures. Post-war military justice commentators considered this to be the norm and generally asserted that military commissions were an exercise of constitutional authority committed to the legislature, not the executive. *See* Glazier at 2036-38, 2043-44, 2046.

2. Military commissions received exactly the same post-trial review as courts-martial, and military reviewing authorities overturned a number of trial results on "technicalities" when military commissions departed from court-martial procedures. Neely at 162-74. In fact, in 1862, Congress mandated review by the Army Judge Advocate General of both types of trial. Act of July 17, 1862, ch. 201, § 5, 12 Stat. 597, 598 (1862).

3. Federal courts reviewed the actions of military commissions on the same terms as contemporary courts-martial. Courts refused direct review but considered questions of jurisdiction via petitions for habeas corpus. *Compare Ex parte Vallandigham*, 68 U.S. 243 (1864) *with Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

4. While military commissions were used extensively by military leaders based on the Mexican War precedents, President Lincoln never questioned the limits Congress placed on their use. For example, in 1863, Congress ratified Lincoln's suspension of habeas corpus but required that detainees be set free if not

indicted by grand jury. In another law passed the same day, Congress implicitly repudiated Lincoln's assertion he could try draft resistors by military commission. *See, e.g., An Act relating to Habeas Corpus and regulating Judicial Proceedings in Certain Cases*, ch. 81, 12 Stat. 755 (1863); *An Act for enrolling and calling out the national Forces, and for other Purposes*, § 30, 12 Stat. 731 (1863).

C. The Uniform Code of Military Justice was enacted with the understanding that military commission and court-martial procedure was the same

Articles 21 and 36 of the UCMJ, cited as authority in President Bush's military order, can be traced to the 1916 Articles of War, in which they appeared as Articles 15 and 38, respectively. *See An Act Making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes*, 39 Stat. Part I, 619, 650-70 (1916). In its interpretation of these articles, the government specifically notes the Supreme Court's use of the "authoritative" 1916 Senate testimony of Judge Advocate General Enoch Crowder, the Act's sponsor. Govt. Brief at 35, citing *Madsen*, 343 U.S. at 353. In this "authoritative" testimony, however, Crowder also told Congress that military commissions and courts-martial both "have the same procedure." S. Rep 64-582 at 40 (1916) (testimony of Brig. Gen. Crowder). This suggests that the Court should take at face value the requirement of Article 36 that

the procedures of military commissions may not be inconsistent with or contrary to those of courts-martial.

The modern version of Article 21 deals with concurrent jurisdiction of the court-martial and military commission and must be viewed in historical context. It is important to understand why Article 21's language about concurrency was viewed as necessary. Article 2 specifies those persons statutorily subject to military jurisdiction. In 1913, Congress made several changes to military law, which added to the jurisdiction of a general court-martial "any person who by statute or the law of war is subject to trial by military tribunal." *See* Act of Mar. 2, 1913, 37 Stat. 721 (1913). General Crowder's 1916 changes to the Articles of War made additional persons, such as those accompanying the Army overseas, subject to court-martial jurisdiction as well.

Since the military commission had been created solely to establish common law jurisdiction over persons or offenses not covered by statute, Crowder believed expansion of statutory jurisdiction could deprive military commissions of some of their traditional jurisdiction. Hence he drafted the "saving" provision of Article 15 (today's UCMJ Article 21) to make this jurisdiction concurrent. *See* S. Rep. 64-130 at 40-41. Implicit in this decision is a recognition by the Judge Advocate General that the President's authority to convene such commissions is based on

statute, and not on some undefined Constitutional power as Commander-in-Chief. If it were, then no saving provision would have been necessary.

D. Holding the UCMJ generally to require military commissions to conform to court-martial procedure does not unreasonably interfere with the President's prerogatives as Commander-in-Chief

As former military officers and military law scholars, *amici* are well aware that our national security depends on the President's authority to command and control our nation's military forces. The President must be permitted "to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual . . . to subdue the enemy." *Fleming v. Page*, 50 U.S. (9 How.) 603, 614 (1850). There is also no question the President has authority to detain individuals conducting hostile actions against the United States during times of conflict. *Cf.* Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T 3316, 75 U.N.T.S. 135.

In this case, however, there is no urgent question of national security that would require the court to take an expansive view of presidential powers. The issue here is simply whether the traditional constitutional prerogative of the Congress to specify jurisdiction and procedure for military trials should apply to Hamdan – a man held for three years far from the battlefield.

Past decisions cited by the government suggesting to the contrary clearly are distinguishable. In the *Quirin* case, for example, although the petitioners asked the Court to decide this issue, the justices declined to reach it. *Ex parte Quirin*, 317 U.S. 1, at 46-48. The Court in *Yamashita* excused the government from following court-martial procedures, but did so on the curious rationale that prisoners of war were not specifically included among the Articles of War's list of persons subject to military justice. *Yamashita*, 327 U.S. at 17-24. But as the District Court correctly notes, that rationale does not apply here, because individuals in Guantanamo Bay now fall within the UCMJ's coverage. *Hamdan*, 344 F. Supp. 2d at 169-170.

Madsen v. Kinsella, 343 U.S. 341 (1952), on which the government also relies extensively, involved the judgment of a military government (or occupation) court, not a military commission *per se*. This is a potentially significant distinction, because customary international practice permits modifying occupation court procedures better to match those familiar to citizens of the occupied state. *See* Glazier at 2062 n.254. Further, because the day-to-day conduct of an occupation necessarily can affect the success of the war, there well may be merit to an argument that the President has more discretionary authority as Commander-in-Chief when acting in this field. But that issue is not before this court, because the

U.S. clearly has no claim to be an occupying belligerent in the leased Cuban territory where the military commission at issue would sit.

The government asserts the trial court's ruling may "sound the death knell for military commissions." Govt. Brief at 52. The government reaches this conclusion only because it overlooks the fundamental concept that the valid historical purpose of the military commission has always been one of interstitial jurisdiction, not a procedural shortcut to justice. Under military common law, applying either Gen. Scott or Col. Winthrop's analysis, commissions must adhere closely to court-martial principles of law, rules of evidence and procedure. The President's own preamble to the Manual for Courts-Martial has required this for the past 53 years. *See* Manual for Courts-Martial, I-1 (2002) (available at: http://www.usapa.army.mil/pdffiles/mcm2002.pdf). The present military commissions and their rules thus find no support in military common law, nor contemporary courts-martial practice.

IV. THE PRESIDENT'S ORDER CREATING THE MILITARY COMMISSIONS WAS DEFECTIVE AS A MATTER OF LAW

A. The President's impracticability determination lacked any historical or factual basis

The President grounded his military commissions order in three sources: his inherent authority as President, his inherent Constitutional authority, and his

statutory authority under 10 U.S.C. § 821 and § 836 (Articles 21 and 36 of the UCMJ, respectively). *See* Military Order, preamble.

Article 36 authorizes the President to prescribe rules of procedure for courts-martial, military commissions, and other tribunals (such as a board of inquiry). However, as previously mentioned, Article 36 subjects that grant to an important limitation: such rules must conform to "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." The courts have recognized this as the "intelligible principle" bounding executive discretion in the grant of regulatory power. *See Loving*, 517 U.S. at 772-773; *see also United States v. Curtis*, 32 M.J. at 263.

Article 36 grants the president discretion to depart from this intelligible principle when he considers such rules to be impracticable. In this matter, the President tersely stated his practicability determination in paragraph 1(f) of his military order, in which he stated that, "[g]iven the danger to the safety of the United States and the nature of international terrorism . . . it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."

The courts have jurisdiction to examine executive determinations which underlie military orders such as this one. *See Duncan v. Kahanamoku*, 327 U.S.

304, 318-319 (1946); *Moyer v. Peabody*, 212 U.S. 78 (1909). Here, the President's Article 36(a) impracticability determination neither follows from the considerations cited in Section 1(f) nor the factual findings that precede it in Sections 1(a)-(e) of the Military Order. Further, the Military Order articulates no nexus between its impracticability determination and the procedural rules it establishes for commissions in Section 4. Logic dictates there be such a nexus for the President's impracticability determination for it to be valid.

Courts also may inquire into the factual circumstances supporting a Military Order when judging its lawfulness. *See Duncan*, 327 U.S. at 326 (Murphy, J., concurring). Here, the President's determination is conclusory and unsupported by the available evidence. The "danger to the safety of the United States" comes not from the operation of our judicial system or courts-martial, but from the Al Qaeda terror network. This amorphous statement does nothing to justify the use of military commissions; it contains no tangible or legally cognizable determination of impracticability.

Similarly, "the nature of international terrorism" does not, without more, justify the departure from U.S. jurisprudential norms. Organized crime kingpins have been tried, convicted and sentenced in U.S. courts. *See, e.g., United States v. Gotti*, 155 F.3d 144 (2nd Cir. 1998). Similarly, the deadliest domestic terrorists in U.S. history, with a demonstrated antipathy to the U.S. government and its legal

systems, were tried and convicted in U.S. civilian courts. *See, e.g., United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998), *cert. denied*, 526 U.S. 1007 (1999). Indeed, the top leaders of Al Qaeda have been tried in federal court (albeit in absentia) for their participation in terrorist attacks upon the United States. *See United States v. Bin Laden*, 126 F.Supp.2d 264 (S.D.N.Y. 2000) (ruling on various motions *in limine* before trial). Further, there is nothing about international terrorism *per se* which suggests that U.S. courts or courts-martial are incapable of adjudicating the guilt of suspected terrorists. *See generally* Peter Bergen, Holy War, Inc. (2001); John Arquilla, David F. Ronfeldt, Networks and Netwars: The Future of Terror, Crime, and Militancy (RAND, 2001).

Congress recently has codified laws specifically targeting international terrorists and the legal issues associated with adjudicating them. *See, e.g.*, 18 U.S.C. § 2339b (criminalizing material support to foreign terrorist organizations); 18 U.S.C. § 2339d (criminalizing military-style training with a designated foreign terrorist organization); *see also* § 6001, Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458 (amending the Foreign Intelligence Surveillance Act to authorize clandestine surveillance of individual terrorists not connected to a foreign power). Congress also has legislated how sensitive national security cases that involve concerns of classified information and physical security should be handled. *See generally* Classified Information Procedures Act, Pub. L.

No. 96-456, 94 Stat. 2025 (1980). With these laws and others, Congress has established the legal framework with which to prosecute alleged terrorists in U.S. district courts.

Consequently, the President's finding of impracticability is both arbitrary and capricious, insofar as it states no legally cognizable basis for the President's decision and is contradicted by all available evidence. An impracticability determination that so contravenes the available record evidence is arbitrary and capricious and should be struck down as an unlawful exercise of executive power. In addition, it is arbitrary and capricious for the President to establish a criminal tribunal in the global war on terror that is not recognized as a legitimate tribunal by the world community. *See Amicus Curiae* Brief of 271 British and European Members of Parliament, *Hamdan v. Rumsfeld* (D.D.C. 2004) (available at: http://www.law.georgetown.edu/faculty/nkk/documents/271europeanmembersofparliament.pdf). In the absence of a proper practicability determination, *see* 10 U.S.C. § 836, the military commissions should be required to conform to the rules and principles recognized in U.S. district courts.

B. The President's impracticability finding is defective because it justifies only the departure from U.S. district court practice, not from the rules for courts-martial

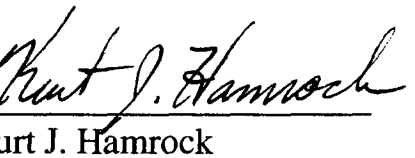
The President's impracticability finding is not only defective because it is arbitrary and capricious; it is also defective because it is incomplete. He stated in

his military order that it was impracticable for the military commission to apply district court principles of law and rules of evidence. He did not, however, make any finding that it was impracticable for the military commission to use the standard practices of courts-martial. Although the President's practicability determination refers to military commissions, it makes no finding of impracticability to support its preference for commissions over courts-martial. For this reason, as well as for those previously stated, the President's practicability determination fails to provide the necessary legal basis for the establishment of military commissions with procedures that are contrary to and inconsistent with those of courts-martial.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the District Court.

Respectfully submitted,



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December 29, 2004

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and D.C. Cir. R. 32(a)(2) because the brief contains 6,665 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(2).

December 29, 2004

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of December, 2004, I have caused two copies of the foregoing Brief of *Amici Curiae* Military Law Practitioners and Academicians to be served on the following by hand delivery and by electronic mail:

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