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

Docket No. 04-5393

DONALD H. RUMSFELD, *ET AL.*,
Appellants,

v.

SALIM AHMED HAMDAN,
Appellee.

On Appeal From the United States District Court
for the District of Columbia
Case No. 04cv01519

BRIEF OF AMICUS CURIAE THE AMERICAN CENTER FOR LAW & JUSTICE SUPPORTING APPELLANTS & REVERSAL OF LOWER COURT RULING

JAY ALAN SEKULOW
STUART J. ROTH
JAMES M. HENDERSON, SR.
(DC Bar # 452639)
(Counsel of Record)
ROBERT W. ASH
AMERICAN CENTER FOR
LAW AND JUSTICE
201 MARYLAND AVE., NE
WASHINGTON, DC 20002
(202) 546-8890
(202) 546-9309 (FAX)

Attorneys for Amicus Curiae

Scheduled for Oral Argument on Tuesday, March 8, 2005, at 9:30 a.m.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) **Parties and Amici.** All parties, intervenors, and *amici* appearing before the district court and in this court are listed in the Brief for Appellants.

Corporate Disclosure Statement

The American Center for Law and Justice (ACLJ) is a public interest law firm incorporated in Virginia. It is tax exempt under Internal Revenue Code 501(a) as an organization described in section 501(c)(3). The ACLJ has no parent companies and issues no stock. The ACLJ exists, *inter alia*, to defend human and civil rights and the separation of powers.

(B) **Rulings Under Review.** References to the rulings at issue appear in the Brief for Appellants.

(C) **Related Cases.** This case was previously before the United States District Court for the District of Columbia (Case No. 04cv01519).

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GLOSSARY

ACLJ	American Center for Law and Justice
ANZUS Pact	Mutual Defense Agreement Between Australia, New Zealand, and the United States
Consolidated Reply	Petitioner's Consolidated Reply to Respondent's Return and Opposition to Cross Motion to Dismiss
Doswald-Beck Br.	Brief as Amicus Curiae of Louise Doswald-Beck, Guy S. Goodwin-Gill, Frits Kalshoven, Marco Sassoli, and the Center for International Human Rights of Northwestern University School of Law in Support of Salim Ahmed Hamdan's Petition for Writ of Mandamus Pursuant to 28 U.S.C. § 1361 or, in the Alternative, Writ of Habeas Corpus
GC	Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (Aug. 12, 1949)
GPW	Geneva Convention (III) Relative to the Treatment of Prisoners of War (Aug. 12, 1949)
ICRC	International Committee of the Red Cross
ICRC Cmt	International Committee of the Red Cross Commentary (on the respective Geneva Convention being referred to)
NATO	North Atlantic Treaty Organization
OAS	Organization of American States

INTEREST OF *AMICUS*[1]

Amicus American Center for Law and Justice (ACLJ) is a not-for-profit organization committed to upholding the integrity of our constitutional system of government based on separation of powers. Jay Alan Sekulow, ACLJ Chief Counsel, has argued and participated as counsel of record in numerous cases involving constitutional issues before the Supreme Court of the United States as well as lower federal and state courts. ACLJ lawyers have argued numerous cases involving constitutional issues before federal and state courts throughout the United States. The ACLJ is very concerned about Appellee Hamdan's attempt to subvert the well-established authority of the Executive and Legislative Branches to deal with the exigencies of war in all its facets and to transfer such authority to the Judiciary. The ACLJ urges this Court to reverse the District Court's ruling and allow the military commissions to proceed.

STATEMENT OF FACTS

Since 9/11, the United States has been engaged in a global war against the

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[1] This brief is filed with the consent of the parties, and letters indicating such consent are available from counsel for *amicus*. No counsel for any party in this case authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

transnational terrorist group *al-Qaeda*[2] and its terrorist allies. Their methods are ruthless, and their goals are geopolitical: "to drive American influence from the Islamic world, to establish a new caliphate there and to renew the medieval war for dominance between Islam and the West."[3] To counter this, President Bush, with the explicit support of Congress,[4] deployed United States armed forces to Afghanistan to strike at and defeat *al-Qaeda* and the Taliban regime that supported it. As could be expected, during the Afghan military campaign, numerous enemy belligerents were killed or taken captive. Some of the captives – described at the time as "the most dangerous"[5] – were brought to Guantanamo Bay

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[2] Because Arabic words must be transliterated into English, there are often different spellings. For example, "*al-Qaeda*" is often transliterated as "*al-Qaida.*" To avoid confusion, "*al-Qaeda*" will be used throughout this brief. Where that term is transliterated differently in a source cited in this brief, it will be changed to the above spelling without further notation.

[3] David B. Rivkin, Jr., & Lee A. Casey, *The Law and War*, pt. 1, Wash. Times, Jan. 26, 2004, at A19.

[4] *See* Pub. L. No. 107-40, 115 Stat. 224 (2001) ("President is authorized to use 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, or harbored such organizations or persons").

[5] *See, e.g.*, www.dailynews.com/socal/terrorist/0102/12/terror01.asp (describing the first arrivals at Guantanamo Bay as "the most dangerous of the *al-Qa[e]da* and Taliban captives . . . ." and quoting Marine Brigadier General Lehnert: "These represent the worst elements of the *al-Qa[e]da* and the

Naval Base (Guantanamo) in Cuba to be detained there. One of those brought to Guantanamo is Appellee Hamdan in this matter.

Shortly after the 9/11 attacks, President Bush issued an Order establishing military commissions to be used to try certain categories of persons, identified in the Order, for war crimes and other offenses. *See* 66 *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, Fed. Reg. 57,833 (Nov. 16, 2001). Appellee Hamdan in this matter has been identified as one of the persons to be tried by military commission. It is his challenge to the President's authority to try him by military commission that brings him before this Court.

SUMMARY OF ARGUMENT

Despite arguments to the contrary, because the United States is currently in a war explicitly sanctioned by the Congress, President Bush possesses the

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Taliban...."). *See also* Deputy Secretary of Defense Paul Wolfowitz, Prepared Statement for the House and Senate Armed Services Committees: *Building a Military for the 21st Century* (Oct. 3-4, 2001), *available at* http://www.defenselink.mil/speeches/2001/s20011003-depsecdef.html ("Our new adversaries may be, in some cases, more dangerous than those we faced in the past. . . . Their decision-making is not subject to the same constraints that earlier adversaries faced. [They] answer to no one. They can use the capabilities at their disposal without consultation or constraint – and have demonstrated a willingness to do so.").

authority to establish military commissions to try certain categories of offenses committed by unlawful combatants, those who cravenly and willingly flout the law of war. Moreover, unlawful combatants, by virtue of their refusal to abide by the strictures of the law of war, do not qualify for the numerous protections enumerated in the Geneva Conventions given to captives who obey the law of war. As such, such persons may be tried by military commissions for their crimes. Further, under American law, issues dealing with foreign and national security policy – including the capture, classification, and handling of war captives – are political decisions, the responsibility for which the Constitution assigns to the political branches. Based on separation of powers, the judiciary should tread lightly when such issues are brought before it. This is such an instance. Therefore, *amicus* urges this court to reverse the lower court and direct the military commissions to proceed.

ARGUMENT

I. HISTORICAL PRECEDENT CONFIRMS THAT THE PRESIDENT HAS CONGRESSIONAL AUTHORIZATION TO ESTABLISH MILITARY COMMISSIONS UNDER 10 U.S.C. § 821.

In *Ex Parte Quirin*, 317 U.S. 1 (1942), the Supreme Court of the United States held unanimously that, based on Article 15 of the then-Articles of War, President Roosevelt had "explicit" Congressional authorization to establish

military commissions. *Id.* at 28. Article of War 15 read, in pertinent part, as follows: that the creation of statutory jurisdiction for courts martial did not "'deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that . . . by the law of war may be tried by military commissions. . . .'"[6] Although "Article 15 [should] probably [have] best [been] read merely as a Congressional refusal to abrogate a prior non-statutory jurisdiction for military commissions," Congress, knowing that the Supreme Court had ruled in *Ex Parte Quirin* that the Article 15 language constituted an explicit grant of Congressional authorization for the President to establish military commissions, in 1950 re-enacted Article 15 *as written*, recodifying it as 10 U.S.C. § 821.[7] President Bush's 2001 Order creating military commissions, *see* 66 Fed.

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[6] Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 Const. Comment. 261, 274 (Spring 2002) (quoting Article of War 15).

[7] *Id.* at 275. The legislative history of the provision "suggests that Congress was aware of, and accepted, *[Ex Parte] Quirin*'s interpretation of the provision." *Id.* (citing Sen. Rpt. 486, Establishing a Uniform Code of Military Justice, 81st Cong., 1st Sess., at 13 (June 10, 1949) ("The language of [Article of War] 15 has been preserved because it has been construed by the Supreme Court."); H. Rpt. 491, Uniform Code of Military Justice, 81st Cong., 1st Sess., at 17 (April 28, 1949) (same)).

Reg. 57,833 (Nov. 16, 2001), was premised, in part, on 10 U.S.C. § 821.[8] Consistent with *Ex Parte Quirin* and Congress' knowing re-enactment of Article of War 15 (as 10 U.S.C. § 821) in light of the Supreme Court's ruling in *Ex Parte Quirin*, President Bush was on firm legal ground when he established military commissions in 2001, firmer by far than the ground upon which President Roosevelt had stood in 1942, when his establishment of military commissions to try the Nazi saboteurs was unanimously upheld by the Supreme Court.[9] Hence,

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[8] The President cited as his authority to establish military commissions, *inter alia*, 10 U.S.C. § 821. *See* 66 Fed. Reg. 57,833 pmbl. (Nov. 16, 2001) (citing his Constitutional authority as President and as Commander-in-Chief of the Armed Forces as well as his statutory authority, including the Congressional authorization to use military force and 10 U.S.C. §§ 821 & 836).

[9] Some may argue that, since World War II was a "declared" war and the current war on terrorism is not, there is a sufficient difference to defeat President Bush's authority to establish military commissions. Such an argument clearly elevates form over substance, for "[i]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority." *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863). The current war on terrorism was thrust upon us – we did not seek the war. Moreover, just as President Roosevelt noted, regarding the Japanese attack on Pearl Harbor, that a state of war existed between the United States and the Empire of Japan *prior to* the Congressional declaration of war, *see* http://bcn.boulder.co.us/government/national/speeches/spch.html, so, too, did a state of war exist immediately following the 9/11 attacks upon the United States, despite the lack of Congressional action. *See also The Pedro*, 175 U.S. 354, 363 (1899) (recognizing that war with Spain began prior to any declaration by Congress based upon a prior declaration of the Spanish government).

Yet, in the case of the current war on terrorism, Congress, agreeing with the

President that the 9/11 attacks constituted acts of war, enacted legislation authorizing the President to use military force to respond. Pub. L. No. 107-40, 115 Stat. 224 (2001). This Congressional action constituted a *de jure* authorization of war and ratified the President's actions. *See Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973) (holding how Congress gives its consent to engage in war to be "a discretionary matter for Congress to decide in which form . . . it will give its consent;" "[a]ny attempt to require a declaration of war as the only permissible form of assent might involve unforeseeable domestic and international consequences"); *see also The Prize Cases*, 67 U.S. at 668; *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) ("Congress is empowered to declare a general war, or congress may wage a limited war . . . . What, then, is the nature of the contest subsisting between America and France? In my judgment, it is a limited, partial, war. *Congress has not declared war in general terms; but congress has authorised hostilities* . . . .") (emphasis added); *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir. 1971) ("For the judicial branch to enunciate and enforce [a specific standard as to how wars should be declared] would not only be extremely unwise but also would constitute a deep invasion of the political domain;" "The form which congressional authorization should take is one of policy, committed to the discretion of the Congress and outside the power and competency of the judiciary"); *Lowry v. Reagan*, 676 F. Supp. 333, 340 n.53 (D.D.C. 1987) ("The President must have flexibility in executing military and foreign policy on a day to day basis. Thus, this Court is inclined to conclude that this case does not present judicially manageable standards."); *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 599 (D.D.C. 1983) ("[W]e are mindful that 'matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention,' *Haig v. Agee*, 453 U.S. 280, 292 (1981), inasmuch as they are 'so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)); *Ange v. Bush*, 752 F. Supp. 509, 514 (D.D.C. 1990) ("In the present case, there is an explicit textual commitment of the war powers not to *one* of the political branches, but to *both*. The various provisions of the Constitution do not grant the war power exclusively to either the legislative or the executive branch. . . . Meddling by the judicial branch in determining the allocation of constitutional powers . . . 'extends judicial power beyond the limits inherent in the constitutional scheme for dividing the federal power.'" *Roegle v.*

to argue that 10 U.S.C. § 821 does not authorize a president to create military commissions is simply untrue.

II. UNLAWFUL BELLIGERENTS DO NOT QUALIFY AS PRISONERS OF WAR UNDER GENEVA CONVENTION III (GPW).

As the Supreme Court aptly noted in *Ex Parte Quirin*:

Fed. Open Mkt. Comm., 656 F.2d 873, 881 (D.C.Cir.), *cert. denied*, 454 U.S. 1082 (1981)); Alexander Hamilton, *The Examination, No. 1, 17 Dec. 1801*, *reprinted in* 3 *The Founder's Constitution* (Kurland & Lerner eds., 1987) ("when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already at war, and any declaration on the part of Congress is nugatory").

Not only did Congress agree that the United States was at war, the international community did as well. *For the first time in the history of the Alliance*, NATO implemented Article 5 of the North Atlantic Treaty, which states "that an armed attack on one or more of [the Allies] in Europe or North America shall be considered an attack against them all." *See* North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 34 U.N.T.S. 243. Similarly, the United States and Australia invoked, *for the first time in the history of the ANZUS Pact*, Article IV of the ANZUS Treaty, which reads, in pertinent part: "Each Party recognizes that an armed attack . . . on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger . . . ." *See* Security Treaty Between Australia, New Zealand and the United States of America, Sept. 1, 1951, 131 U.N.T.S. 83, 86; Press Release Announcing Application of the Anzus Treaty, Sept. 14, 2001. Likewise, on September 21, 2001, OAS Foreign Ministers adopted a resolution recognizing that the attacks on the United States were also attacks against all American states that triggered the reciprocal assistance provision of the Rio Pact. *See* Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3(1), 62 Stat. 1681, 1700, 21 U.N.T.S. 77, 95; OAS Resolution on Terrorist Threat to the Americas, OEA/Ser.F/II.24, RC.24/RES.1/01, Sept. 21, 2001.

> By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war . . . . *Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.*

317 U.S. at 30-31 (emphasis added).[10] The Court noted further, regarding "an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property," that such belligerents "are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals." *Id.* at 31. Such were the tactics of the *al-Qaeda* terrorists who attacked the United States on 9/11 and who engaged United States and allied forces in Afghanistan.

The 1907 Hague Convention set forth four requirements, all of which had to be fulfilled before belligerents would be recognized as lawful combatants: (1)

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[10] The same is true today under the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 74 U.N.T.S. 135 (GPW). *See* Lee A. Casey, et al., *Unlawful Belligerency and Its Implications Under International Law* (*available at* http://www.fed-soc.org/Publications/Terrorism/unlawfulcombatants.htm) ("Casey, *Unlawful Belligerency*") ("claims that the customary status of unlawful belligerent, as codified by the 1907 Hague Convention, was eliminated by the [GPW] are false. Those rules remain fully applicable.").

have a responsible command structure; (2) wear a fixed distinctive emblem recognizable at a distance; (3) carry arms openly; and (4) operate in accordance with the laws and customs of war. *See* Annex to Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 1, 187 Consol. T.S. 227. Failure to meet all four requirements made a belligerent an unlawful combatant, which, in itself, is a war crime.

The 1949 Geneva Conventions retained the four Hague requirements (to which the Court in *Ex Parte Quirin* was referring when it was discussing the difference between "lawful" and "unlawful" combatants in the quote above). Article 5 of the GPW determines to whom the GPW applies: "The present Convention shall apply to all persons referred to in Article 4 . . . ." GPW art. 5. *A fortiori*, the GPW does *not* apply to those *not* referred to in Article 4. Article 4 of the Convention lists the categories of persons who qualify to be prisoners of war ("POW"), i.e., who qualify to be protected by the terms of the Convention, when they fall into enemy hands. The protected categories are as follows:

> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such forces.
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict . . . *provided that such militias and volunteer corps . . . fulfil the following conditions*:
> (a) that of being commanded by a person responsible for his

subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war.[11]

(3) Members of regular armed forces who profess allegiance to a government or authority not recognized by the Detaining Power.
(4) Persons who accompany the armed forces without actually being members thereof . . . *provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card* . . . .[12]
(5) Members of [certain merchant marine and civil aircraft crews].
(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having time to form themselves into regular armed units, *provided they carry arms openly and respect the laws and customs of war.*

GPW art. 4 (emphasis added). Failure to fulfill the Hague requirements for lawful

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[11] The GPW made clear that "members of ad hoc citizen militias and volunteer corps, including members of an 'organized resistance movement,' could be considered to be lawful combatants, entitled to the status of prisoner-of-war upon capture, *but only if they met the four Hague Regulation conditions*." Casey, *Unlawful Belligerency* (the ICRC noted in its commentary on the GPW that "there was unanimous agreement about the necessity for partisans to fulfill the conditions laid down in Article 1 of the Hague Regulations and to have an adequate military organization so as to ensure that those conditions could be fulfilled, in order for them to qualify as 'prisoners-of-war'"). Yet, the four requirements in subcategory (2) merely reflect the inherent characteristics of a Nation's regular armed forces, to wit, the existence of a responsible command hierarchy, the wearing of a uniform distinguishing the military forces from the civilian population, the open bearing of arms, and a commitment to obeying and enforcing the laws and customs of war. *See id.*

[12] Accompanying and supporting unlawful combatants does not excuse one from the consequences of associating with and supporting those who violate the law of war. *See* GPW art. 4.A.(4).

belligerency places the offender outside the protections of the GPW. *See* GPW art. 5 ("present Convention shall apply to the persons referred to in Article 4," which in turn enumerates the lawful belligerency requirements).

III. GPW ARTICLE 5, WHICH ALLOWS A CAPTIVE TO CHALLENGE HIS ARTICLE 4 STATUS, IS NARROWLY DRAWN.

Article 5 of the GPW establishes a procedure to determine a captive's status under Article 4 when there is doubt about such status. *See* GPW art. 5 (*"Should any doubt arise* as to whether persons, having committed a belligerent act . . ., belong to any of the categories enumerated in Article 4 . . . ." (Emphasis added)). Yet, for those who wish to challenge their Article 4 status, Article 5 also *presupposes* that the person challenging his status under Article 4 *has committed* a "belligerent act." *See id.* ("Should any doubt arise as to whether persons, *having committed a belligerent act* . . . ." (Emphasis added)). Hence, the commission of a belligerent act is an integral part of Article 5.

Appellee Hamdan in this matter seeks to challenge his Article 4 status before a "competent tribunal" pursuant to Article 5. In his Consolidated Reply, Appellee Hamdan admits that he is not challenging the President's power to

detain. *See* Consolidated Reply at 19.[13] Further, GPW Article 5, the very vehicle Appellee is using to challenge his status under Article 4, is predicated on the presumption that the person challenging his status under Article 4 has committed a "belligerent act." GPW art. 5, ¶ 2. By appealing to Article 5, the challenger accepts the presumption, thereby making him a "belligerent" of some sort in the eyes of the tribunal. From the language of the Article itself, it follows that all that the Article 5 tribunal is permitted to determine is what type of belligerent the

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[13] Nor could he:

> The right to detain enemy combatants during wartime is one of the most fundamental aspects of the customary laws of war and represented one of the first great humanitarian advances in the history of armed conflict. . . . [T]he right to detain enemy combatants in wartime is so basic that it has rarely been adjudicated [in United States courts.] . . . It is an inherent part of the president's authority as commander-in-chief, and was well-known to the Constitution's framers. Alexander Hamilton addressed this very point in 1801 . . . . Hamilton noted that "[w]ar, of itself, gives to the parties a mutual right to kill in battle, and to capture the persons and property of each other" and that the Constitution does not require specific congressional authorization for such actions, at least after hostilities have commenced. Indeed, he wrote, "[t]he framers would have blushed at a provision, so repugnant to good sense, so inconsistent with national safety and convenience."

David B. Rivkin, Jr., et al., *The Law and War*, pt. 2, Wash. Times, Jan. 27, 2004, at A19 (quoting Alexander Hamilton, *The Examination, No. 1, 17 Dec. 1801, reprinted in* 3 *The Founder's Constitution* (Kurland & Lerner eds. 1987)).

challenger is, not whether he is something other than a belligerent.[14] Furthermore, the ICRC commentary for Article 5 also indicates a *very limited application* for challenging one's status based on "doubt." It reads: "This would apply to deserters, and to persons who accompany the armed forces and have lost their identity card."[15] *Article 5 mentions no other beneficiaries of* ¶ *2.* Yet, that makes considerable sense, since soldiers on the scene of the capture are usually able to determine – without further investigation – whether the belligerents they have captured are lawful combatants, i.e., whether they are complying with the Hague

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[14] Some have suggested that, even if Appellee were to be determined to be an "unlawful" combatant, he might enjoy the protections of the Fourth Geneva Convention (GC). *See, e.g.*, Doswald-Beck Br. at 6. Yet, if that were true, *it would lead to the absurd result in that those who deliberately and openly flout the law of war by indiscriminately targeting civilians and by engaging in belligerent acts using civilian identity as a shield would be required to be treated better than those who diligently obey the law of war, often to their own detriment.* For example, in accordance with GC Article 49, "[i]ndividual or mass forcible transfers, as well as deportations of protected persons [which would include unlawful combatants under this argument] from occupied territory to the territory of the Occupying Power or to any other country, occupied or not, are prohibited, regardless of their motive," GC art. 49, ¶ 1, whereas there is no such limitation in the GPW. From the conclusion that "unlawful combatants" are protected by the GC, some have concluded that bringing "unlawful combatants" like *al-Qaeda* members to Guantanamo Naval Base, in itself, is a war crime. *See, e.g.*, Luisa Vierucci, *What judicial treatment for the Guantanamo detainees?*, German L.J., vol. 3, no. 9 (Sep. 2002) (available at http://www.germanlawjournal.com/print.php?id=190).

[15] *See* ICRC Cmt on GPW art. 5, ¶ 2 (*at* http://www.icrc.org/ihl.nsf/WebCOMART?OpenView&Start=1&Count=150&Expand=3#3).

Convention requirements. Surely, it is not difficult for soldiers on the battlefield to ascertain, short of convening a tribunal, for example, whether those committing belligerent acts are wearing an identifiable insignia visible at a distance and bearing arms openly, whereas identifying deserters and determining that someone has lost his identity card (the sole examples given in the ICRC commentary on Article 5) are not so readily apparent to the battlefield soldier (and would require more investigation, such as by a tribunal).[16]

IV. THE PRESIDENT, AS COMMANDER-IN-CHIEF, IS RESPONSIBLE TO DETERMINE THE CHARACTER OF BELLIGERENTS, A DETERMINATION WHICH COURTS MUST RESPECT BASED ON SEPARATION OF POWERS.

It has been well-settled for over one hundred forty years that the President, as Commander-in-Chief, determines whether those who threaten the Nation have "the character of belligerents," and, once that decision is made, the courts "must be governed by the decisions and acts of the political department of the Government to which this power was entrusted." *The Prize Cases*, 67 U.S. (2

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[16] Although Article 5 tribunals are required when doubt arises as to the Article 4 status of a detainee, Secretary Rumsfeld has gone beyond what is required by the GPW and has directed that the status of all Guantanamo detainees be reviewed annually by competent tribunals. *See Court Clash Over Gitmo*, CBSnews.com, Apr. 20, 2004 (*available at* http://www.cbsnews.com/stories/2003/11/30/ terror/main586001.shtml).

Black) 635, 670 (1863).[17] Additionally, "no governmental interest is more compelling than the security of the Nation,"*Haig v. Agee*, 453 U.S. 280, 307 (1981), and

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[17] "[C]haracter of belligerents" includes determining whether they are obeying the law of war. *See also In Re Yamashita*, 327 U.S. 1, 12 (1946) ("The war power . . . is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy . . . evils which the military operations have produced."); *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) ("The war power of the national government is 'the power to wage war successfully.' . . . It extends to every matter and activity so related to war as substantially to affect its conduct and progress. . . . *It embraces every phase of the national defense* . . . . Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. . . . *Where . . . the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility for war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs*." (internal citations omitted) (emphasis added)); *Haig v. Agee*, 453 U.S. 280, 292 (1981) ("matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention"); *Hamilton v. Ky. Distilleries & Whiskey Co.*, 251 U.S. 146, 161 (1919) (concluding that war power includes power "to remedy the evils which have arisen from [a conflict's] rise and progress") (quoting *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 507 (1871)); *Aktepe v. United States*, 105 F.3d 1400, 1403 (11th Cir. 1997) (finding that political branches accorded high degree of deference in area of military affairs); William Rehnquist, *All the Laws But One: Civil Liberties in Wartime* 222 ("In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts in favor of order – in favor of the government's ability to deal with conditions that threaten the national well-being.").

> [t]he President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. *It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.* Nor can courts sit *in camera* in order to be taken into executive confidences. *But even if courts could require full disclosure, the very nature of executive decisions as to foreign [and national security] policy is political, not judicial.* Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. *They are delicate, complex, and involve large elements of prophecy.* They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. *They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of the political power not subject to judicial intrusion or inquiry.*

Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (citing *Coleman v. Miller*, 307 U.S. 433, 454 (1939); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319-21 (1936); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918)) (emphasis added).

Part and parcel of any resort to war is the issue of what to do with the enemy combatants who may fall into the hands of United States armed forces. That political question implicates a whole host of matters, such as: how to ensure that such persons are no longer able to take up arms against United States forces or harm their captors, how to ensure that perpetrators of war crimes are properly identified, tried and punished, how to ensure that information of intelligence value

is timely obtained, and so forth. Moreover, it falls to the President to orchestrate national policy and balance benefits and risks. *He both needs and deserves the latitude to develop such policies without undue interference by the Judiciary.*

The prosecution of a war involves both foreign policy and national security issues which generally fall outside the realm of judicial competence:

> [I]t is beyond the judicial function for a court to review foreign policy decisions of the Executive Branch. These are political judgments, "decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibilities and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."

People's Mojahedin Org. v. U.S. Dep't of State, 182 F.3d 17, 23 (D.C. Cir. 1999) (quoting *Chicago & S. Air Lines, Inc.*, 333 U.S. at 111). The same is true for military decisions. *See, e.g., Hirabayashi*, 320 U.S. at 93 (noting the wide discretion given the political branches in dealing with war issues and recognizing that courts should not substitute their judgment for that of the political branches). Moreover, to use Justice Goldberg's oft-quoted phrase, the Constitution "is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159-60 (1963). As such, courts should tread lightly where decisions involving warfare[18] are

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[18] Moreover, the ongoing war is unlike any before in our history. *See, e.g.*, Mark Fineman & Stephen Braun, *After the Attack*, L.A. Times, Sept. 24, 2001, at A1 ("[*Al-Qaeda* members'] commitment is unyielding. They film their own suicide videos before they hop into Toyota pickup trucks loaded with hundreds of pounds of TNT, turn on audio cassettes chanting praise to those who will die for

concerned – and *few things are more closely associated with warfare than capturing, classifying, and detaining enemy belligerents. See also Baker v. Carr*, 369 U.S. 186, 210 (1962) (noting that certain issues reserved by the Constitution to the political branches are non-justiciable political issues).

V. THE MILITARY COMMISSIONS WILL PROVIDE FAIR TRIALS.

Appellee and amici from the Trial Court challenge the fundamental fairness of military commissions. *See, e.g.*, Consolidated Reply at 20-69; Doswald-Beck Br. at 24-35. Yet, it should be noted from the outset that it will be politically impossible to conduct an *unfair* trial via military commission in light of the attention being given to such proceedings by the national and international press, the ICRC, the governments of the accused subject to such proceedings, various human rights groups at home and abroad, various national and international lawyer groups, and the like, all of whom will publicly highlight any shortcomings of such commissions. Hence, essential fairness in the military commissions is

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the cause, and blow themselves to bits to weaken the social foundation of their worst enemy: the United States."); President George W. Bush, *Address to a Joint Session of Congress and the American People*, Sept. 20, 2001 (*available at* http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html) (The President noted the following: "The terrorists' directive commands them to kill Christians and Jews, to kill all Americans, and [to] make no distinction among military and civilians, including women and children. . . ."). As such, the President must have the freedom to do his job with minimal judicial interference and second-guessing.

doubtless assured.

Not only do the rules set forth for such commissions generally meet international norms,[19] but the persons selected for the Military Commissions Review Panel (the serving Chief Justice of the Rhode Island Supreme Court, a former Attorney General of the United States, a former Attorney General of Pennsylvania, a serving United States District Court judge, and a former Secretary

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[19] Among the rights and procedural safeguards afforded the accused before a military commission are the following:

- full, fair and open trial;
- presumption of innocence;
- proof of guilt beyond reasonable doubt;
- right to call and cross examine witnesses;
- right to be represented by a military attorney at no cost and by a civilian attorney at his own expense;
- right to remain silent (with no adverse inference for doing so);
- right to receive a copy of the charges in English and in another language that the accused understands; and
- right to have the proceedings translated into a language the accused understands.

Further, a commission member shall vote for a finding of guilty *if and only if* that member is convinced beyond a reasonable doubt as to the accused's guilt. The prosecution shall provide the defense with access to evidence the prosecutor intends to introduce at trial as well as to evidence known to the prosecutor which tends to exculpate the accused. If an accused is found guilty of any offense, he will have the right to address the commission members and may submit evidence during sentencing proceedings. The accused may not be tried twice for the same offense. *See* Dep't of Defense Military Commission Order No. 1 (March 21, 2002) (*available at* http://www.dtic.mil/whs/directives/corres/mco/mco1.pdf); Dep't of Defense Fact Sheet, *Military Commission Procedures* (*available at* http://www.defenselink.mil/ news/Aug2003/d20030812factsheet.pdf).

of Transportation) are all persons of the utmost integrity and judicial independence who will ensure that each person tried by a military commission receives a fair trial.[20] The Military Commissions Review Panel (along with the press, ICRC, and the other groups mentioned earlier) will all seek to ensure that each accused receives a fair trial. It seems fair to say that these trials will be among the most watched in history – that, in itself, should help ensure the fundamental fairness everyone desires and mitigates the need for this Court to intervene in a case so thoroughly suffused with policy considerations outside the judicial ken.

CONCLUSION

For the foregoing reasons, *amicus* American Center for Law and Justice urges this Court to reverse the decision of the United States District Court for the District of Columbia and permit the military commissions to proceed.

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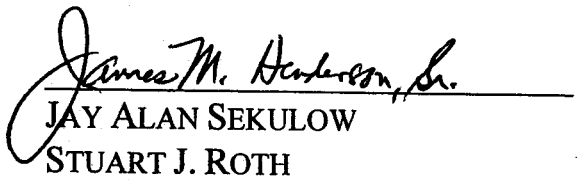
[20] *See* Secretary of Defense Rumsfeld, *Swearing In Office of Military Commissions Review Panel Members* (Sept. 21, 2004) (*available at* http://www.defense.gov/transcripts/2004/tr20040921-secdef1323.html). Secretary Rumsfeld noted that the specific panel members were selected "because we know that they will make every effort to ensure that the procedures followed are fair to the accused and reflective of our basic legal traditions." *Id.*

December 7, 2004

Respectfully submitted,



JAY ALAN SEKULOW
STUART J. ROTH
JAMES M. HENDERSON, SR.
(DC Bar # 452639)
(Counsel of Record)
ROBERT W. ASH
AMERICAN CENTER FOR
LAW AND JUSTICE
201 MARYLAND AVE., NE
WASHINGTON, DC 20002
(202) 546-8890
(202) 546-9309 (FAX)

Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of December, 2004, I served two (2) copies of the foregoing Brief of *Amicus Curiae* The American Center for Law & Justice Supporting Appellants & Reversal of Lower Court Ruling by causing them to be sent by Federal Express, overnight delivery, costs prepaid, to:

Robert Loeb
Special Appellate Counsel
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 7268
Washington, DC 20530-0001

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

Robert W. Ash
One of the Attorneys for *Amicus Curiae*
Supporting Appellants

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DATE: DEC 7, 2004

Robert W. Ash
One of the Attorneys for *Amicus Curiae*
Supporting Appellants