[ORAL ARGUMENT SCHEDULED FOR MARCH 8, 2005]

No. 04-5393

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

SALIM AHMED HAMDAN,

Petitioner-Appellee,

v.

DONALD H. RUMSFELD, United States Secretary of Defense, JOHN D. ALTENBURG, Jr., 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-Appellants.

On Appeal from the United States District Court
for the District of Columbia

BRIEF *AMICUS CURIAE* OF LOUIS FISHER IN SUPPORT OF PETITIONER-APPELLEE URGING AFFIRMANCE

Jonathan L. Hafetz
(D.C. Bar No. 49761)
Lawrence S. Lustberg
Gibbons, Del Deo, Dolan,
Griffinger & Vecchione, P.C.
One Pennsylvania Plaza, 37th Fl.
New York, NY 10119
(212) 649-4743

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

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

(B) Rulings Under Review: Respondents-Appellants seek review of the district court's order in *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004). Respondents-Appellants filed their 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, pending in the district court of this Circuit. Those cases are listed in the brief for Respondents-Appellants. Counsel for *amicus curiae* is not aware of any additional related cases.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

PAGE(S)

CASES

* Authorities on which *amicus* chiefly relies are marked with asterisks.

CONSTITUTION, STATUTES, AND LEGISLATIVE MATERIALS

OTHER AUTHORITIES

REGULATIONS

CERTIFICATE OF COUNSEL

Pursuant to Circuit Rule 29(d), counsel for *amicus curiae* Louis Fisher certifies that this separate brief is necessary because the number of complex issues, the expedited briefing schedule, and the disparate interests and viewpoints of the *amici* make it impracticable for the *amici* to file a single brief.

___/s/_____

Jonathan L. Hafetz
(D.C. Bar No. 49761)
Lawrence S. Lustberg
Gibbons, Del Deo, Dolan,
Griffinger & Vecchione, P.C.
One Pennsylvania Plaza, 37th Fl.
New York, NY 10119
(212) 649-4743

Counsel for Amicus Curiae

Dated: December 29, 2004

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, Louis Fisher, is Senior Specialist in Separation of Powers with the Congressional Research Service of the Library of Congress, where he has worked since 1970.[2] He is the author of numerous books and articles on constitutional law and is frequently invited to testify before Congress. Dr. Fisher has conducted extensive research on military commissions and written two books on the subject: *Nazi Saboteurs on Trial: A Military Tribunal and American Law* (2003); and *Military Tribunals and Presidential Power* (forthcoming 2005, Univ. Press of Kansas). Based upon this expertise, he has an interest in providing the Court with a deeper understanding of the history of military commissions and their relationship to the separation of powers and other issues in this case.

SUMMARY OF ARGUMENT

History does not support the government's argument that the President has broad inherent authority to establish military commissions. First, the separation of powers has traditionally limited the President's authority to establish military commissions without congressional authorization. Military commissions have long been understood as an emergency measure to be used by a commander in the

[1] *Amicus curiae* certifies that all parties have consented to the filing of this brief and that a notice of consent has been separately filed with the Clerk of Court.

[2] The views expressed in this brief are Mr. Fisher's own, and his institutional affiliations with the Library of Congress and Congressional Research Service are provided for identification purposes only.

field to fill a temporary gap created by the absence of civilian court or court-martial jurisdiction. Second, historical practice illustrates that military commissions have typically occurred in a zone of combat operations or occupied territory, have generally sought to adhere to the procedures used in courts-martial, and have never singled out a broad class of non-citizens. Military commissions that have exceeded these parameters have left a stain upon the American system of justice.

ARGUMENT

I. THE SEPARATION OF POWERS HAS HISTORICALLY LIMITED THE PRESIDENT'S AUTHORITY TO ESTABLISH MILITARY COMMISSIONS WITHOUT CONGRESSIONAL AUTHORIZATION.

The American constitutional system is founded upon the principle of the separation of powers. *E.g.*, *The Federalist* No. 47, at 301 (James Madison) (C. Rossiter ed. 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."). One reason for this principle is that military abuses by the king drove colonial leaders to seek independence from England and to limit the concentration of military power in their new republic. *The Declaration of Independence* para. 14 (U.S. 1776) ("[The king] has affected to "render the Military independent of and superior to the Civil power."). The Constitution thus provides Congress with broad powers over armed conflict, including the power "[t]o declare War . . . and

make Rules concerning Captures on Land and Water," U.S. Const. art. I, § 8, cl. 11, "[t]o define and punish . . . Offences against the Law of Nations," *id.* art. I, § 8, cl. 10, "[t]o raise and support Armies," *id.* art. I., § 8, cl. 12, "[t]o provide and maintain a Navy," *id.* art. I., § 8, cl. 13, "[t]o make Rules for the Government and Regulation of the land and naval Forces," *id.* art. I, § 8, cl. 14, and "[t]o constitute Tribunals inferior to the supreme Court." *Id.* art. I, § 8, cl. 9. While the Constitution also makes the President "Commander in Chief of the Army and Navy," *id.* art. II, § 2, cl. 1, this power was historically understood as a limited one. *E.g.*, *The Federalist* No. 69, at 418 (Alexander Hamilton) (C. Rossiter ed. 1961) (explaining commander-in-chief power meant "nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy"); *see also Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 643-44 (1952) (Jackson, J., concurring) ("Constitution did not contemplate that the title Commander-in-Chief of the Army and Navy will constitute [the President] also Commander-in-Chief of the country" or give him a "monopoly of 'war powers'"). Unless Congress maintains the authority to make rules that will govern the military, "the most summary and severe punishments might be inflicted at the mere will of the executive." Joseph Story, *Commentaries on the Constitution of the United States* § 1192, at 418 (R. Rotunda & J. Nowak eds. 1987).

Accordingly, the separation of powers has historically limited the authority of the President and military officials to establish military commissions without congressional legislation. On June 30, 1775, the Continental Congress adopted rules and regulations for the military in a series of 69 Articles of War. *American Articles of War of 1775, reprinted in* William Winthrop, *Military Law and Precedents* 953-60 (2d ed. 1920). Thus, from the beginning, the punishment of offenses by the military was "wholly statutory, having been . . . enacted by Congress as the legislative power." Winthrop, *supra*, at 21; *see also* Alexander Macomb, *A Treatise on Martial Law and Courts-Martial* 19-20 (1809) (describing courts-martial jurisdiction under Articles of War). Congress thereby established standards *in advance* by which to address offenses like mutiny, sedition, and assistance to the enemy, and required that such offenses be judged and punished by courts-martial, not left to the discretion and judgment of military commanders or executive officials. Louis Fisher, *Military Tribunals and Presidential Power* 7 (forthcoming 2005, Univ. Press of Kansas).[3] As commander in chief during the American Revolution, Washington adhered to the Articles of War by reviewing death sentences imposed by courts-martial, 13 *Writings of George Washington* 136-40 (J. Fitzpatrick ed. 1931), which he sometimes overturned for lack of legal basis. 11 *Writings of George Washington*, *supra*, at 262. Washington recognized

[3] For the convenience of the Court, a copy of this manuscript has been lodged with the Clerk of Court.

that changes in the military code "can only be defined and fixed by Congress." 17 *Writings of George Washington*, *supra*, at 239. Similarly, during the War of 1812, President Madison did not make urgently needed changes to court-martial procedure on his own, but rather sought, and obtained, those revisions from Congress. *See* Fisher, *Military Tribunals*, *supra*, at 23.

The government asserts that, "since the founding of the Nation," the President has exercised inherent constitutional authority to create military commissions in the absence of congressional authorization. Br. for Appellants at 57. It ignores this important Founding era history and instead relies upon the trials of John André in 1780 and Alexander Arbuthnot and Robert Christy Ambrister in 1818. *Id.* at 58-59. The proposition that André's trial marked an exercise of unbridled, inherent executive authority is simply false. To the contrary, the Continental Congress had adopted a resolution in 1776 providing that enemy spies "shall suffer death . . . by sentence of a court martial, or such other punishment as such court martial shall direct," 5 *Journals of the Continental Congress, 1774-1789*, at 693, and had ordered that this resolution "be printed at the end of the rules and articles of war." *Id.* Even before that, the Congress had made it punishable by court-martial for members of the continental army to "hold[] correspondence with, or . . . giv[e] intelligence to, the enemy." *American Articles of War of 1775*, *reprinted in* Winthrop, *supra*, at 955 (Article 28). Additionally, the Continental

Congress was the only branch of government at the time, and Washington thus acted as its agent, and not as an official of a separate and independent branch, even if he possessed the title of commander in chief.

The military trial of Arbuthnot and Ambrister during the Seminole War in Florida in 1818, is equally unpersuasive and, moreover, underscores the abuses to which military commissions are prone. After the tribunal changed its sentence against Ambrister from death to corporal punishment, General Andrew Jackson overrode its decision and directed that Ambrister be shot. President Monroe sought to distance himself from Jackson's actions, forwarding documents about the case to Congress for legislative action. 2 *A Compilation of the Messages and Papers of the Presidents* 612 (J. Richardson ed. 1925); *see also* 15 *Annals of Congress* 2136-50 (1818). The following year, the House Committee on Military Affairs issued a highly critical report of the trials. It found that no law authorized the men's trial before a military court for the alleged offenses, except the charge that Arbuthnot was "acting as a spy," of which he was found not guilty, and concluded that there was not even "a shadow of necessity for [their] death." 1 *American State Papers: Military Affairs* 735 (1819). The Committee, moreover, found it "remarkable" that Jackson would seek to justify the tribunals on the ground that the men were pirates or outlaws since the former applies only to "offences upon the high seas" and the latter "applies only to the relations of

individuals with their own Governments." *Id.* A Senate report likewise rejected the theory that Arbuthnot and Ambrister were "outlaws and pirates" and further noted that "[h]umanity shudders at the idea of a cold-blooded execution of prisoners, disarmed, and in the power of the conqueror." 15 *Annals of Congress* 267 (1819) (internal quotation marks omitted). The prominent military jurist William Winthrop later remarked that if an officer had ordered the execution as Jackson had, he "would now be indictable for murder." Winthrop, *supra*, at 465 (emphasis omitted).

The first actual military commissions were not established until 1847, during the Mexican War. As commander of the U.S. forces in Mexico, General Winfield Scott originally established military commissions (a term he coined) as an emergency measure to address undisciplined action and other misconduct by American troops. *See, e.g.*, 2 Winfield Scott, *Memoirs of Lieut.-General Scott, L.L.D.* 392-93 (1864). Yet, Scott never questioned Congress's authority to control the commissions. He instead sought statutory authority in advance and explained that he was merely acting to instill discipline among his troops and combat guerrilla warfare until Congress could enact the necessary legislation. *Id.* at 393. Scott relied heavily upon the statutory Articles of War and existing practices in the States, and further provided that no commission "shall try any case clearly cognizable by any court martial." *Id*. at 544.

Although military commissions were used widely during the Civil War, the first commissions were created to address "'crimes and military offenses . . . not triable or punishable by courts-martial and . . . not within the jurisdiction of any existing civil court.'" 2:1 *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* 247 (1894) (quoting army general order dated January 1, 1862).[4] Statutes recognized the existence and operation of military commissions as early as 1862.[5] *E.g.*, Act of July 17, 1862, ch. 201, § 5, 12 Stat. 597, 598 ("[T]he President shall appoint . . . a judge advocate general . . . to whose office shall be returned, for revision, the records and proceedings of all courts-martial and military commissions, and where a record shall be kept of all proceedings had thereupon."); Act of Mar. 3, 1863, ch. 75, § 30, 12 Stat. 731, 736 (murder, manslaughter, robbery, arson, and specified other crimes, when committed by persons in military service of United States and subject to articles of war, punishable by sentence of court-martial or military commission); Act of July 2, 1864, ch. 215, § 1, 13 Stat. 356, 356 (military commander authorized to execute sentences imposed by military commissions for, *inter alia*, "violations of the laws and customs of war"). Francis Lieber noted that the comprehensive code he developed to enable commanders in the field to wage war effectively and

[4] "2:1" stands for series 2, volume 1.

[5] Appellants incorrectly state that "[i]t was not until 1863 that military commissions were even mentioned in a statute enacted by Congress." Brief for Appellants at 59.

humanely was issued as an army general order because the word "code" indicated something the President "has no right to issue -- something which requires the assistance of Congress -- an enactment." R.R. Baxter, "The First Modern Codification of the Law of War: Francis Lieber: and General Orders No. 100," 3 *Int'l Rev. Red Cross* 171, 185 (No. 25, Apr. 1963). The Supreme Court curtailed the use of military commissions shortly after the war ended. *Ex parte Milligan*, 71 U.S. 2 (1866). While the Court decided *Milligan* on other constitutional grounds, *id.* at 127 (forbidding use of military commissions for civilians except where courts are closed), Chief Justice Chase reaffirmed the traditional understanding that military jurisdiction must be grounded in statute. *See id.* at 139-40 (Chase, C.J., concurring) (only Congress may "institute tribunals for the trial and punishment of offenses, either of soldiers or civilians"); *see also* Winthrop, *supra*, at 836 (absent express statutory authorization, jurisdiction of military commission limited to offenses committed "within the field of the command of the convening commander" and within "the theater of war or a place where military government or martial law may legally be exercised"). And, when military commissions were next used in the South to suppress insurrection and violence during the post-war military occupation, they were authorized by statute. *See* Act of Mar. 2, 1867, ch. 153, § 3, 14 Stat. 428, 428.

Congress amended the Articles of War in 1916, and again in 1920. Article 15 (now 10 U.S.C. § 821) provided that other provisions conferring court-martial jurisdiction did not deprive military commissions of concurrent jurisdiction over offenses or offenders that may be triable by such commissions. *See* Act of June 4, 1920, ch. 227, 41 Stat. 759, 790; Act of Aug. 29, 1916, ch. 418, 39 Stat. 619, 653. Noted military attorney and historian Frederick Bernays Wiener maintained that Article 15 was intended as a *restriction* on military commissions, which had improperly asserted jurisdiction over courts-martial during the Civil War. Louis Fisher, *Nazi Saboteurs on Trial: A Military Tribunal and American Law* 130 (2003). At most, this provision "just save[d]" to military commissions the jurisdiction traditionally exercised by "the military commander *in the field* in time of war." S. Rep. No. 64-130, at 40 (1916) (testimony of Judge Advocate General Enoch H. Crowder) (emphasis added). Notably, attempts to establish military trials during World War I were made by introducing legislation, which President Wilson successfully opposed. Fisher, *Military Tribunals*, *supra*, at 86-87 (defeat of proposed bill to establish military jurisdiction over sedition cases).[6]

[6] One individual, Lothar Witzke, alias Pablo Waberski, a German spy captured after entering the United States from Mexico in 1818, was charged with violating Article of War 82, tried by the military in accordance with courts-martial procedure, and found guilty. Fisher, *Military Tribunals*, *supra*, at 87-88. Attorney General Thomas W. Gregory advised President Wilson that since Witzke had been apprehended in U.S. territory not under martial law, he could be tried only by the civilian courts. 31 Op. Att'y Gen. 356, 361 (1918). Wilson commuted Witzke's

In *Ex parte Quirin*, 317 U.S. 1 (1942), the Court relied on Article 15 in holding that eight German saboteurs could be tried by military commission for violations of the law of war, *id.* at 28, but declined to decide whether the President had the constitutional authority to create such commissions without congressional legislation. *Id.* at 29. Unlike the current military commissions, President Roosevelt's commission was supported by a declaration of war by Congress -- a point underscored by the Court. *Id.* at 26 ("The Constitution thus invests the President as Commander in Chief with the power to wage war which Congress has declared . . . ."); *see also Yamashita v. Styer*, 327 U.S. 1, 11-12 (1946) (noting military commander's power to try and punish offenders "so long as a state of war exists -- from its declaration until peace is proclaimed"). The Court also emphasized the close relationship between the actions of the German saboteurs (who had buried their uniforms) and spying, an offense defined by statute since the American Revolution. *Quirin*, 317 U.S. at 31 & n.9, 41. Furthermore, *Quirin* "was not th[e] Court's finest hour," *Hamdi v. Rumsfeld*, __ U.S. __, 124 S. Ct. 2633, 2669 (2004) (Scalia, J., dissenting), and has been eroded by subsequent criticism and developments. *See infra* Point II.A.

---

death sentence after the war. Fisher, *Military Tribunals*, *supra*, at 89. On July 29, 1942, the day oral argument began in *Quirin*, the Justice Department released a previously unpublished Attorney General opinion, which replaced Gregory's opinion and which stated, based upon new facts, that Witzke was subject to military trial under Article 82. *See* 40 Op. Att'y Gen. 561 (1919).

Thus, the authority to establish military commissions has traditionally resided with Congress, not the President. To the extent the President has any independent authority to establish military commissions without congressional authorization, it is extremely narrow (as in the case of General Scott during the Mexican War), and to be exercised only to fill in jurisdictional gaps until Congress can act. History does not support the Bush Administration's establishment of military commissions to try a broad range of offenses under the rubric of the "law of war" which may already be prosecuted under existing federal statutes. *See* "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," § 2(a), 66 Fed. Reg. 57,833, 57,834, (Nov. 13, 2001) ("Military Order"). It likewise does not support the Administration's wholesale creation of new procedures for military trials where Congress has already set forth such procedures in the Uniform Code of Military Justice ("UCMJ"). To the contrary, the current commissions represent precisely the "blending of functions in one branch of the Government . . . which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers." *Reid v. Covert*, 354 U.S. 1, 39 (1957) (plurality opinion).

II. THE CURRENT MILITARY COMMISSIONS LACK HISTORICAL PRECEDENT.

The current commissions depart from historical practice in other important respects. First, military commissions have traditionally been limited to a zone of

combat operations or occupied territory, and there is no historical basis for their extension to an undeclared, open-ended, and perhaps perpetual "war on terrorism." Second, military commissions have largely adhered to the procedures used in courts-martial. Third, military commissions have never expressly singled out a broad class of non-citizens.

A. Military Commissions Have Traditionally Been Confined to a Zone of Combat Operations or Occupied Territory.

By establishing military commissions to try individuals at the United States Naval Base at Guantanamo Bay, the current Military Order departs from historical practice. Military commissions have typically been limited to a zone of combat operations or occupied territory. The first actual military commissions, used during the Mexican War, took place in occupied territory and enabled the commander there to establish order over both U.S. troops and Mexicans. Similarly, most military commissions during the Civil War occurred in Union-occupied Confederate territory and "strife-torn border states." Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* 168-69 (1991). As they became more widespread, serious abuses resulted. For example, Captain Henry Wirz, the superintendent of the notorious Andersonville prison, was unfairly blamed by a military commission for the conditions at the prison and was "hurried to his death by vindictive politicians, an unbridled press, and a nation thirsty for revenge." *See* Darrett B. Rutman, "The War Crimes and Trial of Henry Wirz," 6

Civil War Hist. 117, 118 (1960). The military commission hastily set up to try alleged conspirators in Lincoln's assassination was, in the words of Lincoln's former Attorney General, "not only unlawful, but . . . a gross blunder in policy . . . [which] denies the great, fundamental principle that ours is a government of *Law*." *The Diary of Edward Bates, 1859-1866,* at 483 (H. Beale ed. 1933) (emphasis in original).

Most military commissions conducted during World War II also occurred in a theater of war or occupied territory. *See, e.g.*, *Yamashita*, 327 U.S. at 5 (military commission in recently re-conquered Philippine Islands to try Japanese general); *Johnson v. Eisentrager*, 339 U.S. 763, 765-66 (1950) (military commission in Nanking, China, to try individuals in service of German armed forces). In *Madsen v. Kinsella*, 343 U.S. 341 (1952), the Court held that a military occupation court had jurisdiction to try a U.S. serviceman's wife for murder in occupied Germany. *Id.* at 342-43; *see also United States v. Tiede*, 86 F.R.D. 227, 256-57 (U.S. Ct. Berlin 1979) (U.S. and Germany technically at war when Madsen was tried; distinguishing military trials by occupation courts during belligerency). *Madsen* has also been eroded by later decisions curtailing military jurisdiction over non-military personnel outside the United States.[7]

[7] *See, e.g.*, *Reid v. Covert*, 354 U.S. 1 (1957) (civilian dependant of armed service member not subject to court-martial in capital case); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960) (civilian dependent of armed service member

Ex parte Quirin took place in the United States, but is of limited, if any, historical value as a precedent for the current commissions. *Quirin* occurred during a dark period in World War II, only six months after Pearl Harbor and amid a major U-boat offensive by Nazi Germany off the U.S. coast. David Glazier, Notes, "Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission," 89 *Va. L. Rev.* 2005, 2053 (2003). Initially, the eight captured Germans were to be tried in civil court. Fisher, *Nazi Saboteurs*, *supra*, at 45-46. The Roosevelt Administration, however, feared that a public trial of the saboteurs in civilian court would reveal that they had been captured not because of "uncanny FBI organizational skills," but rather because one of the saboteurs had turned himself in and identified the others. *Id.* at 46. It also worried that a public trial would broadcast how easily German U-boats had reached American shores undetected and thereby encourage future attempts. *Id.* In addition, the Roosevelt Administration believed that the potential sentences under criminal law were insufficient. A conviction for sabotage carried a maximum thirty-year prison sentence and, moreover, Attorney General Francis Biddle believed the government could not obtain such a conviction since "the preparations and landings were not close enough to the planned act of sabotage to constitute attempt"; conspiracy

---

not subject to court-martial in non-capital case); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960) (civilian employees of overseas military forces not subject to courts-martial in non-capital cases).

laws, on the other hand, provided a maximum three-year prison sentence. Francis Biddle, *In Brief Authority* 328 (1962). In contrast, Biddle told President Roosevelt, a military tribunal could act quickly and impose the death penalty. Fisher, *Nazi Saboteurs*, *supra*, at 50. In establishing the commission, Roosevelt sought to vest final reviewing authority in himself, Executive Order 9185, 7 Fed. Reg. 5103 (July 7, 1942) ("The record of the trial, including any judgment or sentence, shall be transmitted directly to [the President] for [his] action thereon."), and warned Biddle, who shared prosecution duties with the Judge Advocate General of the Army, that he would not "hand [the defendants] over to any United States marshal armed with a writ of habeas corpus." Biddle, *supra*, at 331.

The Court issued a short *per curiam* order on July 31, 1942, dismissing the saboteurs' habeas petitions and upholding the military commission's jurisdiction. *Ex Parte Quirin*, 63 S. Ct. 1 (1942). By the time the Court issued its opinion in late October, six of the eight saboteurs had already been executed (the remaining two had also been found guilty, but were given prison sentences by Roosevelt). Chief Justice Stone described writing the opinion as "a mortification of the flesh," David J. Danelski, "The Saboteurs' Case," 1 *J. Sup. Ct. Hist.* 61, 72 (1996) (internal quotation marks and citation omitted), and found only "meager" authority to support the commission's constitutionality. *Id.* at 73 (internal quotation marks and citation omitted). Stone's purpose "was not to elucidate the law, but rather to

justify as best he could a dubious decision" after the fact. Michal R. Belknap, "The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case," 89 *Mil. L. Rev.* 59, 87 (1980). He and other Justices sought to do everything possible to secure a unanimous opinion. When it appeared the Court might fragment with separate statements, Justice Frankfurter circulated an impassioned plea, entitled "F.F.'s Soliloquy," in which he called the saboteurs "damned scoundrels," described their claim of procedural rights under the Articles of War as a "foolish fancy," and cautioned his colleagues that "we [have] enough of a job trying to lick the Japs and the Nazis" without the Supreme Court "stirring up a nice row" with "abstract constitutional discussions." Fisher, *Nazi Saboteurs*, *supra*, at 119-21. Yet, Frankfurter later acknowledged that *Quirin* "was not a happy precedent," Danelski, *supra*, at 80 (internal quotation marks and citation omitted), while Justice Douglas observed that "it is extremely undesirable to announce a decision on the merits without an order accompanying it . . . [b]ecause once the search for the grounds . . . is made, sometimes those grounds crumble." *Id.* (internal quotation marks and citation omitted).

When the Roosevelt Administration prosecuted individuals charged with assisting the saboteurs, it did so in the civilian courts. Fisher, *Nazi Saboteurs*, *supra*, at 80-84; *see also Haupt v. United States*, 330 U.S. 631 (1947) (affirming treason conviction of father of saboteur Herbert Haupt). Moreover, the Court has

sought to limit military jurisdiction over those who are not members of the U.S. armed forces. *See, e.g.*, *Reid*, 354 U.S. at 33 (plurality opinion) (rejecting extension of military jurisdiction over civilians outside "the extraordinary circumstances present in an area of actual fighting"); *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (declaration of "martial law" in Hawaiian Organic Act did not "authorize the supplanting of courts by military tribunals"); *see also United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955) ("Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service."). A military tribunal, unlike legislatures and courts, is neither a "cherished American institution[ ] . . . [nor] indispensable to our government," and "should always be kept in subjection to the laws of the country to which it belongs." *Duncan*, 327 U.S. at 322-23. Notwithstanding *Quirin*, historical practice by 2001 suggested that military commissions could not be established outside a theater of war or occupied territory absent congressional authorization.[8]

[8] The Supreme Court's recent decision in *Hamdi v. Rumsfeld*, __ U.S. __, 124 S. Ct. 2633 (2004), is not to the contrary. First, *Hamdi* involved only the detention, and not military trial, of an "enemy combatant." 124 S. Ct. at 2639 (plurality opinion). Second, the plurality relied on *Quirin* for the proposition that "the capture, detention, and trial of unlawful combatants, 'by universal agreement and practice,' are 'important incident[s] of war.'" *Id.* at 2640 (quoting *Quirin*, 317 U.S. at 28). It never addressed what body would try unlawful combatants. Congress, however, has provided that individuals like Hamdan may be tried by a

B. Procedures Used in Military Commissions Have Historically Conformed to Those Used in Courts-Martial.

The Military Order and implementing regulations depart in numerous and important ways from the procedures used in courts-martial. For example, they make the President, or the Secretary of Defense acting at his discretion, the final reviewing authority, and thus dispense with the multi-tiered review process under the UCMJ, including an appeal to the U.S. Court of Appeals for the Armed Forces. *See Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 166 & n.12 (D.D.C. 2004) (listing numerous differences between current military commissions and courts-martial). The Military Order also dispenses with the requirement that the Judge Advocate General "shall receive, revise, and have recorded the proceedings of . . . military commissions." 10 U.S.C. § 3037. Moreover, the implementing order designates a judge advocate of the U.S. armed forces to serve as a voting member of the trial panel, 32 C.F.R. § 9.4(a)(4), a practice Congress abandoned when it enacted the UCMJ. Act of May 5, 1950, ch. 169, § 13, 64 Stat. 107, 117, 121 (limiting role of judge advocate members to ruling on questions of law that arise during trial).

The government argues that military commissions "have tried enemy combatants since the earliest days of the Republic under such procedures as the President has deemed fit." Br. for Appellants at 53. Once again, the government's

---

military commission only for aiding the enemy, 10 U.S.C. § 904, and/or spying. *Id.* § 906.

reliance on history has no foundation. Military commissions employed during the Mexican War applied the same procedures, granted the same rights to the accused, utilized the same rules of evidence, and accorded the same post-trial review as did courts-martial. Glazier, *supra*, at 2030-31.[9] The Civil War likewise saw an effort to conform military commission procedures to those used in courts-martial. *See The War of the Rebellion*, *supra*, at 248 ("[M]ilitary commissions . . . should be ordered by the same authority, be constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise."); *see also* Act of July 17, 1862, *supra*, 12 Stat. at 598 (same post-conviction review in military commissions and courts-martial). Testifying before Congress regarding proposed revisions to the Articles of War in 1916, the legislation's author explained that military commissions and courts-martial "have the same procedure." S. Rep. No. 64-130, at 40 (testimony of Judge Advocate General Enoch H. Crowder). Military commissions established in occupied territories in the Rhineland after World War I also employed substantially the same procedures as courts-martial. Glazier, *supra*, at 2048. Moreover, the 1929 Geneva Convention on the Treatment of Prisoners of War provided that the "[s]entence may be pronounced against a prisoner of war

[9] The one exception, the "Councils of War," which tried individuals for offenses related directly to the war, was a brief experiment which was discontinued during the Civil War in favor of the single military commission. *Id.* at 2033.

only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power." Geneva Convention Relative to Treatment of Prisoners of War, art. 63, July 27, 1929, 47 Stat. 2021, 2052. Thus, on the eve of World War II, it was widely accepted that "even in the absence of statute . . . the general court-martial is a proper guide for the constitution, commission, and procedure of military commissions." Frederick Bernays Wiener, *A Practical Manual of Martial Law* 123 (1940).

The Roosevelt Administration unjustifiably departed from court-martial practice under the Articles of War in establishing a military commission to try the eight German saboteurs in 1942. Article 43 mandated a unanimous vote to impose a death sentence, 41 Stat. at 795-96, and Articles 46 and 50 ½ required review of such sentences by a board of review consisting of at least three officers from the Army Judge Advocate General's office and the Judge Advocate General. 41 Stat. at 796-97. Roosevelt's commission, however, allowed conviction and sentence in a capital case by two-thirds vote and failed to provide for judge advocate review. Exec. Order No. 9185, *supra*. This review had historically played an important role in correcting substantive errors and providing integrity to military proceedings. *See, e.g.*, *Ex parte Mason*, 256 F. 384, 387 (C.C.N.D.N.Y. 1882); Fisher, *Military Tribunals*, *supra*, at 124. During the Civil War, for example, President Lincoln's Judge Advocate General, Joseph Holt, frequently overturned

convictions by military commissions and courts-martial, including in cases where the accused was denied the right to be present and confront an adverse witness. Neely, *supra*, at 162-63; *see also* Fisher, *Military Tribunals*, *supra*, at 49-50 (Lincoln, with the assistance of the office of adjutant general, reviewed and often reversed convictions by military tribunals).

The failure to adhere to Articles 46 and 50 ½ troubled the *Quirin* Court. Chief Justice Stone, for example, considered but rejected including a statement in the opinion that the Court had left construction of these articles undecided; Stone noted that since six of the petitioners had already been executed, it was "too late to raise th[is] question in their behalf." Fisher, *Nazi Saboteurs*, *supra*, at 112 (quoting Justice Stone's papers). Divided over whether the President was bound by those articles, the Court instead avoided the issue. *Quirin*, 317 U.S. at 47-48. Justice Frankfurter later asked Frederick Bernays Wiener, his former student and an acknowledged expert on military law, for his thoughts. Wiener told him that "[w]eakness in the [Court's] decision flowed 'in large measure' from the [Roosevelt] Administration's disregard for 'almost every precedent in the books' when it established the military tribunal." Fisher, *Nazi Saboteurs*, *supra*, at 129 (quoting Wiener's papers). Wiener emphasized that court-martial procedures had "almost uniformly been applied to military commissions," and that it was "too plain for argument" that the President could not waive or override the required

review by the Judge Advocate General's office. *Id.* at 130. Wiener also said that the only precedent for using the Judge Advocate General of the Army as prosecutor -- the trial of the Lincoln conspirators -- was one which "no self-respecting military lawyer will look straight in the eye." *Id.* at 131. Unless authorized by statute, Wiener said, the President could not avoid the rules customarily used in courts-martial merely by establishing a military commission. *Id.* at 132.

When two other German agents were captured after entering the United States some two years later, Secretary of War Henry Stimson cautioned Roosevelt that replicating the procedures used for the *Quirin* saboteurs would lead to charges in Germany that "innocent Germans were being tried and condemned by an extraordinary proceeding" and would "likely . . . lead to German maltreatment of American prisoners of war in their hands." Fisher, *Nazi Saboteurs*, *supra*, at 140 (internal quotation marks and citation omitted). This time, President Roosevelt conformed the military commission more closely to courts-martial, including by restoring judge advocate review under the Articles of War. Executive Order 9511, 10 Fed. Reg. 549, § 2(d) (Jan. 16, 1945) ("The record of the trial, including any judgment or sentence, shall be promptly reviewed [by the Judge Advocate General's office] under the procedures established in Article 50 ½ of the Articles

of War."). Thus, the 1942 tribunal upheld in *Quirin* was repudiated less than three years later by the Roosevelt Administration.

In *Yamashita*, the Court stated that the Articles of War then in effect did not require military commissions to follow court-martial procedures. 327 U.S. at 18-20. *But see id.* at 70 (Rutledge, J., dissenting) (Congress intended to "lay down identical provisions" for military commissions and courts-martial). However, the legal basis for *Yamashita* has been eroded by subsequent statutory changes to military jurisdiction. *See Hamdan*, 352 F. Supp. 2d at 169-70 (explaining how revisions to the Articles of War support application of court-martial procedures to military commissions). *Yamashita* is also a dubious precedent as an historical matter. The commission consisted of five American generals hastily sent from Washington to try Yamashita for violations committed by Japanese troops purportedly under his command. None had any legal experience, despite having to rule on complex legal issues, or any significant combat experience. Steven B. Ives, Jr., "Vengeance Did Not Deliver Justice," *Washington Post*, Dec. 30, 2001, at B2. The army officers appointed to defend Yamashita had only three weeks to prepare for trial. Richard L. Lael, *The Yamashita Precedent: War Crimes and Command Responsibility* 81 (1982). Fifty-nine of the 123 charges were filed the same day the trial began, but no continuance was granted to the defense. *Yamashita*, 327 U.S. at 33 (Murphy, J., dissenting). None of those charges established a direct link

between Yamashita and the underlying criminal acts. Lael, *supra*, at 80-81. Indeed, many of the troops that had committed the atrocities were not even under Yamashita's command, let alone control, at the time, and Yamashita's name was rarely mentioned at trial. Ives, *supra*, at B2. Justices Murphy and Rutledge each expressed outrage at the proceedings. *Yamashita*, 327 U.S. at 27-28 (Murphy, J., dissenting) ("[Yamashita] was rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most elementary rules of evidence and summarily sentenced to be hanged."); *id.* at 61 (Rutledge, J., dissenting) (proceeding violated fundamental rights and lacked "any semblance of trial as we know that institution"). *Yamashita* thus stands as a cautionary tale of the egregious violations that can result when military commissions are inappropriately deemed "wholly free" from the restraints that govern courts-martial, *id.* at 70 (Rutledge, J., dissenting), and civilian courts.[10]

In addition, the system of military justice has evolved significantly since the enactment of the UCMJ in 1950. *See, e.g.*, Brigadier General John S. Cooke, "The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X," 156 *Mil. L. Rev.* 1, 8 (1998) ("[E]nacting the UCMJ was the beginning of an effort to erect a true judicial system within the body of the military organization.");

[10] *Madsen v. Kinsella*, Br. for Appellants at 54-55, did not involve a military commission but rather an occupation court, and considered only a challenge to that court's jurisdiction. 343 U.S. at 342-43. *Madsen*, furthermore, has been eroded by subsequent decisions. *See supra* note 7.

Kevin J. Barry, "Military Commissions: Trying American Justice," *2003-NOV Army Law.* 1, 3 (2003) ("Underlying [UCMJ's enactment] was the adoption of the . . . precept that military effectiveness depends on justice and that, by and large, civilian forms and principles are necessary to ensure justice in military trials.") (internal quotation marks and citation omitted). In addition to conforming courts-martial procedure to contemporary notions of due process, *e.g.*, Barry, *supra*, at 3, Congress added professionalism and expertise to the military justice system by, for example, requiring that the Judge Advocate General of each service be a member of a federal or state bar, with at least eight years' experience in legal duties as commissioned officers. Act of May 5, 1950, *supra*, 64 Stat. at 147. The current Military Order, however, was issued without any assistance from the Judge Advocate General's office, let alone from Congress. Fisher, *Military Tribunals*, *supra*, at xi. Career military attorneys criticized the commissions' departure from these standards. *See, e.g.*, Jeanne Cummings, "Gonzales Rewrites Laws of War," *Wall Street Journal*, Nov. 22, 2002, at A4. Indeed, while court-martial procedures have evolved significantly, the current commissions instead recall the military law of a bygone day -- a law, as Blackstone put it, "built upon no settled principles," "entirely arbitrary in its decisions," and "in truth and reality no law." 1 William Blackstone, *Commentaries* *413. They were appropriately invalided by the district court.

C. The Current Military Commissions Are the First to Expressly Single Out a Broad Class of Non-Citizens.

Under the Military Order, only foreign nationals are subject to trial by military commission. Military Order, *supra*, § 2(a), 66 Fed. Reg. at 57,834. The Order encompasses not only non-citizens outside the United States, but also the estimated 18 million non-citizens in the United States. So while the President has asserted the authority to detain both citizens and non-citizens as "enemy combatants," *see Hamdi v. Rumsfeld*, __ U.S. __, 124 S. Ct. 2633 (2004); *Rasul v. Bush*, __ U.S. __, 124 S. Ct. 2686 (2004), only the former will necessarily receive the protections of the civil courts if prosecuted. *See United States v. Lindh*, 227 F. Supp. 2d 565, 566 n.2 (E.D. Va. 2002) (prosecution of U.S. citizen charged, *inter alia*, with providing and conspiring to provide material support to al Qaida). The Military Order's application solely to non-citizens dangerously increases concentration of power in the President since the commissions burden only those who cannot vote, and thus lack "the powerful check of political accountability on Executive" action. *North Jersey Media Group v. Ashcroft*, 308 F.3d 198, 220 (3d Cir. 2002). *See generally, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 490 (1998) (Breyer, J., dissenting) ("The President . . . is an elected official. He is responsible to the voters . . . .").

Military commissions have never before expressly discriminated against a broad class of foreign nationals. Indeed, the first military commissions were

established by General Scott during the Mexican War to address undisciplined action by *American* troops. Scott, *supra*, at 392-95. Yet, Scott understood the importance of even-handedness, recognizing the backlash he could engender by discriminating based upon nationality, and, therefore, sought to ensure that "all offenders, Americans and Mexicans, were alike punished." *Id.* at 395; *see also* Glazier, *supra*, at 2031-32 (Americans soldiers constituted majority of those tried during Mexican War and overall conviction rate for Mexican nationals was lower than for Americans). Commissions during the Civil War were not limited exclusively to Confederates. Neely, *supra*, at 174. Even President Roosevelt's Order providing for the military trial of the German saboteurs, for all its grave shortcomings, did not discriminate based upon citizenship status. Proclamation No. 2561, 7 Fed. Reg. 5101 (July 7, 1942) (subjecting to military tribunals "all *persons* who are subjects, citizens or residents of any nation at war with the United States") (emphasis added); *see also Quirin*, 317 U.S. at 37 ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war.").

CONCLUSION

In sum, military commissions have historically been limited to a particular time and place and have been most vulnerable to abuse where they have exceeded defined parameters. If the President is permitted to unilaterally create an entirely

new system of military justice, lacking in statutory authority, bereft of important due process protections available in courts-martial and civilian courts, and applicable only to a broad class of non-citizens, it will mark another chapter in the troubled history of military commissions, one unsupported by the historical record, the law, or basic constitutional principles.

For the foregoing reasons, the decision of the district court should be affirmed.

Respectfully submitted,

_____/s/_____

Jonathan L. Hafetz
(D.C. Bar No. 49761)
Lawrence S. Lustberg
Gibbons, Del Deo, Dolan,
Griffinger & Vecchione, P.C.
One Pennsylvania Plaza, 37th Fl.
New York, NY 10119
(212) 649-4743

Counsel for Amicus Curiae

Dated: December 29, 2004

CERTIFICATE OF COMPLIANCE

I, Jonathan L. Hafetz, Esq., hereby certify that the foregoing Brief *Amicus Curiae* of Louis Fisher in Support of Petitioner-Appellee Urging Affirmance complies with the type-volume limitations under Federal Rule of Appellate Procedure 32(a)(7) and Circuit Rule 32(a), and contains 6,992 words.

Dated: December 29, 2004

_____/s/_____
Jonathan L. Hafetz

CERTIFICATE OF SERVICE

I, Jonathan L. Hafetz, Esq., hereby certify that I caused to be served on the 29th day of December, 2004, two (2) copies of the foregoing Brief *Amicus Curiae* of Louis Fisher in Support of Petitioner-Appellee Urging Affirmance, by electronic mail and first-class mail, postage pre-paid, upon:

Robert M. Loeb, Esq.
Douglas N. Letter, Esq.
Attorneys, Appellate Staff
Civil Division, Room 7268
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001
email: Robert.Loeb@usdoj.gov
Douglas.Letter@usdoj.gov

Neal Katyal, Esq.
Georgetown University Law Center
600 New Jersey Avenue
Washington, DC 20001
email: katyaln@law.georgetown.edu

Pursuant to Federal Rule of Appellate Procedure 25(d)(2), I further certify that, on the same date, I caused to be sent the original and (10) copies of the foregoing Brief *Amicus Curiae* of Louis Fisher in Support of Petitioner-Appellee

Urging Affirmance, by Federal Express, to:

Clerk of Court
United States Court of Appeals for the
District of Columbia Circuit
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Dated: December 29, 2004

/s/
Jonathan L. Hafetz