No. 04-5393
[Oral Argument - March 8, 2005]

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

SALIM AHMED HAMDAN,
Petitioner - Appellee,

versus

DONALD H. RUMSFELD, Secretary of Defense, *et al.*,
Respondents - Appellants.

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

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS In Support of *Petitioner / Appellee* Urging *Affirmance*

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

PARTIES and AMICI:

Except for *Amicus Curiae* herein, the National Association of Criminal Defense Lawyers [NACDL], all parties appearing before the District Court below are listed in Appellants' Brief.

RULE 26.1 DISCLOSURES:

The NACDL is a not-for-profit, professional Bar Association for the criminal defense bar, with over eleven thousand subscribed members. The American Bar Association recognizes the NACDL as one of its affiliate organizations and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases, both civilian and military, public, private and assigned.

RULINGS UNDER REVIEW:

The Ruling of the District Court under review appears in the appendix.

RELATED CASES:

All related cases are set forth in Appellants' brief.

CONSENT:

Both Appellants' counsel and Appellee's counsel have kindly consented to NACDL's appearance herein as *amicus curiae.*

RULE 29(d), DC Circuit Rule, Certification:

Counsel herein certifies that a separate brief is necessary as the points and arguments made by NACDL have not been made by any other *amici curiae.* Issues and arguments among *amici* herein were coordinated with Petitioner's counsel to insure compliance and prevent duplication.

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GLOSSARY

AW - Article(s) of War

Bd. Rev. - "Board of Review:" Intermediate military appellate court for each branch of the military, *e.g.*, Navy Bd. Review; subsequently renamed the (Service) Court of Military Review [CMR]; now the (Service) Court of Criminal Appeals [CCA]

CAAF - U.S. Court of Appeals for the Armed Forces (previously the CMA), federal civilian appellate court

CCA - (Service) Court of Criminal Appeals, *e.g.*, "Army CCA"

CMA - U.S. Court of Military Appeals (renamed as the CAAF)

CMR - (Service) Court of Military Review [*see* Bd. Rev. *supra*]

C.M.R. - "Court-Martial Reports:" (1951-76); Reporter for military appellate decisions

CRS - Congressional Research Service of the Library of Congress

DoD - Department of Defense

EO - Executive Order

JAG - Acronym for "Judge Advocate" - uniformed military lawyer of each branch certified by TJAG to perform judge advocate duties

MCI - Military Commission Instruction No. __ . These may be accessed at: http://www.defenselink.mil/news/Aug2004/commissions_instructions.html [last accessed on December 28, 2004]

MCM - Manual for Courts-Martial (date)

M.J. - Military Justice Reporter (West/Thompson), or "MJ" as WestLaw™ database which includes all CMRs as well.

NACDL - National Association of Criminal Defense Lawyers - *amicus* herein

OpJAG - Opinions of the Judge Advocate General

POWs - Prisoners of War

RCM - Rules for Courts-Martial - procedural rules in the MCM

TJAG - The Judge Advocate General - statutory position of the highest ranking uniformed lawyer for each military service

UCMJ - Uniform Code of Military Justice

AMICUS CURIAE STATEMENT OF INTEREST
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
By Consent of the Parties

The National Association of Criminal Defense Lawyers ["NACDL"] is a non-profit corporation with a subscribed membership of more than 11,000 national members, including military defense counsel, public defenders, private practitioners and law professors, and an additional 28,000 state, local and international affiliate members. The American Bar Association recognizes the NACDL as one of its affiliate organizations and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases, both civilian and military. Among the NACDL's objectives are ensuring justice and due process for persons accused of crime, promoting the proper and fair administration of criminal justice and preserving, protecting and defending the adversary system and the U.S. Constitution. The NACDL's *Military Law Committee* is co-chaired by three members with a combined 60 years plus military JAG experience, both active duty and active Reserves.

The NACDL's interest in this case is two-fold. First, the exercise of military jurisdiction via "military commissions" is a little known component of military jurisprudence. The lawful application of that jurisdiction is a core issue herein. Second, the structure and procedures of these military commissions are unlike any ever utilized in our jurisprudence. The current procedures contravene established military and international law. *Amicus* herein submits that the ruling below was correct and urges *affirmance* to insure that Petitioner, and those similarly situated, receive whatever process is due them under domestic and international law.

SUMMARY OF ARGUMENT

An analysis of military commissions as part of our jurisprudence shows that their genesis grew out of "military necessity" during the Mexican-American War of the 1840's. The necessity was that *in personam* jurisdiction for courts-martial was strictly limited by statute and did not cover civilians, Prisoners of War [POWs], or "war" crimes.[1] Commissions were created by military *fiat* and used in areas of Mexico under martial law where the civilian courts were not functioning. In 1863, Congress finally adopted these "war courts."

In the intervening years and especially after the enactment of the *Uniform Code of Military Justice* [UCMJ],[2] Congress extensively exercised its "war powers" with considerable legislation pertaining to "military commissions," to include specifically recognizing the right of confrontation, under its textual grants of authority in Article I, § 8, U.S. Constitution. Furthermore, consistent with the provisions of the various 1949 *Geneva Conventions* ratified by the United States, Congress has expanded the *in personam* jurisdiction of the UCMJ, to now include Petitioner for any purported "war crimes," thus negating any military necessity for convening a military commission. The military commissions created by Respondents are "incompatible

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[1]*See* 18 U.S.C. § 2441, *War Crimes;* and 10 U.S.C. § 818 (General court-martial jurisdiction for "war crimes").

[2]Codified at 10 U.S.C. §§ 801 *et seq.*

with the express or implied will of Congress. . . ."[3] Constitutionally, there is no "inherent" Presidential authority to create these military commissions and the challenge to their jurisdiction by Petitioner via *habeas corpus* has long been recognized in our military law:

> . . . United States courts may, on writ of habeas corpus, inquire into the legality of detention of a person held by military authority, at any time, either before or during trial or while serving sentence . . . .[4]

I. "MILITARY COMMISSIONS"

A. Basic History

To understand the contemporary context of military commissions, one must first understand both their historical origin and jurisprudential evolution. Before 1847, the "modern" military commission was an unknown entity.[5] Prior to assuming command of U.S. forces during the Mexican War, General Winfield Scott recognized

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[3] *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 637 (1952)(Jackson, J., concurring).

[4] *Manual for Courts-Martial* (1917), 18 [hereinafter "MCM"].

[5] Military tribunals other than courts-martial existed. *See generally,* Fisher, *Military Tribunals: Historical Patterns and Lessons,* CRS Report for Congress (July 9, 2004), available at: http://www.fas.org/irp/crs/RL32458.pdf (last accessed December 22, 2004) [hereinafter "Fisher, *Tribunals*"]. Regardless of the nomenclature, the weight of scholarly opinion is that they originated in 1847 during the Mexican War. *See,* Winthrop, *Military Law and Precedents,* 2nd ed., at 832 (1920 reprint) [hereinafter "Winthrop"]; Davis, *A Treatise on the Military Law of the United States,* 2nd ed., at 307 *et seq.*, (1909); Winthrop, *Digest of Opinions of the Judge Advocate General,* at 324 *et seq.*, (1880). Notably, the leading pre-Civil War military law treatise, copyrighted in 1846, makes *no* mention of "military commissions." DeHart, *Observations on Military Law* (1859 pub.).

that there was little legal jurisdiction to try offenders, civilian or military, during a foreign occupation.[6] No federal statute existed either authorizing or establishing a mechanism for trying offenders, so Scott drafted an Order establishing proposed military tribunals.[7] The Secretary of War "recommended legislation that would authorize a military tribunal, but [Congress] declined to act." [8] Thus, as created by a subordinate to the President, the Constitutional authority for military commissions began in Justice Jackson's "zone of twilight."[9]

While *Amicus Curiae* is not aware of any authority whereby the constitutionality of General Scott's tribunals or their jurisdiction were legally challenged, the unilateral[10] actions of the military regarding other aspects of the Mexican War, did not fare well. In *Fleming v. Page,*[11] the Court emphatically rejected the military's attempt to declare a captured Mexican city part of the United

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[6]Fisher, *Tribunals,* 11-12; Winthrop, 832.

[7]Scott created two tribunals: one, "military commissions" for conventional criminal activity, the other was the "council of war" for violations of the "laws of war." Winthrop, *op cit.* By the time of the Civil War these two tribunals had morphed into a single entity, the "military commission."

[8]Fisher, *Tribunals,* 12 (footnote omitted).

[9]*Youngstown, supra,* 635-38 (1952) (Jackson, J., concurring). *Amicus* submits that there is no *inherent* Presidential power to create such military commissions under our Constitution absent Congressional authorization.

[10]"Unilateral" here is used in the context that there was no express Congressional authorization for the military's actions.

[11]50 U.S. 603 (1850).

States.[12] Likewise the seizure of American private property to aid the "war effort" in Mexico was rejected in *Mitchell v. Harmony.*[13] Lastly, in an analogous situation to General Scott's military tribunals, the Court emphatically condemned the military's attempt to unilaterally - but under purported Executive authority - create a Prize Court in Mexico.[14]

Jecker is fundamental in analyzing the Respondents' extravagant claims of Presidential power under the law of war.[15] The court simply and squarely *rejected* that claim, holding:

> [N]either the President nor any military officer can establish a court in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals in prize cases, ***nor to administer the laws of nations.*** 54 U.S. at 515 [emphasis added].

Modern American usage of military commissions[16] has been limited to the

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[12]"[The President's] conquests do not ... extend the operation of our institutions and laws beyond the limits before assigned to them ***by the legislative power.***" 50 U.S. at 615 [emphasis added].

[13]54 U.S. 115 (1851). Chief Justice Taney's observations on "necessity" are highly relevant herein: "It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified." *Id.,* 134.

[14]*Jecker v. Montgomery,* 54 U.S. 498, 512-16 (1952).

[15]Appellant's Brief, 57 *et seq.*

[16]*Amicus* does not include the various *international* military tribunals post-WW II, *e.g.,* Nüremberg and Tokyo, nor those sanctioned under U.N. auspices.

World War II era.[17] Three significant commission cases were decided by the Supreme Court - *Quirin,*[18] *Yamashita,*[19] and *Madsen.*[20] *None* of these cases offer any precedential value to the case *sub judice,*[21] as the limited *in personam* jurisdiction of the then Articles of War was replaced by an expansive *in personam* jurisdictional statute when Congress enacted Article 2, UCMJ, in 1950.[22] While Yvette Madsen was arguably subject to court-martial jurisdiction under Article 2, Articles of War, as a serviceman's wife in post-war Germany, subsequent constitutional evolution holds that civilian citizens, absent a declared war, are not subject to the UCMJ.[23]

B. The "Necessity" Requirement.

> Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war and which are lawful according to modern usage and

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[17]Later prosecutions for violations of the law of war have been by ***courts-martial***. *Compare, United States v. Schultz,* 4 C.M.R. 104 (CMA 1952) [occupied Japan]; *United States v. Fleming,* 23 C.M.R. 7 (CMA 1957) [Korea]; *United States v. Calley,* 48 C.M.R. 19 (CMA 1973) [Vietnam]; and *United States v. Manginell,* 32 M.J. 891 (AF CMR 1991) [Panama].

[18]*Ex parte Quirin,* 317 U.S. 1 (1942).

[19]*In re Yamashita,* 327 U.S. 1 (1946).

[20]*Madsen v. Kinsella,* 343 U.S. 341 (1952). There are other "military commission" cases from this era, but these are the legally significant ones.

[21]They do, however, provide a valuable ***pre-UCMJ*** historical overview.

[22]10 U.S.C. § 802. This went into effect in 1951, *after Madsen's* trial.

[23]*See, e.g., Reid v. Covert,* 354 U.S. 1 (1957); Fisher, *Tribunals,* 60-65.

usages of war.[24]

Dr. Lieber was a special advisor to Lincoln and his War Department as a recognized expert on the laws of war. Yet, he clearly noted - and the United States adopted - that "military necessity" is limited by the law of war and is not a "blank check" for unfettered Executive action.

Winthrop in his treatise explains the necessity concept in relation to military commissions and the conundrum faced by General Scott in Mexico:

> The *occasion* for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offenses defined in a written code. It does not extend to many criminal acts, especially of civilians, peculiar to a time of war . . . .[25]

Our military has consistently construed military "necessity" as an *emergency* power, as another respected military scholar noted during the height of WW II and *after* the *Quirin* decision:[26]

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[24]F. Lieber, *Instructions for the Government of Armies of the United States in the Field,* (1898) [reprint of War Department, General Order No. 100 (April 23, 1863)].

[25]Winthtop, 831. *Three* facts are key in application herein. Winthrop's observations were made before Congress passed the "concurrent jurisdiction" statute in 1916, currently at 10 U.S.C. § 821; *second,* they were made before Congress enacted a greatly expanded *in personam* jurisdiction statute in 1950, 10 U.S.C. § 802; and *third,* they were prior to the ratification of the 1949 *Geneva Conventions*' limitations on military commissions' jurisdiction.

[26]Fairman, *The Law of Martial Rule,* 2nd ed., Chapter X, "The Tribunals of Martial Rule," (1943) ["When the emergency had passed, it is believed that the military tribunals should at once (continued...)

> [M]ilitary commissions are extraordinary bodies called upon to act in abnormal situations. . . . [thus] the extent of their power will often raise difficult questions of law. ... In all doubtful matters the appointing authority should act with prudence. . . .[27]

Fairman's conclusions were not aberrations, but were distillations of military law at the time, including another Civil War era expert, Army Lieutenant Colonel Benét.[28] Benét noted that in "carrying on war," crimes are committed that were not triable by courts-martial nor any civil court - hence, the "necessity" for trial by military commission.[29] Five years after Benét's conclusions, the question was presented to the U.S. Attorney General. During the Medoc Indian War of 1873, the question of whether the classic war crime of "perfidy"[30] could be tried by a military

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[26](...continued)
desist from the trial of alleged offenses. . . ." (p. 268)] [hereinafter, "Fairman"]. *See also, United States v. Russell,* 80 U.S. 623, 628 (1872) [Union forces had commandeered a steamer in 1864]:

> [T]he emergency in the public service must be extreme and imperative, and such as will not admit to delay. . . . it is the emergency . . . that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified.

The trial of Mr. Hamdan by military commission (versus court-martial) is hardly necessitated at this date by any "war time" emergency.

[27]Fairman, 278.

[28]Benét, *A Treatise on Military Law and the Practice of Courts-Martial,* 6th ed., Chapter XV, "Military Commissions," (1868).

[29]*Id.,* 203.

[30]*See, e.g., United States v. Potter,* 39 C.M.R. 791, 793 (Navy Bd. Rev. 1968) [Vietnam "war crimes" court-martial, discussing the concept of "perfidy"].

commission, was asked. Under a flag of truce to discuss a peace treaty, Medoc warriors killed the United States' negotiators. Noting that "no civil tribunal has jurisdiction," the Attorney General concluded that a military commission had jurisdiction to try the offenders.[31]

Winthrop provides the basis for this "necessity" jurisdiction:

> . . . Military Commissions have become adopted as authorized tribunals in this country in time of war. They are simply criminal war courts, resorted to for the reason that the jurisdiction of Courts Martial, creatures as they are of statute, is restricted by law and cannot be extended to include certain classes of offences ***which in war would go unpunished*** in the absence of a provisional forum for the trial of offenders. [emphasis added][32]

The United States' military formally adopted this rationale in the 1908 *Manual for Courts-Martial.*[33] Or, as one noted Civil War historian characterized the legal commentary on this issue during that era, they "saw trials by military commission as plugging loopholes in the law in wartime . . . ."[34]

The Supreme Court in the context of civilian citizens, has created a relevant

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[31] 14 Opn. Atty Gen 249, 252 (June 7, 1873).

[32] Winthrop, *Digest of Opinions of the Judge Advocate General,* 325 (1880). However, as noted above in note 26, the basis for this "necessity" no longer exists.

[33] *MCM* (1908), 6. ["Military Commissions, for the trial of offenders against the laws of war . . . [are] founded in necessity."]

[34] Neely, *The Fate of Liberty: Abraham Lincoln and Civil Liberties,* 180 (1991) [hereinafter "Neely"].

corollary to the "necessity" rule: "The exigencies which have required military rule ***on the battlefront*** are not present in areas where no conflict exists."[35] Guantanamo Bay, whatever else it might be, is not a battlefield nor the *situs* of a conflict involving Mr. Hamdan.[36]

Finally, as *Amicus Curiae*, we respectfully submit that the question of the "existence of military necessity is justiciable. . . ."[37] And, as the *Yasui* Court astutely observed:

> [I]f the necessity did not exist, until some political or military authority has faith enough in the position to proclaim a state of martial law, a court which is in fact open, should not find the existence of necessity as a fact.[38]

That is the exact status here - an *ex post facto* "political" decision by the Respondents claiming a fictitious "necessity" to try Petitioner by an atypical "military commission."

Military Commissions are creations of necessity - ***not*** the necessity of war, but the necessity of having some "court" available to exercise criminal jurisdiction.

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[35]*Reid v. Covert,* 354 U.S. 1, 34-5 (1957) [emphasis added].

[36]Professor Randall in his seminal work, *Constitutional Problems Under Lincoln, rev. ed.,* at xviii (1951), posits: "In thinking of 'military necessity,' one should ask: Necessity for what? . . . If wrongfully applied, military necessity may be a fraud." Chief Justice Rehnquist apparently concurs: "It is all to easy to slide from a case of genuine military necessity . . . to one where the threat is not critical and the power either dubious or non-existent." *All The Laws But One,* 224 (1998).

[37]*United States v. Yasui,* 48 F.Supp. 40, 52 (D. Ore., 1942), *aff'd* 320 U.S. 115 (1943).

[38]*Id.*

Thus, if a general court-martial has both *in personam* and *subject-matter* jurisdiction over Petitioner, no military necessity exists legally or factually, for the use of a military commission.

II. CONGRESSIONAL ACTION

A. Legislative History.

Congress did not act on General Scott's 1847 request for specific legislation authorizing military commissions.[39] That was not a symbol of benign neglect as Congress, to include the Continental Congress, had always taken an active role in exercising its *legislative* prerogatives over military justice. Thus:

- On June 30, 1775, the first *American* "Articles of War" were enacted;[40]
- On September 20, 1776, the *revised* Articles of War were enacted;[41]
- On May 31, 1786, Congress revised portions of the Articles of War;[42]
- On April 10, 1806, Congress substantially rewrote the entire Articles of War;[43]
- On July 17, 1862, Congress authorized the appointment of a "Judge

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[39]*See* text accompanying notes 7-8, *supra.*

[40]Winthrop, 953.

[41]*Id.*, 961.

[42]*Id.*, 972.

[43]2 Stat. 359 (1806). It should be noted that Congress in Article 74 [2 Stat. at 368] recognized the right of *actual* confrontation when authorizing the limited use of depositions in *non-capital* proceedings. *Crawford v. Washington,* 541 U.S. 36 (2004).

> Advocate General," "to whose office shall be returned, for revision, the records and proceedings of all courts-martial and ***military commissions*** . . . ."[44]

Thereafter, on September 24, 1862, Lincoln suspended the privilege of *habeas corpus* by Proclamation and directed that:

> . . . all Rebels and Insurgents, their aiders and abettors . . . shall be subject to martial law and liable to trial and punishment by Courts Martial or Military Commission....[45]

As part of the *Military Conscription Act* of March 3, 1863,[46] Congress for the first time exercised its Article I, § 8, power to expressly provide for trial by *military commission* in two separate areas:

1. Section 30, provided for trial by military commission or general court-martial for murder and other crimes of violence by members of the U.S. military; and

2. Section 38, authorized the trial of spies by military commission or general court-martial.

On that same date, March 3, 1863, Congress also passed the *Habeas Act*,[47] which ultimately formed the statutory basis for the decision in *Ex parte Milligan*.[48]

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[44]12 Stat. 598, § 5 (1862). Mandating "revision" proceedings and records retention are *indicia* of Congressional control.

[45]As quoted in Neely, *op cit.*, 64-6.

[46]12 Stat. 731 (1863).

[47]12 Stat. 755 (1863).

[48]71 U.S. 2 (1866).

That legislation demonstrated a profound commitment by Congress that the rule of law, not the dictates of the President, would govern those in military custody. Or, as Professor Randall, the noted Lincoln scholar, observed:

> Whereas arrest and releases had previously been at the discretion of the executive, it was now intended that the further holding of prisoners should depend upon ***judicial procedure.*** [emphasis added][49]

Congress further demonstrated its active role involving military commissions with an 1864 *amendment* to the 1863 *Military Conscription Act.*[50] Specifically, Congress delegated to various subordinate military commanders, consistent with the 1863 Act, the authority to approve certain sentences, stating that § 21 "shall apply as well to the sentence of military commissions as to those of courts-martial . . . ."[51] If anyone at that time thought that the President had "inherent" power and control over military commissions, this 1864 legislation (as well as the 1863 *Habeas Act*) would have been superfluous. *Milligan,*[52] long ago rejected that concept.

After the surrender of the South, Congress effectively placed it under martial law and expressly provided via the *Reconstruction Acts,* for trials by military

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[49]Randall, *The Civil War and Reconstruction,* 400 (1937).

[50]13 Stat. 356 (July 2, 1864). Section 1, modified § 21 of the 1863 Act.

[51]*Id.*

[52]*Ex parte Milligan,* 71 U.S. 2 (1866).

commissions.[53] But, it was not just the President who felt Congressional scrutiny over the role of military commissions. One McCardle was being detained for trial by military commission and sought *habeas corpus* relief. On appeal to the Supreme Court and after oral argument but prior to a decision, Congress simply passed legislation *revoking* the Court's appellate jurisdiction over *habeas* appeals.[54] Thus, the Court dismissed the appeal "for want of jurisdiction."[55]

Congress had now expressly demonstrated its control over military commissions to *both* of the other branches of the federal government. This "expressed will" of Congress under its Article I authority, leaves the President herein little room for discretion under Justice Jackson's third, *Youngstown* category.[56]

In 1874, Congress modified the *Judge Advocate General Act*,[57] mandating that he "shall receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry and ***military commissions***. . . ." This directive, which is still in effect,[58] demonstrates strong (and continued) Congressional interest in the military

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[53] *See, e.g.*, 14 Stat. 428 (1867).

[54] 15 Stat. 44 (March 27, 1868).

[55] *Ex parte McCardle*, 74 U.S. 506 (1868).

[56] *Youngstown, supra*, 637-38.

[57] 18 Stat. 244 (June 23, 1874).

[58] 10 U.S.C. § 3037(c)(3).

commission process - something hardly indicative of inherent and unrestricted *Executive* power as claimed herein. *Amicus* respectfully submits that the Commission's rules of procedure called "Instructions," totally violate this statute as the TJAG "revision" process[59] was simply eliminated by Respondents' procedures.[60] The President, even as Commander-in-Chief, cannot supercede an express act of Congress passed pursuant to its "war powers." *Little v. Barreme,* 6 U.S. (2 Cr.) 170 (1804).

This Congressional control over the Commander-in-Chief, as relevant herein, is perhaps best demonstrated by the Congressional enactment of March 1, 1875: "the President is hereby authorized . . . to make and publish regulations for the government of the Army ***in accordance with existing laws.***"[61] Anything to the contrary, *viz.,* the MCIs herein, is *ultra vires* under *Barreme, supra.*

With minor exceptions, the *status quo* of military justice was maintained until 1916. The *1916 Articles of War*,[62] constituted a major revision in military jurisprudence and unless placed into the proper construct, will continue to plague the

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[59]The TJAG "revision" process for military commissions under § 3037 is totally different from the process used in courts-martial. *See,* 10 U.S.C. § 860(e). This differentiation reemphasises the extent of Congressional control over this process.

[60]*See* MCI No. 9, *Review of Military Commission Proceedings* (December 26, 2003).

[61]18 Stat. 337 (1875)[emphasis added]. That is still the law also: 10 U.S.C. § 836(a).

[62]39 Stat. 650 *et seq.* (1916).

judiciary in the context of "military commissions."[63]

Prior to 1916, the *in personam* jurisdiction of courts-martial, was with a few well-defined exceptions, limited to members of our military, while the *subject-matter* jurisdiction was limited to crimes specified in the Articles of War. The new 1916, Article 12, [64] provided *in personam* jurisdiction for general courts-martial over "any person who by the law of war is subject to trial by military tribunals. . . ."[65] This Congressional expansion of court-martial jurisdiction over war crimes and war criminals was feared by the Army Judge Advocate General, General Crowder, to be susceptible to an interpretation that military commissions would become extinct.

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[63]To understand the 1916 Articles of War in the context of military commissions, it is imperative to understand the *pre*-1916 jurisprudence. *See, e.g.*, Brig. Gen. E. Dudley, LL.D., USA (ret), *Military Law and the Procedure of Courts-Martial,* 3rd ed. (1910)

> [Military commissions] are organized under the laws of war and under martial law, as a ***military necessity***, for cases involving persons and offenses outside the powers and duties conferred upon the statutory tribunals and therefore beyond the jurisdiction of courts provided for in the Rules and Articles of War. [*Id.*, 17]
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> * * * * *
>
> During the existence of war . . . the military commander is authorized, by the established customs and usages of the laws of war, to organize tribunals for the trial of offenders and offenses, under those laws, ***not subject to*** ordinary civil or military tribunals. In the service of the United States such tribunals are called "military commissions." [*Id.*, 312][emphasis added].

Thus, the "necessity" for a military commission was (a) a lack of *in personam* jurisdiction; or (b) a lack of subject-matter jurisdiction, *i.e.*, "beyond the jurisdiction" of courts-martial.

[64]39 Stat. at 652.

[65]*Id.* Again, Congress was taking control - taking the *ad hoc* jurisdiction of military commissions and to a large extent, placing "offenders and offenses" under the Articles of War.

To insure that did not happen, General Crowder as the chief proponent of the 1916 Articles of War, proposed a totally new Article 15,[66] which stated that Article 12, "shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect to offenders or offenses that by the law of war may be triable" by military commission. Congress was shrinking the sphere of "military necessity" for commissions, while simultaneously expanding the jurisdiction of courts-martial. General Crowder during a 1916 hearing, insisted upon the inclusion of Article 15:

> [S]o that the military commander ***in the field in time of war*** will be at liberty to employ either form of court that happens to be convenient. [emphasis added] [67]

In practice however, Crowder's expansive concept of concurrent jurisdiction

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[66]39 Stat. at 653.

[67]As quoted in *Yamashita, supra*, 66, n. 31 (Rutledge, J., dissenting). General Crowder's 1916 Congressional testimony was somewhat disingenuous, as when he first proposed Article 15 to Congress in ***1912,*** his rationale was as follows:

> I was influenced to propose the article 15, largely perhaps by experience during our second intervention in Cuba. It was not very long after that intervention . . . until two soldiers were charged with homicide of some natives. ***There was no civil court of the United States*** with jurisdiction. Plainly the ***court-martial could not try them***, as the condition was not war. [emphasis added].

As quoted in *Madsen, supra,* 353, n. 20. This rationale was consistent with the "military necessity" doctrine which is the underlying premise for military commissions. It is also consistent with other historical analysis of Article 15. *See,* Wiener, *Civilians Under Military Justice,* 305 (1967). Wiener, a noted military law scholar, cites another incident in Cuba as documented by Crowder where an alleged criminal escaped justice - again invoking military necessity for military commissions.

was historically rejected by the military itself, until the matter *sub judice.*[68]

> Except where [commissions] have been invested by statute with a jurisdiction concurrent with courts-martial, their authority cannot be extended to the trial of offenses which are specifically, or in general terms, made punishable by courts-martial by the Articles of War or other statutes. (citation omitted) [69]

In 1917, Congress passed the *Espionage Act,*[70] and recognized the *separate* jurisdictions of courts-martial and military commissions.[71] This language would be superfluous if Crowder's expansive and total "concurrent" jurisdiction premise was correct.[72]

B. Comprehensive Legislation - the UCMJ.

After the Second World War, Congress set out to again revamp military justice.

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[68]*Compare, U.S. ex rel. Wessels v. McDonald,* 265 F. 754 (E.D. NY, 1920), *app. dismissed per stip.* 256 U.S. 705 (1921). Wessels, an undercover German naval officer, was arrested in New York City during WW I as an enemy alien. Thereafter, "he was arrested by the Naval authorities on the charge of being a spy, and is now to be tried by a court-martial of the Navy." *Id.,* 758. He sought *habeas* relief, claiming that he should be tried in federal court. There is no *indicia* that a military commission was considered under Crowder's premise.

[69]Tillotson, *The Articles of War Annotated,* 33 (1942). The current version of Article of War 15, is Article 21, UCMJ, 10 U.S.C. § 821. In view of the expansive *in personam* jurisdiction in the UCMJ [10 U.S.C. § 802], President Truman appears to have adopted Colonel Tillotson's analysis in promulgating the *MCM* (1951), p. 17.

[70]40 Stat. 217 (1917).

[71]Section 7 stated, "Nothing in this title shall be deemed to limit the jurisdiction of the general court-martial, military commissions. . . ."

[72]Congress amended the Articles of War again in 1920, 41 Stat. 787. Nothing relevant herein was altered.

The result was the *Uniform Code of Military Justice,* or UCMJ, enacted in 1950.[73] The UCMJ represents a comprehensive and *uniform* exercise of the "war power" textually conferred to Congress in Article I, § 8, of the Constitution. The initial and perhaps most profound change was with the significantly expanded provisions for *in personam* jurisdiction in UCMJ Articles 2 and 3, 10 U.S.C. §§ 802-803. Once again, Congress was taking control by expanding the jurisdiction of courts-martial while simultaneously shrinking the penumbra of "military necessity."

1. Jurisdictional Aspects of the UCMJ.

In addition to the comprehensive expansion of persons now subject to the provisions of the UCMJ, Congress continued in a slightly modified format the provisions of Articles of War 12 and 15 - now Articles 18 and 21, UCMJ [10 U.S.C. §§ 818 and 821]. Article 18, UCMJ, 10 U.S.C. § 818, provides general court-martial jurisdiction over two categories of people:

1. "Persons subject to this chapter;" [74] and

2. "Any person who by law of war is subject to trial by a military tribunal."

Thus, the phrase "any person" makes § 818 truly concurrent with § 821. But, the reverse is *not* true, as 10 U.S.C. § 821's "military commission" jurisdiction is *limited*

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[73]64 Stat. 107 (1950).

[74]*See,* 10 U.S.C. §§ 802 and 803.

to "offenders or offenses that by statute[75] or by the law of war[76] may be tried by military commissions. . . ."

Mr. Hamdan is simply *not* an "offender" who is subject to the jurisdiction of a military commission under the plain language of § 821. Furthermore, there is no "necessity" to use a commission to insure that any purported "war crimes" do not go unpunished, as Congress has specifically made Mr. Hamdan subject to the *in personam* jurisdiction of the UCMJ and specifically the general court-martial jurisdiction under 10 U.S.C. § 818, via *two* provisions in § 802:

10 U.S.C. § 802:

> (a) The following persons are subject to this chapter:
> * * * * *
> (9) Prisoners of war in custody of the armed forces.
> * * * * *
> (12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, ***persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States*** and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands. [emphasis added]

Amicus Curiae respectfully submits that unless and until a competent tribunal

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[75]The only statutes authorizing trial by military commission are 10 U.S.C. § 904, *Aiding the Enemy;* and § 906, *Spies.*

[76]*Amicus Curiae* knows of ***no*** "offenders or offenses" that may be tried by military commission under the "law of war." The 1949 *Geneva Conventions* (ratified after the UCMJ was enacted), mandate trial by the same forum as our military forces are subject to, *viz.,* courts-martial. Other *Amici* will address this point.

determines otherwise, Petitioner is presumptively entitled to POW status.[77] Furthermore, Respondents cannot deny that Mr. Hamdan is a prisoner within Guantanamo Bay Naval Base, an "area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States" *viz.,* in Cuba - a place that Respondents placed him at while presumably knowledgeable of the UCMJ's provisions.[78] The Respondents simply cannot claim that some mythical military necessity obviates the clear, plain and written will of Congress that Petitioner is subject to the UCMJ by being confined at our Naval Base in Cuba.

2. Congress Has Preempted the Field of Military Commissions.

While General Scott in 1847 may have acted in a "zone of twilight" in the then absence of Congressional authority, today Respondents' actions fly in the face of and are incompatible with the expressed will of Congress. In addition to the provisions of 10 U.S.C. §§ 818 and 821, discussed above, Congress has enacted legislation pertaining to military commissions in nineteen (19) other statutes.[79] These include:

1. Exempting military commissions from various federal "agency"

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[77]This issue will be addressed by other *Amici Curiae.*

[78]*Cf.,* 10 U.S.C. § 802(a)(7), providing UCMJ *in personam* jurisdiction over "Persons in custody of the armed forces serving a sentence imposed by a court-martial." While they may be lawfully discharged from the military and serving a sentence, they are still subject to military jurisdiction. *Kahn v. Anderson,* 255 U.S. 1 (1921).

[79]*See,* Addendum hereto, where relevant statutory excerpts are reproduced.

requirements;[80]

2. Providing court reporters and interpreters for military commissions;[81]

3. Limiting self-incrimination or compelling immaterial or degrading evidence;[82]

4. Mandating that procedures, modes of proof and rules of evidence in military commissions be consistent with U.S. District Courts and the UCMJ;[83]

5. Prohibiting illegal "command influence" in military commissions;[84]

6. Making it a crime to refuse to appear, testify or produce lawfully subpoenaed evidence before a military commission;[85]

7. Providing military commissions with "contempt" power;[86]

8. Authorizing the limited use of depositions in non-capital military commissions subject to confrontation and "the rules of evidence;"[87]

9. Providing for the limited use of sworn testimony from courts of inquiry, subject to confrontation and consent by the Accused in military

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[80] 5 U.S.C. §§ 551(1)(F) and 701(b)(1)(F).

[81] 10 U.S.C. § 828.

[82] 10 U.S.C. § 831.

[83] 10 U.S.C. § 836. This is hardly the case herein. Other *Amici* will address this point.

[84] 10 U.S.C. § 837(a).

[85] 10 U.S.C. § 847(a).

[86] 10 U.S.C. § 848.

[87] 10 U.S.C. § 849(a).

commissions; [88]

10. Making it a crime to "knowingly and intentionally" fail to enforce or comply with the UCMJ's procedural rules;[89]

11. Specifically authorizing trial by military commission for the offense of "aiding the enemy;"[90]

12. Specifically authorizing trial by military commissions for the offense of "Spying;"[91]

13. Mandating that both the Army and Air Force Judge Advocates General "receive, revise and have recorded the proceedings of . . . military commissions;"[92]

14. Making bribery and graft of persons appearing before military commissions a crime;[93]

15. Differentiating between "offenses" triable in federal courts versus those tried before military commissions;[94] and

16. Providing some limited "concurrent" jurisdiction between military commissions and the *Military Extraterritorial Jurisdiction Act*.[95]

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[88]10 U.S.C. § 850(a).

[89]10 U.S.C. § 898.

[90]10 U.S.C. § 904.

[91]10 U.S.C. § 906.

[92]10 U.S.C. §§ 3037(c)(3) and 8037(c)(3). The present commission procedures and rules totally ignore these Congressional mandates. Other *Amici* will address this in more detail.

[93]18 U.S.C. § 203(a).

[94]18 U.S.C. §§ 3156(a) and (b); and § 3172.

[95]18 U.S.C. § 3261(c).

This comprehensive pattern of legislation which is totally *inconsistent* with the procedures and regulations pertaining to the military commission Petitioner is facing, defeats any claim that Congress has somehow authorized the Respondents' actions herein.

III. INTERNATIONAL LAW: THE IMPACT ON U.S. MILITARY LAW AND MILITARY COMMISSIONS.

It is axiomatic that "all Treaties made . . . shall be the supreme Law of the Land . . . ." Art. VI, § 2, U.S. Const. Furthermore, treaties have long impacted on our generic military law, to include the Commander-in-Chief:

> It is certainly true that the execution of a contract between nations is to be demanded from, and . . . superintended by the executive of each nation . . . .[96]

Chief Justice Marshall went on to conclude:

> [I]n great national concerns where individual rights, acquired by war, are sacrificed for national purposes, the contract . . . ought always to receive a construction conforming to its manifest import . . . .[97]

A. Military Law, International Law and Military Commissions.

International treaties further restrict the jurisdiction

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[96] *The Schooner Peggy,* 5 U.S. (1 Cr.) 103, 109 (1801); *see also, Dames & Moore v. Regan,* 453 U.S. 654 (1981).

[97] *Id.,* 110. Marshall's observations were echoed by one of the *Quirin* prosecutors, Army TJAG, General Cramer: "In this total war, the rule of law rather than the rule of man, must be preserved." Cramer, *Military Commissions: Trial of the Eight Saboteurs,* 17 Wash. L. Rev. 247 (1942).

> of military commissions. . . . [the U.S.] has entered into several treaties that affect how or when it can use commissions and the minimum due process necessary at a commission.[98]

Our military jurisprudence has long considered military commissions as "an agency for administering international law."[99] Manifest from that is the premise that treaties govern military commissions.[100] Furthermore, as one commentator notes: "The significance of Geneva Conventions III and IV to the jurisdictional boundaries of military commissions is considerable."[101]

As early as 1917, the Army TJAG was asked to render a formal opinion concerning German POWs, international law and military commissions. In an Opinion dated December 27, 1917, it was noted that the provisions of the *Hague Convention* of 1909, "are good evidence of what is just and acceptable under international law."[102] The opinion further notes that under AW 12 of the 1916 *Articles of War*, a general court-martial had "jurisdiction" over the POWs. Of remarkable interest however, is the Opinion's recommendation that "it is inadvisable

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[98]MacDonnell, *Military Commissions and Courts-Martial,* March 2002 *Army Lawyer* 19, 30 [citing the four 1949 *Geneva Conventions*].

[99]Miller, *Relation of Military to Civil and Administrative Tribunals In Time of War,* 7 Ohio St. L.J. 188, 193, n. 10 (1941).

[100]Green, *The Military Commission,* 42 Am. J. Int'l L. 832, 838 (1948).

[101]MacDonnell, *op cit.,* 33.

[102]*Opinions of the Judge Advocate General of the Army,* April-December 1917, 276 (1919).

to resort to a . . . military commission in such case."[103]

B. Presidential Precedents.

From at least the time of Calvin Coolidge, American Presidents have *ordered* our military to observe and comply with international law in general and applicable treaties in particular. While the NACDL as *Amicus Curiae* disagrees strenuously with the Respondents' position that the *Geneva Conventions* (and other treaties) provide no authority for Petitioner's relief herein, their arguments ignore two key facts. First, there is a long history in our military jurisprudence of complying with *international* law and treaties.[104] Second, Presidents have long *ordered* their military subordinates to observe and comply with international law by promulgating appropriate regulations.[105]

By Executive Order ["EO"] dated November 29, 1927, President Coolidge

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[103] *Id.*, ¶ 6. This Opinion is thus consistent with the "military necessity" concept of military commissions. *See,* fn. 66, *supra.*

[104] *See, e.g., The Schooner Peggy, supra.*

[105] *See* DoD Instruction 2000.14 (1994), ¶ 4.1.3, mandating that "actions to combat terrorism outside the United States . . . comply with applicable Status of Forces Agreements (SOFAs), other international agreements and memoranda of understanding." *See also,* DoD Directive 5100.77 (1998), ¶ 3.1, defining the *Law of War* as encompassing "all international law for the conduct of hostilities binding on the United States . . . including treaties and international agreements to which the United States is a party . . . ." and ¶ 4.1, noting that "It is DoD policy to ensure that . . . [t]he law of war obligations of the United States are observed and enforced by the DoD Components." The DoD publications are available at: http://www.dtic.mil/whs/directives/ [last accessed, December 28, 2004].

promulgated *MCM* (1928).[106] He observed: "The sources of military jurisdiction include the Constitution and international law . . . ." *Id.*, 1, ¶ 1. When the UCMJ was enacted in 1950, President Truman promulgated *MCM* (1951).[107] Since many of Truman's military advisors and counsel were the same individuals who worked with Congress on the UCMJ, the *MCM* (1951) is considered to be an authoritative treatise on military jurisprudence and the intent of the UCMJs drafters. Truman's MCM stated the following:

- "The sources of military jurisdiction include the Constitution and international law. International law includes the law of war. [1, ¶ 1];[108]
- (Military Commissions) "Subject to any applicable rules of international law . . . these tribunals ***will be guided*** by the applicable principles of law and rules of procedure and evidence prescribed for courts-martial." [1, ¶ 2][emphasis added];
- "Certain limitations on the discretion of military tribunals to adjudge punishments under the law of war are prescribed in international conventions . . . ." [18, ¶ 14b];
- [Note] "See Articles 45-67, inclusive, Geneva Convention of 27 July 1929 (Prisoners of War)." [413, Art. 2(9), UCMJ];
- [Note] "Pertinent treaties or executive agreements should be consulted . . . ." [414, Art. 2(12), UCMJ];
- [Note] " . . . The limitations on the discretion of military tribunals to

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[106]Since then all MCMs have been issued as Executive Orders.

[107]EO 10214 (February 8, 1951).

[108]All references here are to *MCM* (1951) [page __, ¶ __].

adjudge punishments against prisoners of war are prescribed in the Geneva Convention on Prisoners of War, 27 July 1929 . . . ." [419, Art. 18, UCMJ];

- "Congress has adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts and as further defined and supplemented by the Hague Convention." (Citation omitted) [420, Art. 21, UCMJ];

President Nixon promulgated *MCM* (1969),[109] which *inter alia* provided similar instructions and observations. Subsequent MCMs by later Presidents are in accord:

- *MCM* (1984)[110] - RCM 201(a)(3) and its Discussion cites the 1949 *Geneva Convention Relative to Civilians in Time of War*; the Discussion to RCM 201(f)(1)(B)(ii), also cites to this; while Appendix 21's Analysis of the "Sources of military jurisdiction," cites the 1949 *Geneva Convention on Prisoners of War.*

- *MCM* (1995)[111] - is the same as the 1984 edition on these issues; and

- *MCM* (2000)[112] - also is the same as the 1984 edition on this issues.

Most notably, both the 2002 Amendments to the MCM,[113] and the 2004 Amendments,[114] issued by Respondent Bush, did ***not*** change any of the foregoing provisions regarding international law, treaties or military commissions.

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[109]EO 11476 (June 19, 1969).

[110]EO 12473 (April 13, 1984).

[111]EO 12960 (May 12, 1995).

[112]EO 13140 (October 6, 1999).

[113]EO 13262 (April 11, 2002).

[114]EO 13365 (December 3, 2004).

With this historical *Executive* precedent, *Amicus* respectfully submits that Respondents' position that the *Geneva Conventions* provide no authority for Petitioner's relief, is not only totally without merit, but ignores 76 years of precedent, to include amendments made to the *MCM* less than a month ago which totally failed to alter or even distinguish this precedent.

CONCLUSIONS

> Certainly, it cannot be assumed that the mere existence of a state of war begot of necessity the military power asserted . . . .[115]

If one traces the "evolution" of what is now Article 2, UCMJ, 10 U.S.C. § 802, Congress - not the President - has steadily expanded both the *in personam* and subject-matter jurisdiction of courts-martial to both persons and crimes that had not been covered prior to 1863. The doctrine of "military necessity" which spawned military commissions has been steadily eroded since Congress first spoke on this subject. Thus, proper analysis (historical and legal) shows an inverse relationship between the expansion of courts-martial jurisdiction and the shrinking jurisdiction of military commissions. That coupled with the provisions of the 1949 *Geneva Conventions* mandating a trial forum as applicable to our own military, *viz.*, courts-martial, constitutionally precludes Respondents from trying Mr. Hamdan by military

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[115] *Caldwell v. Parker,* 252 U.S. 376, 385 (1920) [WW I case].

commission - especially as they are now constituted.

Furthermore, by enacting Article 2(a)(12), UCMJ, 10 U.S.C. § 802(a)(12), Congress has clearly and expressly provided for *in personam* jurisdiction over Petitioner because of the *situs* of his incarceration at our Guantanamo Bay Naval Station. Additionally, through comprehensive legislation Congress has pre-empted the field pertaining to military commissions. As Justice Jackson observed in *Youngstown,* "Courts can sustain exclusive presidential control . . . only by disabling the Congress from acting upon the subject."[116] But constitutionally, Respondents cannot ignore or displace the plethora of legislation regarding military commissions enacted by Congress pursuant to its "war powers," without violating the core premise of *Barreme.* The President cannot ignore or countermand a law passed pursuant to a specific, textual grant of constitutional power to Congress, much less directly violate such a law. Yet, with respect to the power that Congress has placed in both the Army and Air Force TJAGs to "receive, revise and have recorded the proceedings of . . . military commissions;"[117] the President has done just that with the Instructions promulgated for the military commissions herein.

The decision of the Court below should respectfully be ***affirmed.*** [6940]

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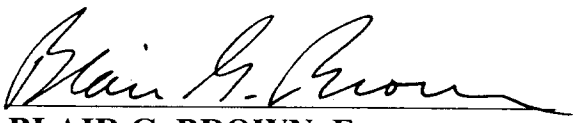
[116]343 U.S. at 637-38.

[117]10 U.S.C. §§ 3037(c)(3) and 8037(c)(3).

Dated: December 29, 2004:



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On Brief

CERTIFICATE OF COMPLIANCE

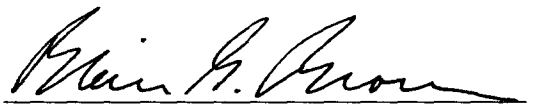
FRAP, Rule 32(a) and D.C. Circuit Rule 32(a)

1. This Brief of *Amicus Curiae*, NACDL has been prepared using WordPerfect Version 11, Times New Roman font, 14 point.

2. ***EXCLUSIVE*** of the Statement of Interest by *Amicus Curiae*, Table of Contents, Table of Authorities, Glossary, any Addendum containing statutes, rules or regulations, and the Certificate of Service, this Brief contains ***6940 words*** (which is less than the allowable **7000** words).

I understand that a material misrepresentation may result in the Courts striking the brief and imposing sanctions. If the Court so requests, I will provide an electronic version of the brief.

Date: December 29, 2004



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ADDENDUM

5 U.S.C. § 551: [Administrative Procedure Act]

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include–

* * * * *

(F) courts martial and military commissions;

5 U.S.C. § 701:

* * * * *

(b) For the purpose of this chapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include–

* * * * *

(F) courts martial and military commissions;

10 U.S.C. § 802:

(a) The following persons are subject to this chapter:

* * * * *

(9) Prisoners of war in custody of the armed forces.

* * * * *

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

10 U.S.C. § 818:

Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter,

including the penalty of death when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to ***trial by a military tribunal*** and may adjudge any punishment permitted by the law of war. However, a general court-martial of the kind specified in section 816(1)(B) of this title (article 16(1)(B)) shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.

10 U.S.C. § 821:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive ***military commissions***, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

10 U.S.C. § 828:

Under such regulations as the Secretary concerned may prescribe, the convening authority of a court-martial, ***military commission***, or court of inquiry shall detail or employ qualified court reporters, who shall record the proceedings of and testimony taken before that court or ***commission***. Under like regulations the convening authority of a court-martial, ***military commission***, or court of inquiry may detail or employ interpreters who shall interpret for the court or ***commission.***

10 U.S.C. § 831:

(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence ***before any military tribunal*** if the statement or evidence is not material to the issue and may tend to degrade him.

* * * * *

10 U.S.C. § 836:

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, ***military commissions*** and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, ***but which may not be contrary to or inconsistent with this chapter.***

10 U.S.C. § 837:

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or ***any other military tribunal*** or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. . . .

10 U.S.C. § 847:

(a) Any person not subject to this chapter who -

(1) has been duly subpenaed to appear as a witness before a court-martial, ***military commission***, court of inquiry, or any other military court or board, or before any military or civil officer designated to take a deposition to be read in evidence before such a court, commission, or board;

(2) has been duly paid or tendered the fees and mileage of a witness at the rates allowed to witnesses attending the courts of the United States;

and

(3) willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which that person may have been legally subpenaed to produce;

is guilty of an offense against the United States.

* * * * *

(c) The United States attorney or the officer prosecuting for the United States in any such court of original criminal jurisdiction shall, upon the certification of the facts to him by the military court, ***commission***, court of inquiry, or board, file an information against and prosecute any person violating this article.

10 U.S.C. § 848:

A court-martial, provost court, or ***military commission*** may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of $100, or both.

10 U.S.C. § 849: Depositions.

* * * * *

(d) A duly authenticated deposition taken upon reasonable notice to the other parties, so far as otherwise admissible under the rules of evidence, may be read in evidence or, in the case of audiotape, videotape, or similar material, may be played in evidence ***before any military court or commission*** in any case not capital, or in any proceeding before a court of inquiry or military board, if it appears - (1) that the witness resides or is beyond the State, Territory, Commonwealth, or District of Columbia in which the court, commission, or board is ordered to sit, or beyond 100 miles from the place of trial or hearing; (2) that the witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing; or (3) that the present whereabouts of the witness is unknown.

(e) Subject to subsection (d), testimony by deposition may be presented by the defense in capital cases.

10 U.S.C. § 850:

(a) In any case not capital and not extending to the dismissal of a commissioned officer, the sworn testimony, contained in the duly authenticated record of proceedings of a court of inquiry, of a person whose oral testimony cannot be obtained, may, if otherwise admissible under the rules of evidence, be read in evidence by any party before a court-martial or ***military commission*** if the accused was a party before the court of inquiry and if the same issue was involved or if the accused consents to the introduction of such evidence.

10 U.S.C. § 898:

Any person subject to this chapter who -

(1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter; or

(2) knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused;

shall be punished as a court-martial may direct.

10 U.S.C. § 904:

Any person who -

(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or

(2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly;

shall suffer death or such other punishment as a court-martial or ***military commission*** may direct.

10 U.S.C. § 906:

Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a

general court-martial or by a ***military commission*** and on conviction shall be punished by death.

10 U.S.C. § 3037: [Army] Judge Advocate General, Assistant Judge Advocate General, and general officers of Judge Advocate General's Corps: appointment; duties

* * * * *

(c) The Judge Advocate General, in addition to other duties prescribed by law -

(1) is the legal adviser of the Secretary of the Army and of all officers and agencies of the Department of the Army;

(2) shall direct the members of the Judge Advocate General's Corps in the performance of their duties; and

(3) ***shall receive, revise, and have recorded the proceedings of*** courts of inquiry and ***military commissions.***

10 U.S.C. 8037: [Air Force] Judge Advocate General, Deputy Judge Advocate General: appointment; duties

* * * * *

(c) The Judge Advocate General shall, in addition to other duties prescribed by law -

(1) ***receive, revise, and have recorded the proceedings of*** courts of inquiry and ***military commissions***; and

(2) perform such other legal duties as may be directed by the Secretary of the Air Force.

18 U.S.C. § 203:

(a) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly--

(1) demands, seeks, receives, accepts, or agrees to receive or accept any compensation for any representational services, as agent or attorney or otherwise, rendered or to be rendered either personally or by another--

(A) at a time when such person is a Member of Congress, Member of Congress Elect, Delegate, Delegate Elect, Resident Commissioner, or Resident Commissioner Elect; or

(B) at a time when such person is an officer or employee or Federal judge of the United States in the executive, legislative, or

judicial branch of the Government, or in any agency of the United States, in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court, court-martial, officer, or any civil, ***military, or naval commission***; or

(2) knowingly gives, promises, or offers any compensation for any such representational services rendered or to be rendered at a time when the person to whom the compensation is given, promised, or offered, is or was such a Member, Member Elect, Delegate, Delegate Elect, Commissioner, Commissioner Elect, Federal judge, officer, or employee;

shall be subject to the penalties set forth in section 216 of this title.

18 U.S.C. § 3156:

(a) As used in sections 3141-3150 of this chapter–

* * * * *

(2) the term "offense" means any criminal offense, other than an offense triable by court-martial, ***military commission***, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress;

* * * * *

(b) As used in sections 3152-3155 of this chapter–

* * * * *

(2) the term "offense" means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a Class B or C misdemeanor or an infraction, or an offense triable by court-martial, ***military commission,*** provost court, or other military tribunal).

18 U.S.C. § 3172:

As used in this chapter–

* * * * *

(2) the term "offense" means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established

by Act of Congress (other than a Class B or C misdemeanor or an infraction, or an offense triable by court-martial, ***military commission,*** provost court, or other military tribunal).

18 U.S.C. § 3261:

* * * * *

(c) Nothing in this chapter may be construed to deprive a court-martial, ***military commission,*** provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, ***military commission,*** provost court, or other military tribunal.