No. 05-184

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD, ET AL.,

Respondents.

On Writ of Certiorari to
the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF PROFESSOR RICHARD D. ROSEN, ASSOCIATE DEAN AND DIRECTOR OF CENTER FOR MILITARY LAW AND POLICY, TEXAS TECH UNIVERSITY SCHOOL OF LAW AND THE GEORGETOWN UNIVERSITY LAW CENTER APPELLATE LITIGATION PROGRAM AS *AMICI CURIAE* IN SUPPORT OF PETITIONER ADDRESSING THE ISSUE OF ABSTENTION

STEVEN H. GOLDBLATT*
ALISTAIR E. NEWBERN
DAVID J. ARKUSH
Appellate Litigation Program
Georgetown University Law Center
111 F Street, N.W., Suite 123
Washington, DC 20001
(202) 662-9555
* Counsel of Record for the *amici curiae*

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Professor Richard D. Rosen is an Associate Dean and the Director of the Center for Military Law and Policy at the Texas Tech University School of Law. Before assuming these positions, Dean Rosen completed a twenty-six-year career as an Army judge advocate. His assignments included Commandant (Dean) of the Judge Advocate General's School, United States Army, in Charlottesville, Virginia; Staff Judge Advocate of the III Armored Corps and Fort Hood, Texas; Staff Judge Advocate of the 1st Cavalry Division; and Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff. He has written in the area of habeas corpus review of military courts and has an ongoing interest in military justice and the proper relationship between military tribunals and the Article III courts.

The Appellate Litigation Program at Georgetown University Law Center is a clinical program primarily engaged in pro bono representation of parties and amicus curiae practice in civilian courts, including this Court and the Article III courts of appeals. The Program has also appeared as an amicus curiae in the United States Court of Appeals for the Armed Forces, both upon invitation of the court and at the Program's request, beginning with *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982) (enforceability of promise of immunity as a matter of due process or under military law), and in nine cases thereafter, including *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983) (validity of military

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[1] Pursuant to Rule 37.3(a) of the Rules of this Court, the parties have consented to the filing of this brief and letters of consent have been lodged with the Clerk. Pursuant to Rule 37.6 of this Court, we state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than amici or their counsel, has made a monetary contribution to the preparation or submission of this brief.

death penalty procedures); *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987) (admissibility of polygraph evidence in court-martial proceedings); *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991) (validity of death penalty where aggravating factors are determined by the President); *United States v. Kelly*, 45 M.J. 259 (C.A.A.F. 1996) (authority of service court of criminal appeals to disregard precedent from Court of Appeals for the Armed Forces); *United States v. Fogg*, 52 M.J. 144 (C.A.A.F. 1999) (Fourth Amendment search and seizure); *United States v. Hurn*, 55 M.J. 446 (2001) (application of *Batson v. Kentucky*, 476 U.S. 579 (1986), in a military setting); *United States v. Ellis*, 57 M.J. 375 (C.A.A.F. 2002) (Fifth Amendment voluntariness of confession); *United States v. Rorie*, 58 M.J. 399 (C.A.A.F. 2003) (right to abatement where service member dies while appeal is pending); *United States v. Daniels*, 60 M.J. 69 (C.A.A.F. 2004) (Fourth Amendment search and seizure).

Dean Rosen and the Georgetown Appellate Litigation Program have extensive experience litigating before the military justice system and an ongoing interest in its ability to afford service members substantially equivalent justice as is provided in civilian courts. They participate here to address the abstention issue generally and, in particular, the extent to which this Court's decision in *Schlesinger v. Councilman*, 420 U.S. 738 (1975), articulating the Court's modern abstention doctrine with regard to court-martial proceedings, applies when the military tribunal is a commission rather than a court-martial. The United States, in its brief in opposition to certiorari in this case, treats *Councilman* abstention principles as applicable to military proceedings generally. Opp. Cert. at 21-22. Professor Rosen and the Georgetown Appellate Program here argue that there is no basis for treating military court-martial and military commission review as equivalent for abstention purposes and that the Government's position, should it prevail, would substantially depreciate the value of the

important safeguards now applied in court-marital proceedings only.

SUMMARY OF ARGUMENT

This Court granted certiorari to consider two questions arising out of the trial by military commission of petitioner Salim Ahmed Hamdan, an alleged enemy combatant captured by United States forces during the ongoing hostilities in Afghanistan. The first question addresses the President's authority to convene military commissions to try those whom he has identified as "terrorists or those who support them." *See* President's Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,833 (Nov. 16, 2001) (hereinafter, "President's Military Order") (establishing military commission jurisdiction over members of al Qaida, those who have attempted acts of terrorism, or those who have harbored such persons). The second question concerns the ability of a person so charged to obtain enforcement in Article III federal courts of rights protected under the Geneva Convention Relative to the Treatment of Prisoners of War (GPW), 6 U.S.T. 3316 (1949). Both questions challenge the military commission's jurisdiction over Hamdan and both present "basic constitutional issues of utmost concern" with regard to restriction of individual liberties during a time of heightened national security interest. *Reid v. Covert*, 354 U.S. 1, 3 (1957).

The government, however, urges consideration of a third question: whether this Court should abstain from hearing Hamdan's claims while his trial before a military

commission goes forward. *See* Opp. Cert. at I.[2] Abstention is the exception to the rule that jurisdiction, when established, should be exercised. *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). This Court has never abstained from a habeas petitioner's claims that a military tribunal has no jurisdiction to try the petitioner at all. *See Schlesinger v. Councilman*, 420 U.S. 738, 756-57 (1975), *Noyd v. Bond*, 395 U.S. 683, 696 (1969); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 282 (1960); *Reid*, 354 U.S. at 4; *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 13 (1955); *Ex parte Quirin*, 317 U.S. 1, 19 (1942). Further, the principles of comity and deference that guide abstention decisions simply do not arise where there is no opportunity for "full and fair" hearing of the petitioner's constitutional claims before a competent tribunal. *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 627 (1986); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 435 (1982); *Younger v. Harris*, 401 U.S. 37, 45 (1971). The military commission at issue in this case, which operates under *ad hoc* rules created entirely by the President and over which the President is the ultimate review authority, does not provide full and fair consideration of the issues Hamdan raises and is not the type of forum to which this Court will defer.

Nor is there any basis for creating a special wartime or emergency exception that would require abstention from

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[2] Although the Government advanced its abstention argument as a question presented for review, Opp. Cert. at I, the Court did not grant review of that question. Therefore, the Court may have resolved the issue at the certiorari stage. This brief is filed, however, in the event that the issue is considered at the merits stage. The brief does not address the very recent legislation regarding judicial review of detention of enemy combatants although its amendments to 28 U.S.C. § 2241 do not appear to apply to pending claims. *See* H.R. 2863, Title X, Sec. 1005(h), 109th Cong. (2005) (signed into law on December 30, 2005).

Hamdan's claims. While some accommodation is necessary to allow the President to defend the nation, war is also a time for heightened vigilance from all branches of government, working together to preserve the basic liberties for which the war is fought. This Court has already twice rejected arguments that it has a diminished role in war in cases arising out of the United States' current conflicts. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2005) ("[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances."); *Rasul v. Bush*, 542 U.S. 466, 474 (2004) ("[T]his Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving executive detention, in wartime as well as in times of peace."). It should do so again in this instance and hear Hamdan's claims without delay.

ARGUMENT

I. ABSTENTION IS NOT APPROPRIATE WHERE, AS HERE, THE QUESTIONS UPON WHICH CERTIORARI HAS BEEN GRANTED ARE CHALLENGES TO THE JURISDICTION OF THE MILITARY COMMISSION.[3]

This Court has not required the Article III courts to abstain from challenges to the right of a military tribunal "to try [a defendant] at all," whether the tribunal in question is a military commission or a court-martial. *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975) (quoting *Noyd v. Bond*, 395 U.S. 683, 696 n.8 (1969)); *Ex parte Quirin*, 317 U.S. 1, 19 (1942).[4] Hamdan's petition presents this kind of jurisdictional challenge, acknowledging that he can be tried by the military, but arguing that the military commission convened under the President's Order has no jurisdiction over him. *See Hamdan v. Rumsfeld*, 415 F.3d 33, 37 (D.C. Cir.

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[3] Neither English courts nor the courts in this country have ever expressed reluctance to review the jurisdiction of military tribunals over the person, nor have they given deference to a military tribunal's assertion of jurisdiction. Indeed, the one issue civilian courts have always reviewed in collateral challenges to military proceedings is whether the military tribunal had jurisdiction. *See e.g., Hiatt v. Brown*, 339 U.S. 103, 111 (1950); *Ex parte Reed*, 100 U.S. 13, 23 (1879); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 118 (1866); *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 337 (1806); *Grant v. Gould*, 126 Eng. Rep. 434, 451 (C.P. 1792).

[4] Until its 1950 decision in *Gusik v. Schilder*, 340 U.S. 128 (1950), this Court generally did not abstain at all when the jurisdiction of a military court was at issue. Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 1, 67-69 (1985).

2005). Hamdan challenges the military commission's jurisdiction on two bases. First, Hamdan asserts that the military commission was convened without proper authority and is not sanctioned by Congress's Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224; the Uniform Code of Military Justice (UCMJ); or the President's inherent powers as Commander in Chief. Second, he asserts that the military commission lacks jurisdiction over him because it will not apply the GPW and, under the treaty's terms, he can only be tried by a tribunal that affords those protections. Both points present substantial allegations that the commission is not lawfully constituted and has no right to try Hamdan at all.

Hamdan's claims are similar in kind to those heard without delay by this Court in *Ex parte Quirin*. There, petitioners claimed that the President lacked authority to order that they be tried by military commission, that they should be tried in the civilian courts, and that the President's order prescribing the military commission procedures conflicted with the Articles of War and, therefore, that any conviction it might issue would be void. *Quirin*, 317 U.S. at 24. This Court's unquestioned assertion of jurisdiction over the petitioners' claims and its use of extraordinary measures to hear those claims during a special term, *see id.* at 19, provide "compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions." *Hamdan*, 415 F.3d at 36.

This Court similarly has not abstained from such jurisdictional challenges in the court-martial context. *See Councilman*, 420 U.S. at 758; *Noyd*, 395 U.S. at 696 n.8. In *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960), *Reid v. Covert*, 354 U.S. 1 (1957), and *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), this Court heard without abstaining challenges to the authority upon which Congress based its assertion of military jurisdiction over the petitioners. *See McElroy*, 361 U.S. at 283 (challenging

extension of court-martial jurisdiction over civilians employed by the armed forces outside the United States); *Reid*, 354 U.S. at 3-4 (challenging application of UCMJ to civilian dependents of members of the armed forces serving overseas); *Toth*, 350 U.S. at 13 n.2 (challenging court-martial jurisdiction over previously discharged servicemen). These claims are equivalent to those made by the petitioners in *Quirin* that the President did not have sufficient authority to convene the military commission that would try them. *See Quirin*, 317 U.S. at 24 (hearing petitioners' arguments that "the President is without any statutory or constitutional authority to order the petitioners to be tried by military tribunal for offenses with which they are charged"). There is no question that these challenges to the military tribunal's authority are jurisdictional in nature. So, too, is Hamdan's challenge to the President's authority to convene the military commission before which he is set to stand trial.

Hamdan's second claim, that he is entitled to federal court enforcement of his GPW protections in any military tribunal poised to try him, is also a challenge to the military commission's jurisdiction over him. *See Johnson v. Eisentrager*, 339 U.S. 763, 785 (1950) (considering and rejecting on the merits claim that "conviction of the Military Commission was in excess of its jurisdiction" because it would not apply certain GPW protections). The President and the Combatant Status Review Tribunal (CSRT) convened on his orders have determined that Hamdan is an enemy combatant, not a prisoner of war, and that the GPW does not apply to the current conflict in Afghanistan. *See Hamdan*, 415 F.3d at 36, 40-42. Under these determinations, the military commission convened to try Hamdan will not apply any of the GPW's protections. Hamdan asserts that he is a prisoner of war or, at the very least, that his status is in doubt and challenges the President's classification of the conflict in Afghanistan as not international in scope and, thus, not falling under the GPW. *See* Alberto R. Gonzales, Mem. for the President, "Decision Re Application of the

Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban" (Jan. 25, 2002) (hereinafter, Gonzales Mem.) (noting that the Legal Adviser to the Secretary of State "expressed a different view"), *available at* http://www.msnbc.msn.com/id/4999148/site/newsweek. On that basis, Hamdan contends that he is not subject to trial before a military tribunal that does not afford to him the GPW's protections, at least until a competent tribunal determines his proper status.

This is manifestly a jurisdictional claim. Article 102 of the Third Geneva Convention provides that "[a] prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power . . . ." GPW, Art. 102, 6 U.S.T. 3316 (1949). A court that is not the "same court," applying the same procedures, as would try the Detaining Power's service members cannot validly sentence a prisoner of war. If Hamdan is correct in his assertions, such a court is without jurisdiction over him. Further, Article 5 of the GPW provides that, "[s]hould any doubt arise" as to whether a person is properly categorized as a prisoner of war, "such persons shall enjoy the protections of the present Convention until such time as their status has been determined by a competent tribunal." GPW, Art. 5, 6 U.S.T. 3316 (1949). If this Court determines that Hamdan may enforce his protections under the GPW, until his prisoner-of-war status has been determined by a competent tribunal, he may be tried only by court-martial.

Similarly, GPW Common Article 3 applies to persons captured in an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties" and also provides that sentences levied under the GPW must be pronounced "by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." GPW, Art. 3 (Common Article 3), 6 U.S.T. 3316 (1949). Because

Hamdan disputes the President's characterization of the conflict in Afghanistan, he argues that a tribunal that is not a "regularly constituted court" affording basic judicial guarantees does not have jurisdiction to try him under the GPW. To demonstrate that a military commission is not such a court, Hamdan cites the fact that he has already been excluded from significant proceedings in his own trial, *see Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 171 (D.D.C. 2004) ("Counsel made the unrefuted assertion at oral argument that Hamdan has already been excluded from the *voir dire* process . . . ."). Denial of the right to be present at one's own trial is recognized as an act which deprives a military court of jurisdiction. *See Weirman v. United States*, 36 Ct. Cl. 236, 238 (1901) ("In cases of felony, where the prisoner's life or liberty is in peril, he has *the right* to be present, and must be present, during *the whole* of the trial, and until the final judgment. If he be absent, either in prison or by escape, there is a want of jurisdiction over the person, and the court can not proceed with the trial, or receive the verdict, or pronounce the final judgment.") (quoting Thomas Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 319 (1890)). Although the Court of Appeals did not so find, *see Hamdan*, 415 F.3d at 42, Hamdan's Common Article 3 claim is also, therefore, a challenge to the military commission's jurisdiction, contending that it has no personal jurisdiction over Hamdan or persons of his status under the GPW.

As in *Quirin*, *McElroy*, *Reid*, and *Toth*, this Court should not abstain from hearing either of the jurisdictional challenges presented in Hamdan's appeal. The civilian petitioners in *McElroy*, *Reid*, and *Toth* claimed that they were improperly subjected to court-martial jurisdiction because their status as civilians entitled them to the greater protections afforded by the Article III courts. In each case, the Court found that the military had no right to try the petitioners at all and that it could not "interfere with the

liberty of civilians even for the limited purpose of forcing them to answer to the military justice system." *Councilman*, 420 U.S. at 759. In each, the Court based its holding on a determination that the petitioners could not be compelled to appear before a tribunal that did not offer the rights that their civilian status guaranteed. *See McElroy*, 361 U.S. at 284 (noting historical authority that "a civilian, entitled as he is, by Art. VI of the Amendments to the Constitution, to trial by jury, cannot legally be made liable to the military law and jurisdiction, in time of peace, is a fundamental principle of our public law") (quoting William Winthrop, MILITARY LAW AND PRECEDENTS 143 (2d ed. 1896)); *Reid*, 354 U.S. at 37 (noting that, "[n]otwithstanding the recent reforms, military trial does not give an accused the same protection which exists in the civil courts" and finding spouses of service members entitled to the greater protections); *Toth*, 350 U.S. at 23 (finding Toth and other ex-service members to be "like other civilians . . . entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article III of the Constitution"). In such circumstances, the Court found that the civilians could not be compelled to appear before the less-protective military tribunals as a prerequisite to Article III court review. *Councilman*, 420 U.S. at 759.

Hamdan's argument is the same. Although Hamdan does not argue that the military cannot try him at all—he acknowledges that he can be required to stand trial before a properly constituted military body—this factor does not distinguish Hamdan's case from *Toth*, *Reid*, or *McElroy* in a meaningful way. In each case, as in this one, the petitioners claimed to have been improperly classified as belonging to a group that may be tried by a military tribunal offering circumscribed procedural rights. Just as the petitioners in *Toth*, *Reid*, and *McElroy* argued that they could not be tried by court-martial because it would not afford them the protections of an Article III court, Hamdan argues that the military commission convened under the President's Order

has no jurisdiction over him because it does not provide the protections of a court-martial. *Hamdan*, 415 F.3d at 37. In both situations, the habeas challenge is to the authority of a tribunal offering limited procedural rights to assert criminal jurisdiction over the accused. Similarly, the *Quirin* petitioners argued that they could not be tried by a military commission applying procedures that did not comport with the Articles of War. *See Quirin*, 317 U.S. at 47-48. While the Court ultimately found that such protections were not required, it did not abstain from evaluating the petitioners' that challenge when presented in their habeas claims. The Court also should not abstain from hearing Hamdan's claims.

The case for immediate review of Hamdan's claims is strengthened by comparison to those claims in which this Court has found abstention to be appropriate in a military context. When this Court has abstained from hearing a challenge to a court-martial's jurisdiction, that challenge has been based on the nature of the offense charged, not the status of the individual defendant. *See Councilman*, 420 U.S. at 741 (abstaining from hearing claims "that the court-martial lacked jurisdiction under . . . *O'Callahan v. Parker,* 395 U.S. 258 (1969), because the alleged offenses were not 'service connected.'"). Such challenges are not the kind of "substantial arguments denying the right of the military to try [the petitioner] at all," *id*. at 759, that this Court will hear without deference. *See Solorio v. United States*, 483 U.S. 435, 439 (1987) (noting, in overruling *O'Callahan*, "unbroken line of decisions from 1866 to 1960" in which "this Court interpreted the Constitution as conditioning the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused").

Much is at stake in this proceeding. The rights Hamdan invokes here are not unlike the right to avoid a second trial on the basis of the constitutional bar on double jeopardy. In each instance, the defendant asserts that he cannot be forced to stand trial. If a trial court denies a

double jeopardy motion, the criminal defendant may appeal and have his double jeopardy rights resolved finally on appeal before any second trial commences. *See Abney v. United States*, 431 U.S.651, 662 (1977) (double jeopardy claims "must be reviewable before that subsequent exposure occurs."). So too here, Hamdan asserts both that the military commission is without lawful authority to try him and that, under the GPW, he must be afforded full court-martial proceedings until such time as his status as an enemy combatant is conclusively determined. These rights contemplate resolution of status before any trial takes place and cannot properly be vindicated if Hamdan is forced to go before the military commission prior to having his claims heard by a court with the authority to make a proper judicial determination of them.

II. THERE IS NO BASIS FOR ABSTENTION BECAUSE THE MILITARY PROCEEDINGS DO NOT PROVIDE HAMDAN A FULL AND FAIR OPPORTUNITY TO LITIGATE HIS CONSTITUTIONAL CLAIMS.

Even if this Court were to find its prior precedent not controlling here and reexamine whether it will hear challenges to a military commission's jurisdiction generally, the Court's basic abstention jurisprudence dictates that it cannot abstain while the military commission proceeds in this case. "It is axiomatic . . . that '[a]bstention from the exercise of federal jurisdiction is the exception, not the rule" and "rarely should be invoked, because the federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them." *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (stating that the Court has "no more right to decline the exercise of jurisdiction which is

given, than to usurp that which is not given"). When this Court does abstain, it is for reasons of comity and because it is assured that the claims presented will receive adequate hearing before an established judicial body operating under settled procedure and rule of law. *See Councilman*, 420 U.S. at 757-58. Unlike a court-martial, the military commission before which Hamdan is set to be tried is not such a body. Instead, it is an *ad hoc* tribunal made up primarily of members without legal training who apply an ever-shifting set of rules to the claims that come before it. The commission's nominal review panels are composed entirely of Executive Branch personnel and have only the power to render advisory opinions about the proceedings themselves, not the underlying constitutionality of the commission process. The President, who directed the creation of the commissions, is the ultimate review authority over all claims, including Hamdan's challenge to the President's constitutional authority to convene the commissions. In these circumstances, where there is no established and adequate tribunal to which it will defer, abstention by the Court would be an abdication of its essential role. No such departure from this Court's basic principles is warranted in this case.

A. The Military Commission Process Cannot Give Full and Fair Hearing to Hamdan's Constitutional Claims.

This Court requires abstention only if the claimant will receive a "full and fair opportunity to litigate his constitutional claims" before an alternate tribunal, *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 627 (1986); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 435 (1982); *Younger v. Harris*, 401 U.S. 37, 45 (1971) (quoting *Fenner v. Boydin*, 271 U.S. 240, 243-44 (1926)). In these cases, the Court abstained because it found

that there was an adequate alternate forum in which the litigants could fully and fairly adjudicate their constitutional claims. *See Ohio Civil Rights Comm'n*, 477 U.S. at 629; *Middlesex*, 457 U.S. at 435-37. The same "considerations of comity, [and] the necessity of respect for coordinate judicial systems" that underlie the Court's abstention doctrine apply with full force "to the balance governing the propriety of equitable intervention in pending court-martial proceedings."[5] *Councilman*, 420 U.S. at 756-57 (citing *Younger*, 401 U.S. at 46). "Under accepted principles of comity, the court should stay its hand only if the relief the petitioner seeks . . . would also be available to him with reasonable promptness and certainty through the machinery of the military justice system in its processing of the court-martial charge." *Parisi*, 405 U.S. at 42; *Gusik*, 340 U.S. at 132. The principles of comity underlying that determination, however, are based upon this Court's extensive review and approval of the procedural safeguards established by Congress under the UCMJ and cannot be transferred to military commission proceedings wholesale.[6]

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[5] This principle is also drawn, in part, from the similar doctrine of exhaustion of administrative remedies. *See Councilman*, 420 U.S. at 756 (noting that "practical considerations" underlying military abstention "are similar to those that underlie the requirement of exhaustion of administrative remedies"); *Parisi v. Davidson*, 405 U.S. 34, 41 n.6 (1972) ("The concept of 'exhaustion' in the context of the demands of comity between different judicial systems is closely analogous to the doctrine of abstention.").

[6] In this regard, "full and fair review" is used in the context of abstention regarding jurisdictional claims as opposed to the question whether a constitutional claim will be redetermined on habeas review after court-martial proceedings have completed. *See Burns v. Wilson*, 346 U.S. 137, 142 (1953) (plurality) ("[w]hen a military decision has dealt fully and fairly with an allegation . . . it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence. . . .") (citation omitted). Application of this

Under the UCMJ, "[r]igorous provisions guarantee a trial as free as possible from command influence, the right to prompt arraignment, the right to counsel of the accused's own choosing, and the right to secure witnesses and prepare an adequate defense." *Burns*, 346 U.S. at 141. These provisions "also establish a hierarchy within the military establishment to review the convictions of courts-martial, to ferret out irregularities in the trial, and to enforce the procedural safeguards which Congress determined to guarantee to those in the Nation's armed services" and "provide[] a special post-conviction remedy within the military establishment, apart from ordinary appellate review, whereby one convicted by a court-martial, may attack collaterally the judgment under which he stands convicted." *Id.*

It is against the backdrop of these rigorous procedural innovations, and with the knowledge that "Congress has taken great care both to define the rights of those subject to military law, and provide a complete system of review within the military system to secure those rights," *Burns*, 346 U.S. at 140, that this Court has abstained while court-martial proceeding go forward.[7] *See Councilman*, 420 U.S. at 760; *Noyd*, 395 U.S. at 694. The Court has given deference to Congress's attempt "to balance . . . military necessities against the equally significant interest of ensuring fairness to servicemen charged with military offenses, and to

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standard in the context of collateral review by Article III courts after military proceedings have concluded has proven difficult. *See, e.g.*, Rosen, *supra* note 4 at 67-76.

[7] As the court of appeals correctly found, the second *Councilman* rationale for abstention, that "comity aids the military judiciary in its task of maintaining order and discipline in the armed services," "does not exist in Hamdan's case." *Hamdan*, 415 F.3d at 36 (quoting *New v. Cohen*, 129 F.3d 639, 634 (D.C. Cir. 1997)).

formulate a mechanism by which these often competing interests can be adjusted." *Councilman*, 420 U.S. at 757-758. Particularly compelling to the Court in *Councilman* was Congress's creation of "an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals [now the Court of Appeals for the Armed Forces] consisting of civilian judges 'completely removed from all military influence or persuasion.'" *Id.* at 758 (quoting *Noyd*, 395 U.S. at 694-695).

Today, legally trained and command-insulated military judges preside over the courts-martial, exercising powers similar to civilian judges. UCMJ art. 26, 10 U.S.C. § 826; Rule for Courts-Martial 801, MANUAL FOR COURTS-MARTIAL UNITED STATES (2005 ed.), *available at* http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf. Court-martial judgments are subject to review by service courts of criminal appeals, whose decisions are not subject to *administrative* revision, except for the benefit of the accused, *see* UCMJ art. 66(e), 10 U.S.C. § 866(e). Moreover, courts-martial are subject to discretionary review before the five-judge civilian Court of Appeals for the Armed Forces, whose decisions are similarly not subject to further review in the Executive Branch, except for the benefit of the accused. UCMJ art. 67(e), 10 U.S.C. § 867(e).[8] If the Court of Appeals for the Armed Forces reviews and decides a case, its decision can be reviewed by this Court on petition for certiorari. UCMJ art. 67a, 10 U.S.C. § 867a.

Although the President's Military Order gives nominal assurance of "full and fair" trial, *see* President's Military Order at § 4(c)(2), the military commissions simply do not provide the procedural guarantees of courts-martial.

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[8] The military appellate courts also have authority to grant extraordinary relief under the All Writs Act, 10 U.S.C. § 1651(a). *See Noyd*, 395 U.S. at 695; *United States v. Dowty*, 48 M.J. 102, 106-07 (C.A.A.F. 1998).

Historically, military commission procedures generally conformed to the "principles of law, rules of evidence, and procedure then applicable in courts-martial." Kevin J. Barry, *Military Commissions: Trying American Justice*, 2003-Nov. ARMY LAW. 1, 2 (2003) (citing Winthrop, MILITARY LAW AND PRECEDENTS at 841-42); ABA Task Force on Terrorism and the Law, Report and Recommendations on Military Commissions at 12 (Jan. 4, 2002) (hereinafter, ABA Report on Military Commissions), *available at* http://www.abanet.org/leadership/military.pdf. Since military commissions were last used some sixty years ago, however, court-martial practice has evolved to the point that, in many respects, it is indistinguishable from civilian criminal proceedings. *See* ABA Report on Military Commissions at 12. This reform was based on a previously "largely untested precept that military effectiveness depends on justice and that, by and large, civilian forms and principles are necessary to ensure justice." Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 9 (1998). The military commission before which Hamdan is to be tried, however, is convened upon orders that draw extensively from those issued by President Roosevelt to convene military commissions during World War II. Indeed, at the time the President's Military Order was issued, then-Assistant Attorney General for the Criminal Division, Michael Chertoff and then-White House Counsel Alberto Gonzales declared that its terms "were 'virtually identical'" to and "derived from" Roosevelt's Proclamation and Order. *See* Carl Tobias, *Detentions, Military Commissions, Terrorism, and Domestic Case Precedent*, 76 S. CAL. L. REV. 1371, 1378-79 (2003). For that reason, they diverge radically from modern court-martial procedure and are a relic of an earlier time, adopting a judicial scheme long abandoned by the military and unfamiliar to contemporary judge advocates.

There can be no full and fair review in such bodies. The government asks this Court to defer, not to an independent judicial review process, but, in essence, to the President himself. Although it provides some appearance of hearing by a deliberative process and multi-level review, including three-member review panel, its decisions are finally controlled by the President alone. *See* Revised Military Commission Order No. 1 § 6(H)(4) (Aug. 31, 2005), *available at* http://www.defenselink.mil/news/Sep2005/d20050902order.pdf, (hereinafter, Military Commission Order No. 1) (requiring Secretary of Defense to establish review panel); *id.* § 6(H)(6) (vesting final review of the military commission in the President or the Secretary of Defense as his designee).[9] Accordingly, were this Court to abstain, it would do so at the behest of the executive to allow Hamdan's claims to remain in a review process that takes place entirely within the Executive Branch, which has already decided the questions presented. A military commission, created by the President, serving at the pleasure of the President, staffed by military officers under the command of the President, and ultimately reviewed by the President is not a proper tribunal to determine whether the President's Military Order convening that commission was invalid or whether the commission itself has the authority to try the defendant appearing before it. This is a far cry from the structure of judicial independence carefully

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[9] It is not clear whether the review panels even have the authority to review Hamdan's claims challenging the underlying authority of the President to establish military commissions. By instruction of the Department of Defense General Counsel, the Panel is seemingly limited to reviewing the findings and sentences of the military commissions. Military Commission Instruction No. 9, § 4.C.(1), (4) (Oct. 11, 2005), *available at* http://www.dod.gov/news/Oct2005/d20051014MCI9.pdf.

constructed for the Court of Appeals for the Armed Forces.[10] *See Burns*, 346 U.S. at 141 & n.7. This Court should not allow such consolidation of power by refraining from undertaking judicial review, *see Hamdi*, 542 U.S. at 535-36 (rejecting position that "courts must forgo any examination of the individual case" as an "approach [that] serves only to *condense* power into a single branch of government") (emphasis original), and no recognized abstention doctrine of this Court requires or allows that result.

Further, no system of independent review exists for Hamdan's claims within the military commission structure. Military commission procedures are established and implemented by the Secretary of Defense, who also appoints its members. All judgments are reviewed by the Secretary of Defense, *see* Military Commission Order No. 1 § 6(H)(5), and must ultimately be forwarded for "final decision" to the President himself, *id.* § 6(H)(6). Indeed, no portion of the military commission process is open to scrutiny by any other branch of government. This is an unprecedented consolidation of power in the executive. Further, the President issued the Military Order convening the commissions in question upon a finding that he had the authority to do so. *See* President's Military Order, 66 Fed. Reg. at 57,833. The Executive Branch has also determined that "none of the provisions of [the] Geneva [Convention] apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to [the] Geneva Convention." Mem. Re: Humane Treatment of al

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[10] That the President went to such lengths to avoid using the existing review structure provided under the UCMJ, including appeal to the United States Court of Appeals for the Armed Forces, suggests that the Executive Branch was not willing to allow for judicial review that was independent of the control of the President.

Qaeda and Taliban Detainees 1 (Feb. 7, 2002) (*cited in* Br. for Appellants in Court of Appeals at 40); Gonzales Mem. at 1. Without outside review of these issues—the essential issues that Hamdan now raises to this Court—there is no reason for the President to reconsider the decisions he has already made. Where doing so "would be to demand a futile act," this Court will not demand that a petitioner bring his claims before a tribunal that has predetermined its result. *See Houghton v. Shafer*, 392 U.S. 639, 640 (1968).

The futility of presenting an argument against a military commission's authority to the military commission itself was recognized by the government in its argument of *Quirin*. The *Quirin* defendants argued before the military commission that "the order of the President of the United States creating this court is invalid and unconstitutional," and further questioned "the jurisdiction of any court except a civil court over the persons of these defendants," *Transcript of Proceedings before the Military Commission to Try Persons Charged with Offenses against the Law of War and the Articles of War, Washington D.C., July 8 to July 31, 1942*, 4-5, Minneapolis: University of Minnesota, 2004, Joel Samaha, Sam Root, and Paul Sexton, eds., http://www.soc.umn.edu/~samaha/nazi_saboteurs/nazi01.htm. The government responded:

> In the first place, I cannot conceive that a military commission composed of high officers of the Army, under a commission signed by the Commander-in-Chief, would listen to argument on the question of its power under that authority to try these defendants. In the second place, let me say that the question of the law involved is a question, of course, to be determined by the civil courts should it be presented to the civil courts.

Id. at 5.

The attorney general recognized that the military commission had no authority to decide "the question of its power . . . to try [the] defendants." *Id.* Ultimately the *Quirin* commission heard argument on the issue whether the commission had jurisdiction over the defendants and, without stating the basis for its holding, held that "[t]he Commission does not sustain the objection of the defense." *Id.* at 39. This cursory affirmance of the executive's order is the expected response and cannot be considered a "full and fair" adjudication of the petitioners' claims. This Court should not require the formalism that Hamdan obtain that answer to a question long since decided before seeking review.

Moreover, the military commission is not competent to decide the substantial and complex constitutional issues Hamdan raises. The commission is not a judicial tribunal. It is staffed, at its first level, by military officers, only one of whom must be an attorney. Hamdan will be tried by a panel composed primarily of lay persons who cannot be expected to have the expertise necessary to evaluate his constitutional claims. Nor do those claims draw upon any particular military expertise that the commissions' members might possess. *See Councilman*, 420 U.S. at 756-57 (finding that considerations of "special competence" and "peculiar[] expert[ise]" drawn from exhaustion principles of agency law "apply in equal measure to the balance governing the propriety of equitable intervention in pending court-martial proceedings").

Unlike *Councilman*, the issues raised by Hamdan will not benefit from further factual refinement by or from any unique military expertise. In *Councilman*, the question at issue was one of fact: whether the accused's off-post transfer of marijuana to another soldier constituted a service-connected offense. Resolution of the issue turned on the facts of the case and, in large part, depended upon the "impact of [the] offense on military discipline and effectiveness, on determining whether the military interest

in deterring the offense is distinct from and greater than that of civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts." *Councilman*, 420 U.S. at 760. This Court held that "[t]hese are matters that often will turn on the precise set of facts in which the offense has occurred." *Id.* "More importantly, they are matters as to which the expertise of military courts is singularly relevant, and their judgments indispensable to inform any eventual review in Art. III courts." *Id.*

By contrast, Hamdan raises purely legal issues unconnected to the facts of his particular case. The President's constitutional or statutory authority to convene military commissions is not fact-dependent. Moreover, Hamdan's status as an enemy combatant outside the protections of the Third Geneva Convention is an issue already decided by the Executive Branch, and one whose further adjudication is not required as an element of the government's case. Military Commission Instruction No. 2 (Apr. 30, 2003), *available at* http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf, (setting forth elements of offenses tried by military commission, which do not include Hamdan's status as an "unprotected" enemy combatant). These are fundamental constitutional questions directed to the expertise of the Article III courts.

When, as here, the only forum in which the Hamdan's claims may be heard does not provide an adequate procedural mechanism that will ensure full and fair hearing of the Hamdan's claims, or when, as here, the forum is not competent to do so, there is no basis for abstention. For principles of comity to apply, the petitioner must have the opportunity to proceed before a concurrent judicial authority that provides equal opportunity for development of the petitioner's claims. The military commission is no such court.

B. The Military Commission Offers No Guarantee Of Reaching a Final Decision That Can Be Reviewed By the Article III Courts, Should This Court Abstain.

Should this Court abstain from hearing Hamdan's claims at this time, the military commission set to try Hamdan provides no guarantee of reaching final decision.[11] Indeed, proceedings before the military commission appear to exist in perpetuity: at each level of intermediate review of the commission's findings, provision is made to return the case for further proceedings, should the reviewing body disagree with some aspect of the result. *See* Military Commission Order No. 1 (providing that Appointing Authority "if not so satisfied" that the proceedings were administratively complete "shall return the case for any necessary supplementary proceedings"); *id.* § 6(H)(4) (allowing Review Panel to return the case to the Appointing Authority for further proceedings, "provided that a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred"); *id.* § 6(H)(5) (allowing Secretary of Defense to "either return the cases for further proceedings" or forward it to the President for final decision). The President has the sole authority to execute a final decision.

The lack of any guarantee of prompt resolution is particularly troubling in this case because it vests in the President the ability to avoid any form of judicial review, if

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[11] Under the recently enacted legislation, it is also not clear to what extent the Article III courts would be able to hear Hamdan's constitutional claims upon direct review of the military commission's decision. *See* H.R. 2863, Title X, Sec. 1005(e)(3)(d). In light of this recent development, and to the extent this issue remains in doubt, review of Hamdan's constitutional claims now presented is especially appropriate.

this Court abstains. In light of the lengths to which the President has gone to avoid review of the military commission proceedings by the Article III courts, "from contesting Petitioner's right to seek habeas relief, to holding trials at Guantanamo, to changing commission rules after trials have begun," Pet. Rep. at 1, and, indeed, to avoid judicial review of any controversy arising out of the current military conflict, there can be no expectation that a final decision will be quickly executed in this case. *Cf. Padilla v. Hanft*, Case No. 05-6393 at p. 6 (4th Cir., December 21, 2005) (holding that government's actions in that case "have given rise to at least an appearance that the purpose of these actions may be to avoid consideration of our decision by the Supreme Court"). This lack of established procedure or timeline for reaching final decision gives this Court no assurance that, should it abstain from ruling at this juncture, it will have an opportunity to review Hamdan's claims again within any reasonable timeframe. While this may be the government's intended result, allowing it to proceed unchecked while the amorphous War on Terror continues, under such circumstances, abstention is resolutely inappropriate.

III. HAMDAN'S CASE PRESENTS FUNDAMENTAL QUESTIONS OF GREAT IMPORTANCE IN TIME OF WAR WHICH THIS COURT SHOULD DECIDE PROMPTLY AND WITHOUT DEFERING TO THE MILITARY COMMISSION.

In addition to the inapplicability of traditional principles of comity and deference that justify abstention in other contexts, Hamdan's case presents issues that are too important to delay their consideration in the Article III courts. In part, the government asks the Court to abstain because judicial review hinders the Executive Branch in what it deems an unprecedented war against terrorism.

Opp. Cert. at 22-23. But, as this Court reaffirmed in the last Term, "a state of war is not a blank check for the President," *Hamdi*, 542 U.S. at 536 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)), and judicial review is not a peacetime luxury to be discarded during times of crisis. This Court has consistently recognized that, when questions of this magnitude are raised during periods of national emergency, they are properly resolved by the Article III courts upon presentation. *See Quirin*, 317 U.S. at 19; *Ex parte Yerger*, 75 U.S. 85, 88 (1868) (hearing petitioner's habeas claims that he was unlawfully subjected to the jurisdiction of a military commission while he was held for trial before it); S*ee Ex parte McCardle*, 73 U.S. 318, 320 (1867) (granting McCardle's pretrial habeas petition challenging the military commission's jurisdiction).[12] In each of these cases the Court undertook review without considering abstention. Nothing in this case counsels for a departure from that practice.

There are, however, even more fundamental reasons why this Court should hear Hamdan's claims at this time. The Court, by determining whether wartime restrictions on individual liberty exceed what the Constitution allows, fulfills its role in our system of checks and balances. While the Executive Branch's weighty responsibility to protect the nation in wartime entitles it to some deference from coordinate branches, it is not specially tasked with the ultimate responsibility for defining and safeguarding individual rights. Its primary function is to combat terrorism, wage wars, and do everything in its power to prevent another national tragedy like that experienced on September 11, 2001. In carrying out these grave responsibilities, executive officials will inevitably test the

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[12] Congress, apparently not anticipating any possibility of abstention by the Court, ended McCardle's case by stripping the Court of jurisdiction before it rendered an opinion. *Ex Parte McCardle*, 73 U.S. 318, 320 (1867).

boundaries of their authority. The balance that they strike between security and individual rights will not always be reasonable or consistent with constitutional dictates. *See Hamdi*, 542 U.S. at 536; *Rasul*, 542 U.S. at 474. While Congress also plays an important role in checking the executive through its legislative powers, this Court is charged with the responsibility for determining what the Constitution protects in times of peace and war. *See Hamdi*, 542 U.S. at 535-36; *Marbury v. Madison*, 5 U.S. 137, 178 (1803). The Court undertakes that vital role by deciding cases like Hamdan's.

The importance of the Court's role and the need for timely action is heightened, not diminished, in times of national crisis or war.[13] As this Court found, reflecting upon the recently concluded Civil War,

> When peace prevails, and the authority of the government is undisputed, there is no

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[13] *See Reid*, 354 U.S. at 14 ("[E]lemental procedural safeguards were embedded in our Constitution to secure their inviolateness and sanctity against the passing demands of expediency or convenience."). *See also Youngstown Sheet & Tube*, 343 U.S. at (refusing "to declare the existence of inherent powers *ex necessitate* to meet an emergency," which the founders "omitted" from the Constitution because they "knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation."); *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring) ("A necessary corollary of *Eisentrager* is that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated."); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 483 (1934) (Sutherland, J., dissenting) ("If the provisions of the Constitution not be upheld when they pinch as well as when they comfort, they may as well be abandoned.").

> difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.

Ex parte Milligan, 71 U.S. 2, 123-24 (1866). Today, the Court's necessary role in balancing security and liberty is as important as it was during earlier conflicts. Like those who preceded them in other times of crisis, today's executive officials are vigorously prosecuting their duties. Only this Court can determine when these efforts violate the Constitution through timely adjudication of cases like the one before it now.

Hamdan's action goes to the very heart of these efforts and calls upon this Court to resolve critical constitutional issues arising out of the current national crisis. *See Quirin*, 317 U.S. at 19 (noting "duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty"). In light of the importance of the questions before the Court, and because its abstention doctrine indicates no reason to delay hearing this case, the Court should not abstain in this instance and should undertake its vital role by deciding Hamdan's claims.

CONCLUSION

In urging this Court to defer to the military commission proceedings and abstain from hearing Hamdan's petition, the government seeks to delay indefinitely judicial review of the constitutional challenges Hamdan asserts. Granting the government's request would be an improper invocation of the abstention principles. There is no alternate competent forum in which Hamdan's claims will be given full and fair hearing; there is only a military commission "built upon no settled principles" and "in truth and reality no law." *Reid*, 354 U.S. at 26 (quoting William Blackstone, 1 COMMENTARIES 413). Under such circumstances, this Court cannot abstain. Hamdan's jurisdictional challenges to the military commission proceedings are properly before it at this time. The Court should fulfill its necessary role and decide these important issues without delay.

Respectfully submitted.

STEVEN H. GOLDBLATT
Counsel of Record
ALISTAIR E. NEWBERN
DAVID J. ARKUSH
Appellate Litigation Program
Georgetown University Law Center
111 F Street, N.W., Suite 123
Washington, DC 20001
(202) 662-9555

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