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 LAWRENCE M. FRIEDMAN, JONATHAN LURIE, AND ALFRED P. RUBIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER [BARBARY WARS PRECEDENT]

WILLIAM F. ALDERMAN
Counsel of Record
ARMEN ZOHRABIAN
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105
(415) 773-5700

RENE A. KATHAWALA
KATHRINE A. GEHRING*
**Bar admission pending*
ALISON F. SWAP
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103
(212) 506-5000

JOSHUA H. WALKER
MICHAEL W. TRINH
SIDDHARTHA M. VENKATESAN
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, CA 94025
(650) 614-7400

DOMINIQUE N. THOMAS
ORRICK, HERRINGTON & SUTCLIFFE LLP
777 South Figueroa Street
Suite 3200
Los Angeles, CA 90017
(213) 629-2020

Counsel for Amici Curiae

January 6, 2006

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

TABLE OF AUTHORITIES – Continued

Page

INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are legal historians. Lawrence M. Friedman is the Marion Rice Kirkwood Professor of Law at Stanford University.[2] Jonathan Lurie is Professor of History and Adjunct Professor of Law at Rutgers University. Alfred P. Rubin is Distinguished Professor Emeritus of International Law at Tufts University. As legal historians, *amici* have an interest in addressing an omission in Supreme Court jurisprudence by setting forth legal history pertinent to this case.

SUMMARY OF THE ARGUMENT

The "war on terror" is not a new type of conflict requiring the adoption of novel rules, or the abrogation of old ones. Between 1785 and 1815, the earliest American leaders, the Founders, waged a remarkably parallel series of conflicts against the Barbary powers, unconventional enemies in North Africa. Despite the parallels between these Barbary Wars and Respondents' "war on terror," Executive power during the former conflict appears never to have been examined by the Court.

The lessons this historical episode teaches are unequivocal: Despite the unlawful combat of their enemies,

[1] *Amici's* counsel researched and drafted this brief with the advice and consent of *amici*. Petitioners and Respondents have consented to the filing of this brief. Copies of their letters of consent have been lodged with the Clerk. Consistent with Rule 37.6, this brief is not authored in whole or in part by counsel for any party. No person, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] Affiliations of *amici* are for identification only.

the Founders acted in accordance with international law and custom. They treated those they detained as regular prisoners of war and strictly complied with standard military and civilian adjudicative procedures. The Founders demonstrated extreme deference to Congress, their objective treaty obligations, and the law of nations.

The Founders' restraint stands in sharp contrast to Respondents' rejection of standard court martial procedures and applicable protocols of the Geneva Convention of 1949.[3] Respondents assert that the Executive has always tried prisoners such as Petitioner at the President's caprice.[4] History teaches the opposite, and confirms that Respondents' categorical rejections of U.S. law are *ultra vires* assertions of Executive power mandating judicial intervention.

ARGUMENT

Respondents repeatedly claim that the present Military Commission has a broad warrant in the history of U.S. Executive practice. They state that Executive military commissions "have tried enemy combatants since the

[3] Geneva Convention Relative to the Treatment of Prisoners of War ("GPW"), Aug. 12, 1949, 6 U.S.T. 3316.

[4] *See* Brief for Appellants at 57-60, *Hamdan* v. *Rumsfeld*, 415 F.3d 33 (D.C. Cir. Jul. 15, 2005) (No. 04-5393) (Respondents' Circuit Brief).

earliest days of the Republic under such procedures as the President has deemed fit."[5]

Not so.

The Barbary Wars experience belies that assertion. Faced with savage and irregular attacks by an enemy as openly defiant of the law of nations and international custom as al Qaeda and the Taliban, the Founders dealt with such enemy detainees not as the Executive "deemed fit," but as mandated by recognized international law and custom.[6] They showed extraordinary deference to standard military detention and adjudication procedures, as well as to other applicable laws, during a similarly open-ended and irregular conflict.

I. Executive Conduct During The Barbary Wars Provides Powerful Guidance For The Present Controversy

The Barbary Wars are more analogous to the present controversy than World War II or the Civil War. In the Barbary Wars, the United States waged an open-ended international conflict against unconventional enemies who disregarded the law of nations and international custom.

---

[5] Respondents' Circuit Brief at 53; *id.* at 57-60; Brief for Respondents in Opposition to Petition for Writ of Certiorari at 2, *Hamdan* v. *Rumsfeld*, No. 05-184 (U.S. 2005).

[6] This Court has long recognized the existence of "international law," stemming from the law of nations known to the Founders and has recognized that modern international legal norms may be enforced as federal common law. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 715 (2004); Alfred P. Rubin, The Law of Piracy 166 (2d ed. 1998).

Corsairs of the Barbary powers terrorized shipping in the Mediterranean and Atlantic for hundreds of years, extorting large sums of tribute from European countries and, following its independence, from the United States. As well as exacting tribute and seizing merchant shipping, the Barbary powers took hostages for ransom and slavery.[7] The Barbary powers were Morocco and the warlords of Tripoli, Algiers and Tunis. Tripoli, Algiers and Tunis, although nominally satraps of the Ottoman Empire, acted autonomously.

The Founders engaged these corsairs in the Barbary Wars. Many of the framers of the Constitution served the country during the Barbary Wars.[8] The Barbary Wars predated the Constitutional Convention,[9] ran contemporaneously

[7] Letter from Salva to Franklin (Apr. 1, 1783), *in* 6 The Revolutionary Diplomatic Correspondence of the United States 357 (Francis Wharton, ed. 1889) ("Algiers has many ships, and the politics of certain European powers do not restrain them from paying tribute to enjoy peace; they make use of these human harpies as a terror to the belligerent nations, whose commerce they chain to the car of Algerine piracy").

[8] George Washington faced issues relating to the Barbary powers. *See, e.g.*, Message of President George Washington to the Congress of the United States (Dec. 30, 1790), *in* 1 Naval Documents Related to the United States Wars With the Barbary Powers ("Naval Doc.") 18-22 (Office of Naval Records and Library, 1939). Both future Chief Justice John Marshall and James Madison served as Secretaries of State during much of the Barbary struggle.

[9] As the Constitutional Convention began, an American captain and his crew were imprisoned and enslaved in Algiers. Letter from Richard O'Brien (Apr. 28, 1787), *in* 1 Naval Doc., *supra* note 8, at 14-17, 15. *See* Letter to Thomas Jefferson, U.S. Minister to Paris, France, from Richard O'Brien, Algiers (June 8, 1786), *in* 1 Naval Doc., *supra* note 8, at 1-6 (appealing for help from the U.S. government to free him and his crew).

with the formation of the new government,[10] and were among the many early tests faced by the young nation and her Founders. The Barbary Wars shaped the Founders' views of the separation of powers during international conflict. The Founders' service demonstrates that they did not understand the Constitution to allow unbridled Executive power permitting the President to disregard international law.

A. Like The AUMF, Congressional Authorizations Of Force Against The Barbary Powers Fell Short Of A Formal Declaration Of War

Like the current Authorization to Use Military Force ("the AUMF"),[11] none of the Congressional authorizations to the Jefferson and Madison administrations during the Barbary Wars constituted a formal declaration of war. There were at least 11 Congressional authorizations of force against the Barbary Powers; not one was a formal declaration of war. *See, e.g.,* Act for the protection and the Commerce and Seamen of the United States, against the Tripolitan Cruisers, ch. 4, 2 Stat. 129 (1st Sess. 1802); Act further to protect the commerce and seamen of the United States against the Barbary powers, ch. 45, 2 Stat. 291-92 (2d Sess. 1804) (recognizing a state of war but not declaring one); Act for the protection of the commerce of the United States against the Algerine Cruisers, ch. 90, 3 Stat. 230 (3d Sess. 1815).

---

[10] A Treaty between Morocco and the United States was signed on June 23, 1786 and ratified on July 18, 1787, during the Constitutional Convention. Note, *in* 1 Naval Doc., *supra* note 8, at 6.

[11] P.L. 107-40, § 2, 115 Stat. 224 (Sept. 18, 2001).

B. Our Enemies In The Barbary Wars Presented Identification Issues Similar To Those Faced In The War On Terror

As with the current AUMF, Congress during the Barbary Wars authorized the use of force against an enemy which had not yet been fully identified or defined. *Compare* Act further to protect the commerce and seamen of the United States against the Barbary powers, 2 Stat. at 291-92 (authorizing the use of force against "Tripoli" and "any other of the Barbary powers which may commit hostilities against the United States") *with* the AUMF, Pub. L. No. 107-40 at § 2, 115 Stat. at 224 (authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" the attacks of September 11, 2001).

These congressional authorizations for action against the Barbary powers continued as the Founders faced an indefinite conflict, ambiguous as to precise enemy, scope, and duration. The Barbary Wars ultimately lasted 30 years as the United States contended with corsairs hailing from various Barbary powers, including Tripoli, Morocco, Tunis, and Algers. As discussed below, despite the broad language of the congressional authorizations, the behavior of the earliest Executive branches demonstrates that international law and custom, as then understood, limited the scope of Presidential authority.

C. The Barbary Corsairs Were "Unlawful Combatants" That Did Not Adhere To Internationally Recognized Norms Of The Laws Of War

The Founders consistently described the Barbary powers as "piratical" and "lawless."[12] Indeed, the Barbary powers admitted that they gave little or no credence to the law of nations, laws of war, or other international laws and customs.[13] The Barbary powers violated each whenever convenient.

The Tripolitan forces and their allies employed deception tactics to hide their identity. *See, e.g.,* Letter to Captain Edward Preble, USN, from Captain William

---

[12] *See, e.g.,* Letter from B. Franklin, Silas Deane, and Arthur Lee to Germain (Feb. 7, 1777), *in* 2 The Revolutionary Diplomatic Correspondence of the United States, *supra* note 7, at 265-66 (Barbary "pirates'" seizure of U.S. vessel); Paul M. Zall, Jefferson on Jefferson, 77 (The University Press of Kentucky 2002) *quoting* Jefferson Ms 77, 81 (Library of Congress) (referring to Barbary "cruizers (sic)" as "lawless pirates"). While the phrase connotes lawlessness, it should be observed that "piracy," like "terrorism," is a legally amorphous term. *See* Rubin, *supra* note 6, at 172. Just as the distinction between "freedom fighter" and "terrorist" is beyond the scope of this argument, so too is the historical distinction between "pirate" and "legal" privateer.

[13] When American diplomats explained the capture of a Tunisian ship that attempted to run the U.S. blockade of Tripoli, the Bey of Tunis asserted that the law of nations had no applicability to him:

> The Bey of Tunis claims a part as Tunisian property: In an interview the Bey asked – "Why did you take that vessel"? "Because it is agreeable to our Laws and the Laws of Nations." [Bey of Tunis:] "I Know no Laws of Nations." [U.S. Commander:] "But we do & observe them & we mean to make ourselves respected as a Nation."

Extract from journal of Midshipman Henry Wadsworth, U.S. Navy ("USN"), on board U.S.S. *Chesapeake*, Captain Richard V. Morris, USN, commanding (Mar. 1-6, 1803), *in* 2 Naval Doc., *supra* note 8, at 367-68.

Bainbridge, USN (Feb. 17, 1804), *in* 3 Naval Doc., *supra* note 8, at 431 (warning of a Tripolitan attack on Syracuse by Tripolitan crews wearing disguise uniforms). At times, the Tripolitan crews continued to deny their allegiance long after capture. *See* Letter to Sir Alexander John Ball, Governor of Malta, from Captain Samuel Barron, USN (Mar. 20, 1805), *in* 5 Naval Doc., *supra* note 8, at 430-31 (*Mastico* crew's sustained denials of participation in Tripolitan conflict; later proven by regularly constituted admiralty tribunal).

Moreover, the Barbary powers frequently violated the treaties they made with various nations, including the United States. It was not uncommon for a Barbary power to extort large amounts of "protection money" and gifts from a nation, including the United States, and then later ratchet up its demands. *See, e.g.,* Extract of a letter from William Eaton, Esq., Consul of the United States at Tunis, to the Secretary of State, 2 American State Papers 355 (Walter Lowrie & Matthew St. Clair Clarke, eds., 1832) (complaint regarding manifest treaty violations by Tripolitan regency, including violative seizure of U.S. commercial vessel and attempts to extort additional money from the U.S. through threats of war).

During battle, Barbary corsairs violated the law of nations in order to gain tactical advantage. Tripolitan crews broke the laws of war by feigning surrender to lull the Americans, and then suddenly attack again. Early in the Barbary Wars, a Tripolitan cruiser attempted this tactic three times against an American naval ship, the *Enterprize*. *See, e.g.,* Capture of the Ship of War *Tripoli* by U.S. Schooner *Enterprize* (Nov. 18, 1801), *in* 1 Naval Doc., *supra* note 8, at 538-39 (description of Lt. Sterrett's report, commanding *Enterprize*). Pursuant to the law of nations

and recognized customs, the *Enterprize* stopped firing each time the Tripolitan ship lowered its colors. *Id.* The Tripolitans used this tactic to lure the American crew from safety and onto the deck, and then fire on the exposed American sailors. *Id*.

In violation of international customs of the time, the Barbary powers also habitually enslaved Americans and others they captured on the high seas, including U.S. naval crews. These prisoners subjected to forced labor[14] and beatings included U.S. Navy personnel captured aboard the U.S.S. *Philadelphia* by Tripoli. *See, e.g.,* Extracts from journal of Surgeon Jonathan Cowdery, USN (Oct. 31, 1803 to Mar. 26, 1804), *in* 3 Naval Doc., *supra* note 8, at 529-32, 531 (describing enslavement and beatings of U.S. prisoners held in Tripoli). One American prisoner held captive by Tripoli attempted to kill himself "in a fit of despair." *Compare Id.* at 531 (American prisoner prevented from committing suicide by Tripolitan captors) *with* Josh White, *Guantanamo Desperation Seen in Suicide Attempt*, Washington Post, Nov. 1, 2005, at A01 (military reports 36 total suicide attempts in 22 months by detainees at Guantanamo Bay where Petitioner is held).

[14] American prisoners held for ransom were forced to build military fortifications while they were held. Letter from Nathaniel Ramsey to Otho Holland Williams (Aug. 7, 1786), *in* 23 Letters of Delegates to Congress (November 7, 1785-November 5, 1786) 441 (1996) (U.S. prisoners held by Algers forced to build fortifications).

II. The Founders' Administrations, Unlike That Of The Respondents, Strictly Complied With Pre-Existing U.S. Law, Including Standard U.S. Military Adjudicative Procedures And The Law Of Nations

In a conflict against stateless enemies of indefinite status who repeatedly violated international laws and customs, the United States maintained its adherence to recognized international laws and customs throughout the Barbary Wars. This experience demonstrates that the Founders both recognized and were compelled by the pre-existing laws and customs of war, both international and domestic. The Executive branch also acted within the precise constitutional framework including military procedure and the law of nations. It is foreign to the Founders' understanding of the Constitution that the Executive branch can summarily exempt its actions from the purview of international law and municipal laws governing wartime Executive practices, even when engaged in a conflict having the characteristics of the "war on terror."

A. The Executive Branch Detained Captured Barbary Corsairs In Strict Compliance With Standard Military Procedures And Pre-Existing U.S. Law

The Founders viewed substantive and procedural war time law, including standard military procedures and the law of nations, as a direct limitation on the scope of the Executive power, particularly the power to detain prisoners captured in the theater of war.

From the onset of the Barbary Wars, U.S. commanders took ships and prisoners only where duly authorized

by law and military procedure.[15] Prior to Congressional authorization of military action against Tripoli, an American naval ship, *Enterprize*, fought and disabled a Tripolitan ship, *Tripoli*, preying on U.S. merchant ships, but did not capture the vessel.[16] In the absence of Congressional authorization to seize Tripolitan ships, the *Enterprize* released the *Tripoli* and her crew.[17] As President Jefferson explained to Congress, the *Enterprize* was "unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense," and the *Tripoli*, "being disabled from committing further hostilities, was liberated with its crew." President's Message, 11 Annals of Cong. 11-17, at 12 (1801) (1st Sess.).

Similarly, U.S. commanders during the Barbary Wars strictly adhered to standard naval laws, despite enemy subterfuge and enemy noncompliance with the laws of war. *See supra*, I.C. In accordance with international practice, American commanders often used foreign admiralty courts to adjudicate seized ships as prizes of war.[18]

---

[15] Under custom and congressional authorization, a prisoner was released if he was determined not to be a citizen of a hostile country. *See, e.g.,* Extract from Diary of Captain Edward Preble, USN, Commodore of U.S. Squadron in the Mediterranean (Saturday, Mar. 10, 1804), *in* 3 Naval Doc., *supra* note 8, at 485 (releasing prisoner after determining prisoner was of friendly Tunis, not enemy Tripoli).

[16] *Supra*, Section I.C. *See* Letter to Benjamin Tallmadge, United States Congress, from Secretary of the Navy (Jan. 13, 1802), *in* 1 Naval Doc., *supra* note 8, at 536-37.

[17] The *Enterprize* was under orders to disable, not capture, hostile Tripolitan warships. Letter to Lieutenant Andrew Sterett, USN, from Captain Richard Dale, USN (Jul. 30, 1801), *in* 1 Naval Doc., *supra* note 8, at 534-35.

[18] *See, e.g.*, Letter to William Higgins, USN Agent, Malta, from Captain Edward Preble, USN (Sept. 20, 1804), *in* 5 Naval Doc., *supra* note 8, at 43-44 (notification to U.S. commanders that British Vice

(Continued on following page)

The determination of these internationally recognized prize tribunals dictated whether a ship's crew would be released or be held as prisoners of war.[19]

Both military procedure and international custom granted prize owners the right to contest the capture of ship and crew. American military commanders gave sworn testimony and were cross-examined in open court before these prize tribunals that were recognized by accepted international custom.[20] The military orders that authorized capture of Tripolitan ships also recognized each property owner's opportunity to contest the capture in court.[21]

Illustrating the Founders' view that these laws constrained wartime power, the U.S. remedied violations of military procedures and the law of nations. In at least one instance of wrongful capture of a person aboard a seized

---

Admiralty court in Malta has determined Greek ship running blockade of Tripoli to be good prize). American commanders also used admiralty courts to recover American vessels taken as prize.

[19] If a ship was adjudicated not to be good prize, the neutral crew was set free. *See, e.g.,* Letter to George Davis, U.S. Chargé d'Affaires, Tunis, from Captain Edward Preble, USN (Jan. 17, 1804), *in* 3 Naval Doc., *supra* note 8, at 340-341 (if seized vessel determined to be a friendly Turkish ship, not an enemy Tripolitan one, captain and crew would be released from treatment as prisoners).

[20] This testimony was often given before foreign tribunals. Deposition of Captain Edward Preble (Oct. 31, 1803), *in* 3 Naval Doc., *supra* note 8, at 180-181 (deposition of U.S. captain before admiralty court in Syracuse).

[21] Upon the seizure of a vessel, the papers of the ship were to be seized and provided to a prize court "for the purpose of defending their property." Letter to Captain William Bainbridge, USN, commanding U.S. Frigate *Philadelphia*, Philadelphia, Pa., from Secretary of the Navy (Jul. 13, 1803), *in* 2 Naval Doc., *supra* note 8, at 477-78.

vessel during the Barbary Wars, the U.S. paid compensatory damages after determining that the procedure of his capture was contrary to law. The prisoner, David Valenzin, had been taken to the U.S. while awaiting the opportunity to contest the seizure of his property aboard a ship taken by the U.S. Letter to President Thomas Jefferson from Charles W. Goldsborough for Secretary of the Navy (June 19, 1803), *in* 2 Naval Doc., *supra* note 8, at 455. A congressional claims committee later determined that while the capture was "justified," the prisoner had been wronged by a lengthy, delayed process of his adjudication, and awarded him compensation. Letter to Charles Pinckney, U.S. Minister to Madrid, Spain, from Secretary of State (Apr. 21, 1804), *in* 3 Naval Doc., *supra* note 8, at 343.

In contrast to the Founders' view of the scope of war powers during the Barbary Wars, Respondents have treated Petitioner and those similarly situated as beyond the procedures established by the laws of this country, including treaties and international custom, subject only to Executive prerogative. Respondents' Circuit Brief at 57-60. Unlike the Uniform Code of Military Justice, the Military Commission rules allow prosecutors to present classified evidence outside the presence of the defendant.[22] *Hamdan* v. *Rumsfeld*, 344 F.Supp. 2d 152, at 167-168 (D.D.C. 2004). Evidence used against "suspected

[22] Such evidence may be gathered by interrogation of persons delivered to other countries with poor human rights records. *See* Frank Davies and Warren P. Strobel, *German citizen held in secret prison sues ex-CIA director*, San Jose Mercury News, Dec. 6, 2005 (German citizen alleges seizure in Macedonia and torture in Afghani camp); Katherine Schrader, *CIA Probes Rendition of Terror Suspects*, Washington Post, Dec. 27, 2005 (CIA Inspector General investigating 10 "erroneous renditions").

terrorists" may also be gathered by warrantless wiretaps beyond existing statutory scheme.[23] Evidence presented before military commissions may also be gathered outside of the protections of international law.[24] Military justice experts have strongly criticized these and other unprecedented aspects of the Respondents' military commissions. *See, e.g.*, Vanessa Blum, *Tribunals a work in progress*, Legal Times, *reprinted in* The Recorder, October 11, 2005, at 8 (describing commission irregularities cited by now-acting Air Force Judge Advocate General Jack Rives).

B. The U.S. Treated Captured Barbary Corsairs As Prisoners Of War

None of the depredations of the Barbary powers induced the Executive to exempt them from standard U.S. military or international norms regarding treatment of prisoners of war. No record can be found of any attempt to create a special court martial or similar extraordinary adjudicative system for such violations.[25]

---

[23] Respondents contend that these warrantless wiretaps intercept communications of persons deemed to have links to terrorist organizations, and require no warrant under the Foreign Intelligence Surveillance Act. White House, Press Conference of the President, http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html (Dec. 19, 2005) (National Security Agency surveillance actions used against persons with links to terrorist organizations).

[24] Persons deemed "suspected terrorists" are held in overseas prisons and subjected to "Enhanced Interrogation Techniques" that raise issues under the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, Washington Post, Nov. 2, 2005.

[25] The Legislative and Judicial branches also have roles in defining and adjudicating piracy offenses. *See* U.S. Const. art. I, § 8, cl. 10; U.S.

(Continued on following page)

Respondents argue that the Geneva Convention should not apply to enemy combatants who are suspected of being members of an organization that "openly flouts" the provisions of the Geneva Convention and acts "in flagrant defiance" of the law of armed conflict. Respondents' Circuit Brief at 40-45. But the Barbary Wars remind us that the U.S. can successfully fight unlawful combatants while adhering to international law. *Compare id.* at 40-45 *with supra*, I.C. (Barbary Pirates acted in disregard for law of nations).

Despite the similarities between the Barbary Wars and the "war on terror," there was no Executive proclamation that any Barbary corsair would be excluded from the procedural or substantive protection of the law of nations or standard U.S. military codes. Notwithstanding the illegal conduct of Barbary corsairs, the Executive recognized and exhibited a sustained and formal deference to these rules and norms in its own conduct. *See, e.g.,* Letter to Levett Harris, U.S. Consul General, St. Petersburg, Russia, from Captain Samuel Barron, USN (Jan. 16, 1805), *in* 5 Naval Doc., *supra* note 8, at 283-86, 285 ("in our Warfare with Tripoli *we must be governed by a strict adherence to the Laws of Nations* . . . ") (emphasis added).

Const. art. III, § 2. *See also United States* v. *Chapels*, 25 F. Cas. 399 (C.C.D. Va.) (Marshall) (jury verdict holding citizens and foreign nationals guilty of piracy for plunder of Spanish vessel), *rev'd sub nom. United States* v. *Smith*, 18 U.S. (5 Wheaton) 153 (1820) (review of piracy as defined by the law of nations). *Cf.* Joseph Allen Stout, The Villista Prisoners of 1916-1917 (*review*), 81.3 Hispanic American Historical Review 819-820 (2001) (describing New Mexico state court trials of captured Mexican bandits led by Pancho Villa in raid on New Mexico town).

While the Barbary powers subjected prisoners to harsh conditions, enslavement, and beatings, *supra*, the U.S. treated prisoners with "humanity & attention" and according to international norm. Letter to Captain Daniel McNeill, USN, commanding U.S.S. *Boston*, from Secretary of the Navy (Oct. 1, 1801), *in* 1 Naval Doc., *supra* note 8, at 587. In the Founders' era, formal U.S. policy required that Barbary prisoners be treated "with the utmost kindness and attention;" prisoners were permitted to write to the Bey of Tripoli in an attempt to insure the safety of the U.S. prisoners held by Tripoli. Letter to Robert R. Livingston, U.S. Minister to Paris, France, from Captain Edward Preble, USN (Mar. 18, 1804), *in* 3 Naval Doc., *supra* note 8, at 498-499. Military commanders further exemplified their commitment to international law by investigating allegations that American military personnel had mistreated a prisoner.[26]

[26] A Turkish captain claimed abuse by a sailor while held aboard the U.S.S. *New York*. Letter to Captain Edward Preble, USN, from James Simpson, U.S. Consul, Tangier, Morocco (Feb. 22, 1804), *in* 3 Naval Doc., *supra* note 8, at 450. After thorough investigation, the claims were determined to be baseless. Letter to James Simpson, U.S. Consul, Tangier, Morocco, from Captain Edward Preble, USN (Apr. 22 1804), *in* 4 Naval Doc., *supra* note 8, at 51-52.

CONCLUSION

Respondents have created a twilight archipelago of military detention and adjudication systems, subject to neither U.S. nor international standards. Respondents arrogate to the Executive power to detain, adjudicate, and legislate the fate of a class of people that only Respondents can define, unconstrained by the checks and balances central to our Constitution. Yet the Founders themselves remained faithful to the Constitution when confronted with a perceived peril of similar character. So, too, should we. The present Military Commission, as constituted, is *ultra vires*.

Respectfully submitted,

WILLIAM F. ALDERMAN
Counsel of Record
RENE A. KATHAWALA
JOSHUA H. WALKER
MICHAEL W. TRINH
KATHRINE A. GEHRING*
**Bar admission pending*
ARMEN ZOHRABIAN
SIDDHARTHA M. VENKATESAN
ALISON F. SWAP
DOMINIQUE N. THOMAS

ORRICK, HERRINGTON &
SUTCLIFFE LLP

Counsel for Amici Curiae

January 6, 2006