No. 04-5393

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

SALIM AHMED HAMDAN,
Plaintiff-Appellee,

vs.

DONALD H. RUMSFELD, United States Secretary of Defense, et al.,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

BRIEF OF AMICI CURIAE PEOPLE FOR THE AMERICAN WAY FOUNDATION, THE RUTHERFORD INSTITUTE AND EUGENE R. FIDELL ADVOCATING AFFIRMANCE IN SUPPORT OF PLAINTIFF-APPELLEE HAMDAN

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SCHEDULED FOR ORAL ARGUMENT
MARCH 8, 2005

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rules 28(a) and 29(d), *amici curiae* state the following:

(A) PARTIES AND AMICI

Except for the *amici*, People For the American Way Foundation, The Rutherford Institute and Eugene R. Fidell, all parties, intervenors, and *amici* appearing before the district court and in this court are listed in the Brief for Appellants.

(B) RULINGS UNDER REVIEW

The ruling at issue in this appeal is the district court's November 8, 2004 Order, in *Hamdan v. Rumsfeld, et al.*, No. 04-CV-1519, 2004 WL 2504508 (D.D.C. Nov. 8, 2004) (Robertson, J.) in which Judge James Robertson granted in part the petition of Salim Ahmed Hamdan for Habeas Corpus and denied Donald H. Rumsfeld's cross-motion to dismiss.

(C) RELATED CASES

All related cases brought by detainees at the Guantanamo Naval Base pending in the district court in this Circuit are listed in the Brief for Appellants. Counsel for *Amici* are not aware at this time of any other related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1(a), *amici curiae* state the following:

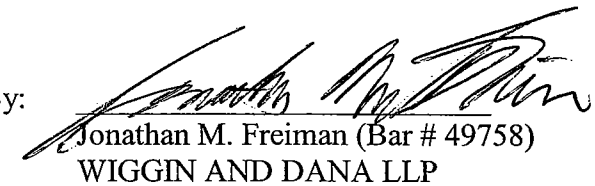
1. People for the American Way Foundation is organized as a corporation. There is no parent corporation and no publicly held corporation owns 10% or more of its stock.

2. The Rutherford Institute is organized as a corporation. There is no parent corporation and no publicly held corporation owns 10% or more of its stock.

Pursuant to D.C. Circuit Rule 26.1(b), *amici* state that their general nature and purpose is the following: *Amici Curiae* are organizations established to promote and protect constitutional rights. Its members have no ownership interest and no members have issued shares or debt securities to the public.

Respectfully submitted,

Dated: December 29, 2004

By: 

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CERTIFICATE OF COUNSEL FOR SEPARATE AMICUS BRIEF:

Pursuant to D.C. Circuit Rule 29(d), Counsel for *Amici Curiae* certifies that a separate amicus brief in support of plaintiff-appellee is necessary because *amici* represented herein are of the opinion that the primary statutory sources for confrontation rights due to defendants in military commissions are Articles 49 and 50 of the Uniform Code of Military Justice. To the undersigned's knowledge, no other *amicus* brief takes this position. This brief addresses no other topic than the federal statutory derivation of confrontation rights due to defendants in military commissions.

Respectfully submitted,

Dated: December 29, 2004

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C.A.A.F ..... United States Court of Appeals for the Armed Forces

C.M.A. ..... The Court of Military Appeals

CONG. REC. ..... CONG. REC., 81st Cong., 1st Sess. (1949)

H. REP. ..... H.R. REP. NO. 491 (1949)

House Hearings ..... *Hearings on H.R. 2498 Before a Subcommittee of the Committee on Armed Services*, 81st Cong. 597 (1949)

Institute ..... The Rutherford Institute

J.A.G. ..... Judge Advocate General

MCO1 ..... Dept. of Def. Military Comm'n Order No. 1 March 21, 2002

People For ..... People For the American Way Foundation

S. REP. ..... S. REP. NO. 486 (1949)

UCMJ ..... Uniform Code of Military Justice

STATEMENT OF *AMICI*

Amici believe Congress ensured that defendants in the military justice system would have the basic fair-trial right to confront any witnesses and evidence against them. Appellant and appellee consented to this brief.

Statements of organizational and individual identification are included at Appendix A1.

INTRODUCTION

More than half a century ago, Congress passed the Uniform Code of Military Justice (UCMJ) in order to ensure fairness and openness in military trials. In the words of the then-Secretary of Defense, the nation needed a system of "maximum justice," and Congress passed the UCMJ to establish that system.[1]

The right to confront one's accusers has always been at the heart of American justice, not just as a part of "maximum justice," but as one of the minimum safeguards of basic fairness. The UCMJ guarantees that right. While the District Court focused on UCMJ Article 39, the applicability of confrontation rights in military commissions is unequivocally guaranteed elsewhere, in Articles 49 and 50. The plain text of Articles 49 and 50 applies not just to defendants in courts-martial, but also to defendants before military commissions. 10 U.S.C. § 849(d) (explicitly covering "any military court or commission"); 10 U.S.C. § 850(a) (explicitly referring to "a court-martial or military commission").

As the nation's highest military court has long noted, those provisions flatly forbid violations of "the right of confrontation." *U.S. v. Davis*, 19 U.S.C.M.A. 217, 224 (1970) (Art. 49); *U.S. v. Sippel*, 4 U.S.C.M.A. 50, 56 (1954) (Art. 50) ("[I]f a party seeks to establish a fact by a substitute method [other than by direct testimony], the party against whom the testimony is

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[1] *Hearings on H.R. 2498 Before a Subcommittee of the Committee on Armed Services*, 81st Cong. ("*House Hearings*") 597 (1949) 597 (Statement of James Forrestal, Secretary of Defense).

offered must have been afforded an opportunity to confront the witness."). That guarantee of fundamental fairness echoes the Supreme Court's decision in *Crawford v. Washington*, 124 S. Ct. 1354 (2004). *Crawford* explained that the use of "*ex parte* examinations as evidence against the accused" was precisely the "evil" that the "right to confrontation was meant to prohibit; and that the founding-era rhetoric decried." *Id.* at 1364. Congress provided a statutory bulwark for those rights through its passage of the UCMJ. Yet the regulations governing the military commission flatly deny petitioner the right to confront the witnesses against him. Moreover, the government has acknowledged that it intends to use that unfair and unlawful advantage: it plans to introduce written reports of secret interrogations of third parties and to bar petitioner from the courtroom when introducing witnesses.

Though battles unquestionably present the need to detain enemies, *see Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004), punishment is different than detention. When it passed the UCMJ, Congress made a choice to continue on the path of openness and fairness that Justice Jackson blazed as a prosecutor at the Nuremburg trials. The regulations governing the commissions flout key fair-trial safeguards that were provided by Congress in the UCMJ, that military courts have consistently protected, and that the Framers viewed as fundamental. The commission as currently constituted cannot lawfully try petitioner.

ARGUMENT

I. Congress Passed the UCMJ to Ensure Fair Trials to Military Defendants

Congress created the Uniform Code of Military Justice ("UCMJ") in order to ensure that defendants accused of crimes in military courts received fair trials. In the years after World War II and the military commissions that tried Quirin and Yamashita, Congress viewed military justice as fundamentally unfair – a system that provided a handful of fair-trial protections in no

more than a "coincidental" manner.[2] Congress sought to replace the "coincidental" connection between fairness and military justice with a new system of military justice "designed to *insure* a fair trial."[3] *Id.* (emphasis added). Congress enacted that system – the UCMJ – in 1950.

At the time, it was unclear whether constitutional rights, including the Sixth Amendment right to confront adverse witnesses, applied in military courts.[4] Congress responded to that uncertainty by incorporating by statute nearly every significant constitutional safeguard ensuring fairness in criminal trials. The legislative history makes clear that Congress knew that "insur[ing] a fair trial" in the military courts necessitated this statutory fortification of constitutional rights. As one Member of the Armed Services Committee noted, the UCMJ "seeks to shield the accused substantially just as he is shielded by our Constitution and laws in civil courts . . . ."[5]

This statutory fortification of constitutional fair-trial protections pervades the UCMJ; indeed, a few UCMJ provisions arguably provide greater fair-trial protections than the civilian justice system. Among the many fair-trial protections are Article 31, which guarantees the right not to be compelled to incriminate oneself "to all persons [subject to the Code] under all circumstances" – and makes the act of compelling self-incrimination an independent criminal

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[2] *House Hearings* at 634 (statement of Richard Wels, Chairman, Special Committee on Military Justice of N.Y. Cty. Lawyers' Assoc.); H.R. REP. NO. 491 ("H. REP."), at 4 (1949) (listing provisions designed to ensure fair trial); S. REP. NO. 486 ("S. REP."), at 2 (1949) (same).

[3] H. REP. at 4 (listing provisions designed to ensure fair trial); S. REP. at 2 (1949) (same).

[4] *See, e.g., U.S. v. Zimmerman*, 2 U.S.C.M.A. 12, 17 (1952) ("The courts have been divided on the question whether [the Constitution] applies of its own force to personnel of the military establishment."). Because the UCMJ guarantees defendants nearly all rights that the Constitution guarantees, the question may remain unanswered. *See Middendorf v. Henry*, 425 U.S. 25, 33 (1976).

[5] CONG. REC., 81st Cong., 1st Sess., at 5726 (1949) (statement of Rep. Philbin) ("CONG. REC.").

offense;[6] Article 44, which extends the Fifth Amendment's double jeopardy provision to military justice;[7] Article 10, which "imposes a more stringent speedy-trial standard than that of the Sixth Amendment";[8] Article 46, which ensures equal processes for obtaining witnesses;[9] Article 37, which criminalizes any effort to coerce the action of "any . . . military tribunal";[10] and Article 27, which guarantees the right to counsel.[11]

Our nation's highest military court has long understood the UCMJ to provide for fundamental fairness in military courts. Just one year after the UCMJ's passage, the Court of Military Appeals[12] noted that courts must look to the UCMJ to determine whether "there are fundamental rights inherent in the trial of military offenses which must be accorded to an accused before it can be said that he has been fairly convicted." *U.S. v. Clay*, 1 U.S.C.M.A. 74, 77 (1951). The answer is plain: the UCMJ ensures that defendants in military courts "be given a

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[6] 10 U.S.C. §831 (establishing right, requiring that individuals be warned of right before interrogation, and making compulsion of self-incriminating statement an offense under UCMJ); *see also House Hearings* at 988 ("So not only do we retain the constitutional protections against self-incrimination . . . but it goes further and provides that if anybody tries to force you to incriminate yourself then he has committed an offense.") (statement of UCMJ drafter, Ass't Gen'l Couns. Felix Larkin, Dept. of Def.).

[7] 10 U.S.C. §844; *see also House Hearing* at 616 ("You see, the commanding officer can do anything in favor of the accused. He cannot do anything against the accused.") (statement of UCMJ drafter, Prof. Morgan); S. REP. at 20 (provision "continu[ed] . . . the highly desirable features and safeguards of the automatic review system" while "represent[ing] a substantial strengthening of the rights of an accused." Further, Article 32 provides safeguards beyond the civilian system by extending confrontation rights to pretrial investigation hearing. 10 U.S.C. §832; *see also House Hearings* at 997 ("This I should say goes further than you usually find in a proceeding in a civil court") (Felix Larkin).

[8] *U.S. v. Kossman*, 38 M.J. 258, 259 (C.M.A. 1993).

[9] 10 U.S.C. §846.

[10] 10 U.S.C. §837.

[11] 10 U.S.C. §827.

[12] The Court of Military Appeals (C.M.A.) was renamed in 1995 the "U.S. Court of Appeals for the Armed Forces" (C.A.A.F.).

fair trial and it commands us to see that the proceedings in the courts below reach that standard." *Id.*

The UCMJ applies to the entire military justice system, not just courts-martial. By its explicit terms, its provisions apply to courts-martial, provost courts, military commissions and "other military tribunals." *See* 10 U.S.C. § 821. To be sure, some provisions were motivated primarily by problems that Congress perceived in courts-martial. But many provisions were not. These provisions, which embody Congress's intention to ensure fair trials in *all* military fora, explicitly apply in military commissions, in all military tribunals (a category that includes commissions),[13] or to all persons subject to the Code.[14]

As the next section makes clear, two of the most significant fair-trial protections establish classic confrontation rights that apply – explicitly – to military commissions.

II. Confrontation Is At the Core of the Fairness Required by the UCMJ

A. The UCMJ Explicitly Provides Confrontation Rights to Commission Defendants

In enacting the UCMJ, "Congress granted to an accused the [right] . . . to be confronted by witnesses testifying against him." *Clay*, 1 U.S.C.M.A. at 77; *see also* CONG. REC. at 5726 (noting that UCMJ "has provided . . . for confrontation of witnesses by the accused") (statement of Rep. Philbin). The right to confront one's accusers is central to a fair trial in any system, civilian or military: "There are few subjects, perhaps, upon which this Court and other courts

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[13] *E.g.*, 10 U.S.C. §837 (eliminating military command's control over military justice and establishing criminal penalties for any person who coerces "any . . . military tribunal").

[14] *E.g.*, 10 U.S.C. §844 ("No person may, without his consent, be tried a second time for the same offense"); 10 U.S.C. §831(a) ("No person subject to this chapter may compel any person to incriminate himself or to answer any questions the answer to which may tend to incriminate him"); 10 U.S.C. §831(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 in not material to the issue and may tend to degrade him"); 10 U.S.C. §855 (prohibiting cruel and unusual punishment "inflicted upon any person subject to" the UCMJ).

have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *U.S. v. Anderson*, 51 M.J. 145, 149 (C.A.A.F. 1999) (citing *Pointer v. Texas*, 380 U.S. 400, 405 (1965)). The confrontation right is, in a word, "fundamental." *Id.*

This understanding of the fundamental nature of confrontation rights to any fair trial mirrors the Founders' own understanding, as reflected in the adoption of the Confrontation Clause. "The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution." *Malloy v. Hogan*, 379 U.S. 1, 404 (1965). As Justice Scalia noted for the Supreme Court only last Term:

> [T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases . . . that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.

Crawford, 124 S.Ct. at 1363; *see also Mattox v. U.S.*, 156 U.S. 237, 238 (1895).

Unsurprisingly, the right to confront one's accusers had a prominent place in the several states' own constitutions,[15] and the ratifying conventions and Framers' writings reveal the same bedrock support for this core principle of American justice.[16] As the Anti-federalist pamphleteer known as "Federal Farmer" noted,

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[15] *See* constitutions of Virginia, Pennsylvania, Delaware, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire (1776-1783), *reprinted in* 1 B. Schwartz, *The Bill of Rights: A Documentary History* 235, 265, 278, 282, 287, 323, 342, 377 (1971).

[16] One delegate at the Massachusetts ratifying convention, Abraham Holmes, objected to a lack of confrontation rights in the pre-Bill of Rights Constitution: "The mode of trial is altogether [u]ndetermined; . . . whether [the defendant] is to be allowed to confront the witnesses, and have

> Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question. . . . [W]ritten evidence . . . [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth.

Crawford, 124 S.Ct. at 1362-63 (*quoting* R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787), reprinted in 1 Schwartz, *supra*, at 469, 473).

Given this background it is not surprising Congress provided extensive confrontation rights in three key articles of the UCMJ. Two – Articles 49 and 50 – explicitly apply to military commissions. As the Government itself notes, "The UCMJ takes pains to distinguish between 'military commissions' or 'military tribunals' on the one hand, and 'courts-martial' on the other . . . ." U.S. Br. at 55. The confrontation rights provided by Articles 49 and 50 – which on their face apply to military commissions – thus must apply in any lawful military commission.

Together, these articles make clear that a defendant in a military tribunal has the right to confront adverse witnesses in court unless that witness's testimony falls within an enumerated and narrow textual exception. Article 49 sets stringent conditions for the introduction of *any* witness testimony that does not occur in court, subject to confrontation. If highly specific conditions of witness unavailability are met, Article 49 allows "[a] duly authenticated deposition taken upon reasonable notice to the other party, so far as otherwise admissible under the rules of evidence, [to] be read in evidence before any military court or commission in any case not capital." 10 U.S.C. § 849. The nation's highest military court has long interpreted Article 49 to mirror the Sixth Amendment Confrontation Clause. *See U.S. v. Cokeley*, 22 M.J. 225, 228 (C.M.A. 1986). To that end, it has understood Article 49 not just to require that a defendant be

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the advantage of cross-examination, we are not yet told. . . . [W]e shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain . . . the *Inquisition.*" 2 Debates on the Federal Constitution 110-111 (J. Elliot 2d ed. 1863) (emphasis original).

given notice of an impending deposition, but that he be given an unqualified right to be present at the deposition and to confront adverse witnesses there. *U.S. v. Jacoby*, 11 U.S.C.M.A. 428, 433 (1960) ("The correct and constitutional construction of the Article in question requires that the accused be afforded the opportunity . . . to be present with his counsel at the taking of written depositions.").

Article 49 tracks the Sixth Amendment not just by providing a right to confront adverse witnesses at the deposition of an otherwise unavailable witness, but also in establishing the limited conditions under which a witness is considered unavailable for the purpose of permitting the introduction of deposition testimony. *See Davis*, 19 U.S.C.M.A. at 224 ("[W]ith regard to military witnesses, the right of confrontation as embodied in military due process requires that actual unavailability be established" before a deposition may be admitted.); *see also U.S. v. Vanderwier*, 25 M.J. 263, 265 (C.M.A. 1987) ("When a deposition is offered against an accused, the Government must establish that the witness is unavailable, both in terms of the hearsay prohibition of Mil.R.Evid. 804(b)(1) [effectively tracking F.R.E.] and in terms of the Confrontation Clause of the Sixth Amendment.").

Like Article 49, Article 50 expresses Congress's intention that defendants have the opportunity to confront any and all witnesses against them. This article arises in the context of courts of inquiry, civil-law style quasi-judicial military bodies that conduct their own investigations. But its establishment of the core confrontation right is no less clear. Article 50 limits the extent to which testimony presented to courts of inquiry – but not subject to a suspect's confrontation – may be used in a subsequent trial. Like Article 49, Article 50 sets strict limits. First, no such testimony at all may be introduced in a capital case. In a non-capital case, such testimony must be sworn and "duly authenticated." 10 U.S.C. § 850. Even then, it may only be

introduced if it "cannot be obtained" at trial, is "otherwise admissible under the rules of evidence," "if the accused was a party before the court of inquiry," *and* if "the same issue was involved" or "the accused *consents* to [its] introduction." *Id.* (emphasis added).

Since the UCMJ's earliest years, the Court of Military Appeals and the U.S. Courts of Appeals for the Armed Forces have understood Article 50 to provide defendants in military tribunals with the right to confront adverse witnesses. "[I]f a party seeks to establish a fact by a substitute method [other than direct testimony], the party against whom the testimony is offered must have been afforded an opportunity to confront the witness whose testimony is sought to be admitted." *Sippel*, 4 U.S.C.M.A at 56. The parallel between the Sixth Amendment right to confrontation and the confrontation rights established by Article 50 is no accident: "Congress concluded that . . . when an accused was being tried for an offense which carried a death or dismissal sentence, he should not be denied the right to confront and cross-examine witnesses" during trial. *Id.* at 56-57. In sum, Article 50, like Article 49, should be interpreted in conformity with "the [Sixth Amendment] decision[s] of the Supreme Court." *U.S. v. Obligacion*, 17 U.S.C.M.A. 36, 37 (1967); *cf. U.S. v. Drain*, 4 U.S.C.M.A. 646, 648 (1954) (noting that Congress enacted Article 50 to insure the "highly important" "examination and cross-examination of these witnesses" because it knew that "key witnesses [would] not infrequently [be] unavailable for call at the time of a particular trial, and their testimony [might] be introduced through the use of depositions").[17]

Together, Articles 49 and 50 of the UCMJ provide defendants in military tribunals the right to confront adverse witnesses – a right that has long been considered essential to any fair

[17] Congress expressed concern about a defendant's right to confront witnesses, even though it highly regarded courts of inquiry. *See House Hearings* at 1071 (describing them as "court[s] of very considerable dignity and powers" about which "[t]here is every reason to believe that the testimony elicited by that court . . . is sound") (statement of Capt. Woods, U.S. Navy).

trial, and which the Framers put at the heart of the Bill of Rights.[18] The narrow exceptions to confrontation that Congress specified in these articles represent the *only* exceptions to the bedrock fair-trial provisions that Congress guaranteed to defendants in military tribunals. *Christensen v. Harris County*, 529 U.S. 576, 583 (2000) ("when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode") (quotation marks and brackets omitted).

B. Respondent's Historical Citations Do Not Alter the Clear Meaning of the UCMJ

As respondent does not address Articles 49 and 50, it should come as no surprise that its citations to case law and history in no way undermine the UCMJ's provision of core fair-trial confrontation rights.

In *In re Yamashita*, the Supreme Court held that the plain terms of the predecessor to the UCMJ did not apply to Yamashita, so could not provide him with its fair-trial protections. 327 U.S. 1, 19 (1946). But the UCMJ plainly does apply to petitioner. 10 U.S.C. § 802(a)(12) (making UCMJ applicable to "persons within an area leased by . . . the United States which is under the control of the Secretary [of Defense] and which is outside the United States"); *accord*

[18] The District Court found that UCMJ Article 39 provides defendants in military tribunals with core confrontation rights. *See* 10 U.S.C. §839(b) (directing that every aspect of a trial except jury voting "shall be made a part of the record and shall be in the presence of the accused, the defense counsel"). Article 39 unquestionably provides confrontation rights to service members in courts-martial. *See U.S. v. Daulton*, 45 M.J. 212, 219 (C.M.A. 1996) (holding that Article 39 tracks Confrontation Clause); *see also* Manual for Courts-Martial, U.S. A21-44 (2002 ed.) (Article 39 rights "grounded in the Due Process Clause of the Fifth Amendment and the right to confrontation clause of the Sixth Amendment of the Constitution"). It was adopted to end a court-martial practice whereby the military judge (or "law officer") instructed the jury ("members"), then deliberated and voted with them. Observers feared that the judge could exert unseen and illegitimate influence over the jury. Congress enacted Article 39 to prevent this possibility. *See House Hearings* at 607 (statement of Prof. Morgan, principal drafter of UCMJ); *id.* at 1023-24 (witness arguing that Article 39 would prevent such "cloak-and-dagger session[s] in the back room"). Article 39 thus reflects a Congressional concern with the fundamental fairness and openness of military trials. In that respect, it underscores the fortification of constitutional confrontation rights that Congress effectuated through Articles 49 and 50.

Op. at 36 (Because UCMJ's expanded scope "undoubtedly applies to petitioner[,] . . . *Yamashita*'s holding now arguably gives more support to petitioner's case than to the government's."). Likewise, *Ex parte Quirin*, simply does not speak to the question whether Article of War protections – let alone subsequently enacted UCMJ protections – apply in military commissions. 317 U.S. 1, 47-48 (1942) (noting that Court came to no decision as to whether Article of War procedural provisions applied in Nazi saboteurs' trials). *Madsen v. Kinsella*, too, provides no support to the effort to deny petitioner an opportunity to confront his accusers, as the commission at issue in that case safeguarded procedural fairness rights through an extensive criminal code that provided for robust confrontation rights. 343 U.S. 341, 359 (1952);[19] *accord* Op. at 37 (noting that "a comparison between [the *Madsen* commission's] procedures and the rules of the Guantanamo Military Commission is not favorable to the government's position here").

The government's efforts to invoke historical deviations from fair-trial confrontation rights likewise cannot justify the deprivation of confrontation rights in the current commission. At most, such deviations provided the backdrop against which Congress acted when it passed the UCMJ – a backdrop that stands in some contrast to the plain textual provisions of the UCMJ.[20]

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[19] U.S. Military Government Ordinance No. 2, which established procedures for the military tribunal at issue in *Madsen*, gave a defendant the right "[t]o be present at his trial, to give evidence and to examine or cross-examine any witness." *Id.* at 358 n.24.

[20] Civil War commissions were overturned because of procedural defects, including a denial of the confrontation right to cross examine an adverse witness. *E.g.*, Opinion of JAG Holt to Gen. Butler (Dec. 16, 1862) (filed at Record Group 153-1, National Archives), *cited in* Carol Chomsky, The U.S.-Dakota War Trials, 43 STAN. L. REV. 13, 60 n.297 (1990) (vacating sentence where witnesses were not sworn and record contained no cross-examination).

III. Commission Procedures Unlawfully Deny Hamdan Confrontation Rights Central to a Fundamentally Fair Trial

Military commission regulations repeatedly deny Hamdan the fundamental right to confront adverse witnesses at the core of the fair-trial protections provided by Congress through the UCMJ. These are not just paper flaws: the government has declared its intention to use the unlawful deprivations of confrontation rights sanctioned by the regulations in order to gain an unfair upper hand in its trial of the defendant.

Several Department of Defense regulations eliminate core fair-trial confrontation rights. First, the regulations allow the presiding officer of the military commission to consider any "protected" evidence in secret *ex parte* proceedings not subject to confrontation by the defendant. *See* Dept. of Def. Military Comm'n Order No. 1 ("MCO1"), March 21, 2002, ¶6(D)(5)(a). Though the defendant has no access to this evidence and no right to be present when it is considered by the presiding officer, the evidence nonetheless becomes part of the trial record via a secret annex not available to the defense. *Id.* ¶6(D)(5)(d). Second, the commission may accept testimony through out-of court statements from witnesses whom the defense has no opportunity to cross-examine, and who may not even be testifying under oath.[21] Finally, the Commission may consider any evidence deemed to have "probative value to a reasonable person," whether or not the defendant ever has any opportunity to see or confront the evidence. *Id.* ¶6(D)(3).

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[21] *Id.* ¶6(D)(2)(d) (permitting "testimony by telephone, audiovisual means, or other electronic means; closure of the proceedings; introduction of prepared declassified summaries of evidence; and the use of pseudonyms"); *id.* ¶6(D)(2)(b) (permitting evidence from witnesses not testifying under oath).

These regulations violate the UCMJ's guarantees of confrontation rights in military commissions. Because the government has brought death-eligible charges against Hamdan, the UCMJ permits only the *defense* to introduce depositions; the government is flatly barred from introducing them. 10 U.S.C. § 849(d). Yet the government seeks to introduce evidence that is even *less* reliable than deposition testimony: not just transcribed testimony of witnesses, but third-party reports written by interrogators summing up their interrogation sessions with detainees. *See* Prosecution Motion to Pre-Admit Evidence, Oct. 1, 2004. Even if the UCMJ permitted the government to introduce depositions in capital cases – and it does not – these third-hand reports would violate several provisions of Article 49. Under the commission rules, Hamdan has no right to call as witnesses and confront the detainees whom the government claims to have accused him during interrogation sessions. That violates Article 49(d), which requires that a defendant be given the opportunity to cross-examine those whose deposition testimony the government seeks to admit at trial. *Jacoby*, 11 U.S.C.M.A. at 433. Like any putative record of an unavailable witness's statement, a deposition is "inadmissible in evidence . . . [when no] certified lawyers played [a] part [in its development]." *Drain*, 4 U.S.C.M.A. at 648. Likewise, a record of an unavailable witness's statement is inadmissible when taken outside the presence of the defendant. *Jacoby*, 11 U.S.C.M.A. at 433.[22] The interrogation reports that the prosecution seeks here to introduce were made from interrogation sessions that concededly occurred without cross-examination (either at the time of the

[22] Some depositions are inadmissible even when the defendant was represented by counsel and physically present, because the right to cross-examine was not adequately protected. *See U.S. v. Donati*, 14 U.S.C.M.A. 235, 238-39 (1963) (vacating sentence because "accused and appointed counsel had been notified one hour and forty-five minutes previously . . . for the taking of an unknown individual's deposition" and defendant "was denied the right to be represented by his individually chosen civilian counsel.").

interrogation or its introduction) and recorded outside the presence of both the accused and his counsel in clear violation of the fair-trial confrontation rights provided by Article 49.

That complete denial of core fair-trial confrontation rights would be dire under any circumstances, but is even more dire here, where:

- the interrogated persons' statements are not authenticated and taken under oath, in violation of § 849(c), which requires both;
- the government did not provide the defense with any notice (let alone "reasonable" notice) of the time and place of the questioning, contrary to § 849(b);
- and the reports are at best an accretion of layers of inadmissible hearsay that – even in a properly authenticated, sworn and noticed deposition – would be barred by § 849(d) (requiring that depositions be admissible according to rules of evidence).[23]

In short, the UCMJ prohibits the introduction by the prosecution of interrogation reports in contravention of core confrontation rights: it prohibits them as a bright-line matter in any capital case, and prohibits them even in a non-capital case because the statements of witnesses who cannot be confronted were taken in violation of explicit requirements of Article 49.

Moreover, unlike depositions, the reports lack any indicia of reliability. Many reports appear to have emerged from coercive interrogations involving physical or mental abuse, *see* Defense Response to Government's Motion to Pre-Admit Evidence, Oct. 18, 2004, at 1; many come from interrogations transcribed by unnamed translators of dubious reliability; the government has not described the circumstances under which the reports were made; the

[23] Moreover, many of those interrogated would not be considered "unavailable" under Article 49. *See* §849(d)(1)-(3). Detainees held at U.S. installations or under effective U.S. control are not unavailable. *Davis*, 19 U.S.C.M.A. at 223 (finding witness not "unavailable simply because" in a U.S. facility "more than one hundred miles from the situs of the trial. Something more is required.").

government has not divulged the witnesses present at the interrogations; and the government has not produced recordings of the interviews. These are precisely the sort of problems that the right to confrontation is meant to avoid. As *Crawford* noted, "interrogations" not subject to confrontation "fall squarely within that class" of "testimonial hearsay" that cannot be introduced "as evidence against the accused." *Crawford*, 124 S. Ct. at 1363, 1365. Precisely because of the "evil" of *ex parte* examinations, "admission of testimonial statements of a witness who did not appear at trial" may be introduced if and only if "the defendant ha[s] had a prior opportunity for cross-examination." *Id.* at 1365. The right to confrontation demands "not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 1370.[24] As noted above, Congress intended Article 49 to track the Confrontation Clause. The commission regulations unquestionably and unabashedly violate that Clause – and thus Article 49.

Equally violative of the confrontation rights guaranteed by the UCMJ is the government effort to present witnesses while the defendant is excluded from the courtroom. MCO1 (6)(B)(3) (permitting Appointing Authority or Presiding Officer to permit closed proceedings); *id.* at (6)(D)(5) (permitting exclusion of defendant from proceedings); *see* 10/25/04 Tr. 132 (petitioner's counsel noting, without refutation by respondent, that "the government's already indicated that for two days of his trial, [the defendant] won't be there. And they'll put on the evidence at that point.").

[24] Far more modest attempts to deprive defendants of the opportunity to confront adverse witnesses have thus been found to violate the Confrontation Clause. When the government sought to conceal the name and address of a prosecution witness, the Supreme Court held that "[t]o forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." *Smith v. Illinois*, 390 U.S. 129, 131 (1968).

Like the introduction of interrogation reports, this *ex parte* presentation of witnesses precludes confrontation by the defendant, thereby violating the most fundamental ideas about the centrality of confrontation to fair and open trials. The defendant's right to be present at trial to confront adverse evidence has deep historical roots. *Lewis v. U.S.*, 146 U.S. 370, 372 (1892) ("A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner."). The defendant's right to be present is "vital to the proper conduct of his defense," *Hopt v. Utah*, 110 U.S. 574, 578 (1884), "scarcely less important to the accused than the right of trial itself," *Diaz v. U.S.*, 223 U.S. 442, 455 (1912), and "one of the most basic" fair-trial rights. *Illinois v. Allen*, 397 U.S. 337, 338 (1970). Without the defendant present during adverse testimony, defense counsel cannot properly function: a defendant's "life or liberty may depend upon the aid which, by his personal presence, he may give to counsel . . . . The necessities of the defense may not be met by the presence of his counsel only." *Lewis v. U.S.*, 146 U.S. 370, 373-74 (1892).

This linkage between the defendant's presence and trial-fairness was so well-established at the time of the UCMJ's passage that Congress went further, prohibiting the introduction of depositions at which the defendant had not been physically present. *Jacoby*, 11 U.S.C.M.A. at 433 (Article 49 "requires that the accused be afforded the opportunity to be present"). The prohibition against *ex parte* trial testimony is the animating force behind Article 49's prohibition on the introduction of *ex parte* depositions. Congress prohibited introducing *deposition* testimony taken without the defendant present because the prohibition against *trial* testimony without the defendant present was so long established that it required no more explicit protection. It would be absurd to forbid *ex parte* depositions but permit *ex parte* trial testimony.

None of these impermissible practices become any more acceptable merely because the