**ORAL ARGUMENT SCHEDULED FOR MARCH 8, 2005**
**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 04-5392**

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SALIM AHMED HAMDAN,

*Petitioner-Appellee*,

v.

DONALD H. RUMSFELD, United States Secretary of Defense; JOHN D. ALTENBURG, Appointing Authority for Military Commissions, Department of Defense; Brigadier General THOMAS L. HEMINGWAY, Legal Advisor to the Appointing Authority for Military Commissions; Brigadier General JAY HOOD, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; and GEORGE W. BUSH, President of the United States,

*Respondents-Appellants*.

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

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# BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS-APPELLANTS URGING REVERSAL

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Dated: December 8, 2004

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

### A. PARTIES AND *AMICI*

All parties, interveners, and *amici* appearing before the district court and/or in this Court are listed in the brief for Respondents-Appellants.

### B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the brief for Appellants.

### C. RELATED CASES

Counsel is unaware of any cases related to this appeal, except for those listed in the brief for Appellants.

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## CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Circuit Rule 29(b), Fed.R.App.P. 26.1, and Circuit Rule 26.1, the undersigned counsel states that *amici curiae* Washington Legal Foundation and Allied Educational Foundation are non-profit corporations; they have no parent corporations, and no publicly-held company has a 10% or greater ownership interest.

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Richard A. Samp

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Authorities upon which we chiefly rely are marked with asterisks.

## GLOSSARY

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| AUMF | Authorization for the Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001) |
| Military Order | "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 5733 (Nov. 13, 2001) |
| Slip op. | November 8, 2004 District Court Opinion |
| Swift Decl. | April 5, 2004 Declaration of Charles Swift |
| UCMJ | Uniform Code of Military Justice |

## INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting America's security. To that end, WLF has appeared before this Court and other federal courts to ensure that the federal government possesses the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Rumsfeld v. Padilla,* 124 S. Ct. 2711 (2004); *Hamdi v. Rumsfeld,* 124 S. Ct. 2633 (2004); *Rasul v. Bush,* 124 S. Ct. 2686 (2004). WLF also filed an *amicus curiae* brief in this case when it was before the district court.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in the federal courts on national security-related issues on a number of occasions.

*Amici* believe that military commissions are an effective and constitutional means of bringing to justice enemy belligerents who violate the law of war, and that there are at least some instances in which the federal courts' criminal justice system is not up to the task. *Amici* also believe that, in the interests of comity,

any challenge to the military commission system established by President Bush should be deferred until after the system has been allowed to operate. All parties consent to the filing of this brief.

## STATEMENT OF THE CASE

The United States has been at war with al Qaeda since September 11, 2001, when al Qaeda's murderous and unprovoked attack on American civilians resulted in nearly 3,000 deaths. Immediately thereafter, Congress enacted a resolution expressing its support of the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force ("AUMF"), Pub.L. No. 107-40, 115 Stat. 224 (2001). President Bush has determined that al Qaeda is such an organization; he has authorized the use of force against al Qaeda and its operatives in Afghanistan and throughout the world. The military campaign against al Qaeda continues unabated, and al Qaeda continues to pose a substantial threat to national security. Based in part on the authority granted him by the AUMF, the President on November 13, 2001 issued an order authorizing the establishment of military commissions to hear war crimes charges brought

against those captured in connection with the war against al Qaeda. "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 5733 (Nov. 13, 2001). (In the district court, this "Military Order" was attached as Exhibit B to the April 5, 2004 Declaration of Charles Swift ("Swift Decl.")).

During the course of fighting in Afghanistan, the American military captured Salim Ahmed Hamdan, a citizen of Yemen. Hamdan admits that he was employed by and worked closely with Osama Bin Laden, the leader of al Qaeda, in Afghanistan from 1996 until his capture in 2001. February 9, 2004 Affidavit of Salim Ahmed Hamdan, at 1-2. Hamdan insists, however, that he is a "civilian," that he never has been a member of al Qaeda, that he is not a terrorist, and that he has committed no crimes. *Id.* at 4. Hamdan has been detained by the American military as an "enemy combatant" at Guantanamo Bay, Cuba since June 2002. *Id.* at 2-3.

On July 3, 2003, the President determined that Hamdan was subject to trial pursuant to the Military Order, based on his determination that there was reason to believe that Hamdan was a member of al Qaeda or was otherwise involved in terrorism directed against the United States. *See* Swift Decl., Exh. A. On July

9, 2004, Hamdan was charged with conspiracy to commit a variety of offenses triable by military commission, including attacking civilians, attacking civilian objects, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent, and terrorism.

On April 6, 2004, Swift filed this petition (as next friend for Hamdan) in U.S. District Court for the Western District of Washington for a writ of mandamus or, in the alternative, a writ of habeas corpus. The case was subsequently transferred to the U.S. District Court for the District of Columbia, and Hamdan was substituted for Swift as petitioner. The petition seeks, *inter alia*, an order preventing Hamdan's trial before a military commission and directing his release from pre-Commission detention at Guantanamo Bay. Hamdan contends that the Military Order violates separation-of-power principles of the Constitution (because, he alleges, Congress has not authorized the establishment of military commissions) and violates both the Geneva Conventions and the Uniform Code of Military Justice (UCMJ) because its allegedly provides insufficient procedural protections to defendants.

On August 6, 2004, Respondents-Appellants filed their consolidated return to the petition and also filed a cross-motion to dismiss. The motion asserted that

the petition is premature until after completion of Hamdan's trial before a military commission, and denied the validity of each claim raised by the petition.

On November 8, 2004, the district court denied the motion to dismiss and granted in part the habeas corpus petition. The court initially rejected Appellants' claim that the petition was premature; the court concluded that abstention was neither required nor appropriate with respect to Hamdan's "substantial arguments" that the military commission lacked jurisdiction over him. Slip op. 6-8. The court next determined that although the President has authority to convene military commissions to conduct war crimes trials, that authority is subject to limitations imposed by Congress -- including that any such commission proceedings be conducted in accordance with the law of war, a body of law that the court deemed to include the Third Geneva Convention. *Id.* at 12-13. The court determined that Hamdan was entitled, under Article 5 of the Third Geneva Convention, to prisoner of war (POW) status. *Id.* at 16-19. It further determined that, as a POW, Hamdan was entitled under Section 102 of the Third Geneva Convention to be tried under the same procedures employed for the trial of an American soldier facing a court-martial. *Id.* at 14. Accordingly, the court determined that alleged war criminals such as Hamdan could only be tried by a

court-martial convened under the UCMJ. *Id.* at 26.

Alternatively, the court ruled that the procedures adopted by Appellants for use by the military commission are deficient because they are contrary to or inconsistent with those of the UCMJ. *Id.* at 27-42. The court held that Article 36 of the UCMJ requires procedures adopted for trials before military commissions not be contrary to or inconsistent with procedures adopted by the UCMJ for use in court-martial proceedings. *Id.* at 34-36. The court held that procedures adopted for use by military commissions are deficient because, unlike UCMJ procedures, they do not require that the defendant be present at every phase of the proceedings. *Id.* at 38-42. The court enjoined any trial of Hamdan before a military commission until such time as a "competent tribunal" has determined that he is not entitled to POW status, and until such time as military commission rules are amended to grant the defendant the right to be present at all proceedings.

## SUMMARY OF ARGUMENT

*Amici* agree with Appellants that the petition should not be permitted to go forward until after completion of Hamdan's trial before a military commission. *Amici* also agree that the Military Order establishing a system of military

commissions does not violate separation-of-power principles set forth in the Constitution. *Amici* also agree that Hamdan is not entitled to be classified as a POW, or to assert his alleged POW rights in federal court. *Amici* do not address other issues raised by the petition.

Hamdan is asking the courts to enjoin a military commission from going forward with a scheduled war crimes proceeding. *Amici* do not doubt that federal courts possess habeas jurisdiction to hear claims that the military commission is proceeding against Hamdan in a manner that exceeds its constitutional authority.[1] But principles of comity and efficiency dictate that the Court stay its hand until after commission proceedings are complete. Federal courts do not step in to enjoin on-going state court criminal proceedings. *Younger v. Harris,* 401 U.S. 37 (1971). They do not step in to enjoin on-going military court-martial proceedings against members of our armed forces. *Schlesinger v. Councilman,* 420 U.S. 738 (1975). Similarly, they should not step in to enjoin proceedings

[1] On the other hand, Hamdan is not entitled to raise a collateral challenge to the sufficiency of the procedural rights afforded him by the military commission system. Such a challenge is not a challenge to the jurisdiction of the military commission and thus is not properly cognizable in a collateral challenge raised in federal court through the filing of a habeas corpus petition. Rather, Hamdan is required to raise this claim directly with the military commission -- as, indeed, he has done.

before a military commission against alleged enemy belligerents.

President Bush's order establishing a system of military commissions does not infringe on Congress's constitutional prerogatives. Presidents throughout our nation's history have relied on their Commander-in-Chief powers to bring charges against alleged war criminals before military commissions. The existence of such a long-standing tradition is entitled to great weight in determining the extent of the President's powers. In any event, as the district court recognized, the claim that the President is acting without Congress's blessing is without merit. Several provisions of the Uniform Code of Military Justice (UCMJ), adopted by Congress in 1950, explicitly recognize the President's right to convene military commissions in appropriate circumstances. Moreover, in adopting the AUMF in 2001, Congress authorized the President to use "all necessary and appropriate force" against those involved in the September 11 attacks. Given our long history of using military commissions in dealing with enemy belligerents, there is every reason to believe that Congress contemplated that the President would deem the creation of such commissions to be "necessary and appropriate."

Finally, the President has properly determined that Hamdan and other

alleged al Qaeda members are not entitled to POW status. But regardless of the propriety of that determination, nonresident aliens are not entitled to invoke the protections of the federal courts to enforce rights allegedly provided to them under the Geneva Conventions.

## ARGUMENT

### I. THE DISTRICT COURT ERRED IN FAILING TO DISMISS THE PETITION AND STAY ITS HAND UNTIL AFTER COMPLETION OF MILITARY COMMISSION PROCEEDINGS

Swift filed his petition on behalf of Hamdan on April 6, 2004, asserting that trying Hamdan before a military commission violates the Constitution. Yet, it was not until July 9, more than three months later, that prosecutors first filed charges against Hamdan, and any trial before a commission was still months away at the time that the district court issued its injunction. Moreover, any verdict against Hamdan is subject to elaborate post-trial review. Any guilty verdict and sentence are to be reviewed initially by a Review Panel, to determine whether material errors of law occurred. 32 C.F.R. § 9.6(h)(4). Further review is conducted by the Secretary of Defense and (unless the President has designated the Secretary of Defense as the final decisionmaker) by the President himself. 32 C.F.R. § 9.6(h)(5) and (6). Because any one of those reviews could result in

Hamdan being exonerated, it makes little sense to permit Hamdan simultaneously to pursue this parallel effort to prevent his conviction by a military commission.

*Schlesinger v. Councilman*, 420 U.S. 738 (1975), is almost precisely on point, and requires that any federal court challenge by Hamdan to military commission proceedings must await completion of those proceedings. *Schlesinger* involved a U.S. Army captain who faced a court-martial based on allegations that he sold marijuana while off duty and away from his army base. Captain Councilman sought an injunction in federal court against the court-martial proceedings on the ground that the alleged drug sale was not "service connected" and therefore not within military court-martial jurisdiction. The Supreme Court overturned a lower court injunction, finding that federal court review should be delayed until after exhaustion of all military court proceedings. *Id.* at 757-61.

The Court explained that while, in general, criminal justice in the military is not subject to review in the federal courts, the judgment of a military court is subject to collateral attack (through the filing of a habeas corpus petition) based on claims that the judgment is void because the military court lacked jurisdiction to impose it. *Id.* at 746-48. But the question before the Court was the proper

time for filing a habeas petition, not the right to file.[2] The Court determined that the equities weighed in favor of delaying federal court intervention until after all court martial proceedings had been completed. *Id.* at 757. The Court held that consideration of a habeas petition should be delayed until after military proceedings have been completed whenever, as here, the only injury that the petitioner would suffer as a result of such delay is that incident to any prosecution. *Id.* The Court explained:

> Of course, there is inevitable injury -- often of serious proportions -- incident to any criminal prosecution. But when the federal equity power is sought to be invoked against state criminal prosecutions, this Court has held that "[c]ertain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, [can]not by themselves be considered 'irreparable' in the special legal sense of that term." *Younger v. Harris,* 401 U.S., at 46. . . . These considerations apply in equal measure to the balance governing the propriety of equitable intervention in pending court-martial proceedings. . . . We hold that when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise.

*Id.* at 754-55, 757, 758.

The Court's discussion of the factors weighing against allowing immediate

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[2] "There remains the question of equitable jurisdiction, a question concerned, not with whether the claim falls within the limited jurisdiction of the federal courts, but with whether consistently with the principles governing equitable relief the court may exercise its remedial powers." *Id.* at 754.

habeas corpus review of court martial proceedings are fully applicable here. The Court stated that requiring military defendants to exhaust all military remedies before seeking federal court relief served the same purposes of rules requiring exhaustion of remedies before administrative agencies. *Id.* at 756-57. Such rules are:

> [B]ased on the need to allow agencies to develop the facts, to apply the law in which they are particularly expert, and to correct their own errors. The rule ensures that whatever judicial review is available will be informed and narrowed by the agencies' own decisions. It also avoids duplicative proceedings, and often the agencies' ultimate decision will obviate the need for judicial intervention.

*Id.* The Court also held that exhaustion requirements are particularly important in the context of military proceedings and "counsel strongly" against premature federal court intervention in such proceedings. *Id.* at 757. The Court explained that such comity is required because "[t]he military is 'a specialized society separate from civilian society' with 'laws and traditions of its own [developed] during its long history.'" *Id.* (quoting *Parker v. Levy,* 417 U.S. 733, 743 (1974)).

Similarly, requiring Hamdan to exhaust all military remedies will allow the military to develop the facts of this case. It may obviate any need for federal court intervention if the military commission or any subsequent reviewer ends up

acquitting Hamdan. Many of the issues raised by Hamdan (such as whether he was in Afghanistan as a civilian or an enemy belligerent, and the requirements of the laws of war) are ones that the military -- because of its particular expertise -- is much better equipped to handle than are the federal courts. Most importantly, requiring exhaustion of all military remedies grants appropriate deference to the unique role of the military in American society. When military leaders determine that the application of "necessary and appropriate force" against al Qaeda operatives includes trying some of those operatives before military commissions as war criminals, it is wholly inappropriate for federal courts to step in and second-guess that determination without even permitting the military proceedings to run their course. One major advantage of bringing alleged war criminals before military commissions instead of federal criminal courts is that historically military commissions have been able to complete their work far more quickly than can federal courts, with their far more elaborate procedural rules.[3] To allow federal courts to interfere in military commission proceedings before they have been allowed to run their course is a sure-fire way to tie the proceedings in knots,

[3] *See, e.g., United States v. Moussaoui*, 365 F.3d 292 (4th Cir. 2004) (criminal proceedings delayed for several years over issues related to defense requests for access to al Qaeda witnesses in federal custody).

thereby eliminating one of the perceived advantages of military commissions. Cf. *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) (by allowing premature judicial intervention into administrative proceedings designed to effect deportation of suspected Palestinian terrorists, lower federal courts improperly delayed those proceedings by more than a decade).

Hamdan may be correct that "[i]t is highly unlikely that a military commission would declare itself unconstitutional." Pet. Br. 22. But pre-habeas exhaustion of all military remedies is required so long as there is a realistic chance that the military will provide Hamdan the principal relief he seeks: clearing his name of all charges. As *Schlesinger* explained, "[E]ven if one supposed that Councilman's service-connection contention almost certainly would be rejected on any eventual military review, there was no reason to believe that his possible conviction inevitably would be affirmed." *Schlesinger*, 420 U.S. at 754.

The district court's and Hamdan's reliance on *Parisi v. Davidson,* 405 U.S. 34 (1972), in this regard is misplaced. The *Parisi* case involved a habeas petition filed by a member of the Army who sought a discharge as a conscientious objector. After exhausting all administrative procedures established

by the Army for seeking such a discharge, Parisi sought relief in federal court by filing a habeas corpus petition. The army then brought court martial proceedings against him for violating an order to go to Vietnam, an order he would not have been given had he been granted a discharge. The Supreme Court ruled that the habeas petition should not have been stayed pending completion of court-martial proceedings, because the military court had no power to grant him the relief he sought: discharge from the Army. *Parisi*, 405 U.S. at 44. Even if he had been acquitted of the charge against him (disobeying an order), Parisi would still have been a member of the armed services. Because military commissions are empowered to grant Hamdan the relief he seeks (dismissal of all charges), there is no similar rationale for exempting him from the exhaustion requirement.

Hamdan contends that exhaustion should not be required unless, as in *Schlesinger*, there is absolutely no dispute that the petitioner is a noncivilian. Hamdan insists that because he has never been a member of al Qaeda and has never participated in its military operations, he ought to be permitted to pursue habeas corpus relief without first being subjected to military proceedings. That argument is without merit, and no case so holds. *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), and *Reid v. Covert,* 354 U.S. 1 (1957), stand for

the proposition that U.S. citizens who (even the military concedes) are *not* members of the U.S. armed forces need not await completion of court-martial proceedings before seeking habeas relief.[4] *Toth* and *Reed* have no application here, because prosecutors contend that Hamdan is an enemy belligerent who, as an al Qaeda member, conspired to murder Americans. If that contention is correct, then Hamdan has no basis for objecting to the exhaustion requirement. Indeed, in light of their special expertise, military commissions are much better equipped than federal courts to make the initial determination on that issue.

Moreover, this Court has explicitly rejected Hamdan's contention that exhaustion is not required when the parties disagree regarding whether a habeas petitioner is a civilian. In *New v. Cohen*, 129 F.3d 639 (D.C. Cir. 1997), a man facing court martial proceedings for failing to obey an order sought to avoid the exhaustion of remedies requirement by claiming that he was not a member of the armed forces. He claimed in his habeas petition that the order given to him (to wear insignia for the United Nations Peacekeeping Force) not only was illegal but also had the effect of relieving him of all further commitments to the military --

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[4] In *Toth*, the petitioner was a man who had been discharged from the armed services before court martial proceedings had been initiated. In *Reed*, the petitioners were the wives of U.S. servicemen who faced court martials for having killed their husbands.

thereby making him a civilian. *New*, 129 F.3d at 645. This Court rejected that contention; it held that exhaustion requirements are excused only where "it has been undisputed that the persons subject to the court-martials either never had been, or no longer were, in the military." *Id.* at 644. Because the Army insisted that New was still a member of the military at the time he disobeyed the order, the D.C. Circuit held that the issue should be addressed in the first instance by military courts, which "are capable of, and indeed may have superior expertise in, considering challenges to their jurisdiction over disciplinary proceedings." *Id.* at 645. The court explained:

> For this court to hold otherwise would produce a rule allowing service members to circumvent the exhaustion requirement merely by contending, without reference to an applicable statute or regulation, that an action by the military "released" them from further service. This result would encourage premature federal judicial intervention in the affairs of the military, a scenario that was expressly rejected by the Court in *Councilman*.

*Id.* Similarly, were this Court to adopt the rule espoused by Hamdan and the district court, *any* alleged war criminal could avoid exhaustion requirements by simply denying that he is an enemy belligerent.[5]

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[5] Moreover, in rejecting Appellants' exhaustion claims, the district court held that "according comity to a military tribunal" was unwarranted in this case because the military commissions established by the Military Order were neither "'autonomous'" nor "'created by Congress.'" Slip op. 7 (quoting *Parisi,* 405

Furthermore, although Hamdan is eventually entitled to his day in federal court to challenge the jurisdiction of the military commission, not all of his claims are jurisdictional in nature. In particular, the claim that formed the alternative basis for the district court's injunction (that the military commission's procedures are "contrary to or inconsistent with" procedures established under the UCMJ) does not challenge jurisdiction; it merely asserts that the military intends to try him in an improper manner. Such claims can be (and have been) raised with the commission itself. But as *Schlesinger* makes clear, it has never been deemed appropriate for federal courts to second-guess the decisions of a military court that is acting "within the scope of its jurisdiction and duty." *Schlesinger*, 420 U.S. at 746.[6]

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U.S. at 40). The district court was wrong on both points. The Military Order clearly contemplates a system of military courts that are "autonomous" from the federal court system. Moreover, as the district court itself admitted, slip op. 12, Congress authorized military commissions when it adopted the UCMJ. But even if the military commission could be deemed a creation of the Executive Branch acting alone, the district court failed to explain why "according comity" is any less appropriate under those circumstances.

[6] The challenge to procedures to be employed by the military commission is particularly ill-suited to pre-trial review. Only after the military commission has conducted its trial will the federal courts be in a position to determine the extent to which, if at all, the commission employed procedures inconsistent with the UCMJ and whether such inconsistencies prejudiced Hamdan.

In sum, the Court should dismiss the petition and stay the district court's hand until after the completion of military commission proceedings. Requiring Hamdan to forgo federal court review until after completion of those proceedings is mandated by case law and will not impose any injury on Hamdan other than that incident to every criminal proceeding.

## II. BY ESTABLISHING MILITARY COMMISSIONS, PRESIDENT BUSH HAS NOT VIOLATED SEPARATION OF POWERS

Hamdan argues that the American military lacks authority under the Constitution to try Hamdan before a military commission. He argues that military commissions are impermissible under the Constitution unless authorized by Congress and that Congress has not provided such authorization. He argues that President Bush's attempt to establish a system of military commissions without obtaining authorization from Congress violates the separation of powers doctrine.

Hamdan's argument is without merit. It gives short shrift to the President's Commander-in-Chief powers and ignores 230 years of American history, during which military commissions have been a significant component of military justice with or without explicit congressional approval. Moreover, it incorrectly assumes that Hamdan has standing to assert that the President has

exceeded his constitutional powers, despite Hamdan's status as a nonresident alien.[7]

The use of military commissions to try war criminals has a pedigree in this country that pre-dates the Constitution. During the American Revolution, the Continental Army regularly convened military commissions to hear charges that enemy belligerents had violated the law of war. Most famously, British Major John Andre, Benedict Arnold's co-conspirator, was hanged in 1780 after being convicted of spying by a military commission. *Ex Parte Quirin*, 317 U.S. 1, 31 n.9 (1942). There is no record that General George Washington ever sought or received permission from the Continental Congress to convene military commissions.

The United States continued to use military commissions to try war

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[7] This Court has held repeatedly that "non-resident aliens . . . plainly cannot appeal to the protection of the Constitution or laws of the United States." *Pauling v. McElroy,* 278 F.2d 252, 254 n.3 (D.C. Cir. 1960). *See also People's Mojahedin Org. v. Dep't of State,* 182 F.3d 17, 22 (D.C. Cir. 1999) (a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise"); *32 County Sovereign Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002); *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003), *rev'd on other grounds sub nom., Rasul v. Bush*, 124 S. Ct. 2686 (2004). Because Hamdan is not entitled to assert rights under the Constitution, he lacks standing to press his claim that President Bush has acted in excess of his constitutional powers.

criminals on a regular basis following adoption of the Constitution. In 1818, General Andrew Jackson resorted to military proceedings to try two Englishmen accused of inciting Creek Indians to wage war against the United States. Gary D. Solis, "Military Commissions and Terrorists," in *Evolving Military Justice,* 199 (Eugene R. Fidell and Dwight H. Sullivan, eds.). Military commissions tried numerous war crimes cases -- both on and off the battlefield -- during the Mexican War and the Civil War. *Quirin*, 317 U.S. at 31 & n.10. Such trials of enemy belligerents continued unabated for several years after the end of fighting and even though civilian courts were open to hear any criminal charges that the Executive Branch chose to file.[8]

Most recently, the United States made extensive use of military commissions to try enemy belligerents during and after World War II. The authority of those commissions to punish enemy belligerents was ringingly endorsed by the Supreme Court in three separate decisions: *Quirin*; *In re*

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[8] The Supreme Court held in *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), that U.S. citizens who are not enemy belligerents are not subject to the law of war and, "where the courts are open and their process unobstructed," may not be brought before military commissions. *Milligan,* 71 U.S. (4 Wall.) at 121. But, contrary to Hamdan's contention, the Court did not hold that the President has no authority to convene military commissions in the absence of explicit authorization from Congress.

*Yamashita,* 327 U.S. 1 (1946); and *Johnson v. Eisentrager*, 339 U.S. 763 (1950).[9]

The scope of the President's authority to establish military commissions to try enemy belligerents must be assessed in light of that history. The Supreme Court has explained that "traditional ways of conducting government * * * give meaning to the Constitution." *Mistretta v. United States*, 488 U.S. 361, 401 (1989); *see, e.g., American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (invoking "the historical gloss on the 'executive Power' [over the conduct of foreign relations] vested in Article II of the Constitution"); *The Pocket Veto Case,* 279 U.S. 655, 689 (1929) ("Long settled and established practice is a consideration of great weight in the proper interpretation of constitutional provisions . . ."). In applying that principle, the Court stated that "a practice of at least twenty years' duration 'on the part of the executive department, acquiesced in by the judicial department, is entitled to great regard in determining the true construction of a constitutional provision.'" *Id.* at 690. Here, the

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[9] *See also, Hirota v. MacArthur,* 338 U.S. 197, 208 (1948) (Douglas, J., concurring) (The President's Commander-in-Chief power "is vastly greater than that of troop commander. He not only has full power to repel and defeat the enemy; he has the power to occupy the conquered country . . . and to punish those enemies who violated the law of war.") (citing *Quirin* and *Yamashita*).

military has been conducting trials of enemy belligerents before military commissions for *230 years* without objection from Congress. Under those circumstances, there is every reason to conclude both that the President does not need explicit congressional authorization before mandating military commissions and that existing statutes are more than sufficient to provide the President with whatever authorization is arguably required.

Appellants' brief thoroughly explains why *Quirin, Yamashita,* and *Eisentrager* fully support the constitutionality of the Military Order and why both the AUMF and Sections 821 and 836 of the Uniform Code of Military Justice demonstrate congressional authorization for/acquiescence to that Order. Rather than repeating all those arguments here, *amici* wish to highlight a few brief points.

First, the argument that President Bush is authorized to establish military commissions is considerably *stronger* than was the argument that President Franklin Roosevelt was authorized to do so in 1942, yet President Roosevelt's actions were upheld in *Quirin.* As two leading constitutional scholars have explained:

> The Bush Order was premised on 10 U.S.C. § 821, which states that the creation of statutory jurisdiction for court martials does not "deprive

> military commissions . . . of concurrent jurisdiction with respect to offenders or offense that . . . by the law of war may be tried by military commissions." Roosevelt's order was premised on the identically-worded predecessor to this statute, Article 15 of the Articles of War -- the very statute that a unanimous Supreme Court in *Quirin* held was "explicit[]" congressional authorization for the President to establish military commissions. *Quirin*, 317 U.S. at 28-29.
>
> Far from being on more tenuous ground than the Roosevelt Order, one could plausibly argue that the Bush Order is on firmer legal ground in light of the relevant precedents. When Roosevelt created his Military Commission, the leading precedent was *Milligan*. Bush's military commissions, by contrast, could rely on the more recent, more supportive, and probably more relevant *Quirin* precedent. Because *Quirin* was on the books when Bush created his commissions but not when Roosevelt created his, Bush's commissions have stronger grounding in Supreme Court precedent.
>
> In addition, although *Quirin* held that Congress had affirmatively authorized military commissions in Article 15 of the Articles of War, Article 15 is probably best read merely as a congressional refusal to abrogate a prior non-statutory jurisdiction for military commissions. The *Quirin* Court thus may have erred in concluding that Congress had, at the time of the *Quirin* decision, authorized the President to establish military commissions. But Congress re-enacted Article 15 in 1950, recodifying it at 10 U.S.C. § 821 against the background of the *Quirin* interpretation. The legislative history to this reenacted provision suggests that Congress was aware of, and accepted, *Quirin*'s interpretation of the provision. And this, in turn, makes it more plausible today than at the time of *Quirin* that Congress has in fact authorized the President to establish military commissions.

Jack Goldsmith and Cass R. Sunstein, "Military Tribunals and Legal Culture:

What a Difference Sixty Years Makes," 19 CONST. COMMENTARY 261, 274-75

(2002).

Second, Hamdan insists that he is not subject to trial by a military commission because he is a civilian. Although Appellants disagree with that characterization, it is undisputed that Hamdan never wore a military uniform and never was part of a regularly constituted army. Nonetheless, the Supreme Court's military commission decisions, particularly *Quirin* and *Eisentrager*, make clear that military commission jurisdiction over enemy belligerents is not limited to the prosecution of those belligerents who are members of regularly constituted armies. For example, the petitioners in *Eisentrager* claimed to be civilian employees of the government of Nazi Germany who found themselves stranded in China at the end of World War II. *Eisentrager*, 339 U.S. at 765. The Supreme Court nonetheless held that their employment status was "immaterial" and declined their petition for relief from prison sentences imposed on them by a military commission. *Id.* Similarly, several of the alleged Nazi saboteurs in *Quirin* denied that they were members of the military. Petitioner Herbert Haupt claimed to be an American citizen. Although the government asserted that Haupt had abandoned his citizenship by professing allegiance to Germany at age 21, his attorney "insisted that Haupt had never taken an oath of allegiance to Germany,

joined the German army or the Nazi party, or done anything else that constituted renunciation of his U.S. citizenship." Michael R. Belknap, "Alarm Bells from the Past: The Troubling History of American Military Commissions," 28 J. S. CT. HIST. 300, 306 (2003). The Court "d[id] not find it necessary" to resolve Haupt's citizenship and military status, because it held that Haupt -- by virtue of his status as an enemy belligerent -- could be tried before a military commission even if he was an American citizen and even if he was not a member of the German army. *Quirin,* 317 U.S. at 20, 37-38.

Finally, *amici* note that the district court itself recognized that Congress endorsed the use of military commissions through the adoption of the UCMJ. Slip op. 12. Nor did it deny that the President has "inherent power in this area"; it simply held that whatever inherent power the President has to establish military commissions on his own "is quite limited" and thus is subject to limits Congress may impose on those powers. *Id.* Given the strong evidence that Congress not only has not sought to limit Executive Branch power in this area but also has affirmatively endorsed its exercise, Hamdan's separation-of-powers argument must be rejected.

## III. THE DISTRICT COURT ERRED IN ENJOINING MILITARY COMMISSION PROCEEDINGS AS A GENEVA CONVENTION VIOLATION

Appellants' brief ably demonstrates that it was error for the district court to enjoin military commission proceedings as a violation of rights allegedly conferred on Hamdan by the Geneva Conventions. Accordingly, *amici* will not repeat here why the district court erred in finding that Hamdan is entitled to enforce his alleged Geneva Convention rights,[10] and why the Executive Branch has acted properly in determining that Hamdan and other alleged al Qaeda members are not entitled to POW status.[11]

*Amici* wish to add one point regarding the district court's interpretation of Article 21 of the UCMJ, 10 U.S.C. § 821, which provides:

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

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[10] As the district court conceded, that finding is directly contrary to the unanimous conclusion of a panel of this Court in *Al Odah v. United States,* 321 F.3d 1134, 1147 (D.C. Cir. 2003), *rev'd on other grounds sub nom., Rasul v. Bush,* 124 S. Ct. 2686 (2004). Slip op. 25 n.10. The district court chose to reject the panel's conclusion, deeming it non-binding *dicta. Id.*

[11] As the district court conceded, once it is determined that Hamdan is not entitled to POW status, he no longer has a viable claim that war crimes charges leveled against him may only be tried by a court-martial.

provost courts, or other military tribunals (emphasis added).

The district court viewed that language as imposing limitations on the Executive Branch's previously recognized authority to conduct trials before military commissions. The district court reasoned that the Geneva Conventions should be deemed a part of "the law of war" and thus that Congress should be deemed, when adopting § 821 of the UCMJ, to have intended to impose a new limitation on military commissions that (the district court conceded) did not previously exist: that the Executive Branch may not conduct military commissions except in strict compliance with the Geneva Conventions.

The district court's conclusion is implausible on its face. Any fair reading of § 821 can only lead one to the conclusion that Congress intended thereby to preserve existing Executive Branch authority to convene military commissions, not to circumscribe that power.

## IV. MILITARY COMMISSIONS SERVE VITAL NATIONAL SECURITY INTERESTS

*Amici* are not filing this brief based simply on a desire to protect the military's prerogatives to conduct the war against terror as it sees fit. Rather, *amici* believe that military commissions are an important component of the war effort and often are the best means of bringing war criminals to justice without

risking information disclosures that could materially assist our enemies.

Indeed, despite the best efforts of prosecutors to prevent the release of confidential national security information, recent criminal proceedings against international terrorists have set back our fight against terrorism. In a 2001 defense of military commissions, Robert Bork wrote:

> The conclusive argument, however, is that in open trials our government would inevitably have to reveal much of our intelligence information, and about the means by which it is gathered. Charles Krauthammer notes that in the trial of the bombers of our embassies in Africa, the prosecution had to reveal that American intelligence intercepted bin Laden's satellite phone calls: "As soon as that testimony was published, Osama stopped using the satellite system and went silent. We lost him. Until Sept. 11." Disclosures in open court would inform not only Middle Eastern terrorists but all the intelligence services in the world of our methods and sources.

Robert Bork, "Having Their Day in (a Military) Court," *Nat'l Review* (Dec. 17, 2001), available at http://www.nationalreview.com/17dec01/bork121701.shtml. While the Military Order contemplates military commissions that are largely open to the public, the implementing regulations grant the commissions greater flexibility than that possessed by federal courts to close portions of a trial when national security concerns so dictate. 32 C.F.R. § 9.6(b)(3) & (d)(5), § 9.9.

Overly open criminal trials often can cause public relations problems as well. As Bork explains, "An open trial and proceedings [that last many years on

appeal], covered by television, would be an ideal stage for an Osama bin Laden to spread his propaganda to all the Muslims in the world. Many Islamic governments would likely find that aroused mobs make it impossible to continue cooperating with the U.S." *Id.* A trial before a military commission in Guantanamo Bay followed by a streamlined review process -- even when the trial is fully open to the press -- would be less easily exploited by our enemies for public relations purposes. Certainly, the safety of trial participants would be much less of a concern at Guantanamo Bay than in a major American city.

Finally, judges sitting on military commissions have much more experience with military matters than do federal court judges and juries, and thus are likely to do a superior job in determining whether the defendant has violated the law of war. A key issue at Hamdan's trial will be whether his services for Osama Bin Laden were simply those of a driver for hire, or whether he also participated in the conspiracy to murder Americans. *Amici* have little doubt that military officers sitting on a military commission could do a far better job of sorting through the evidence on that issue than could 12 jurors who lack military experience.

In sum, the President's decision to authorize military commissions is based

on sound practical reasoning, not a desire to deny meaningful judicial review to those charged with war crimes. *Amici* respectfully request that the Court give that system an opportunity to operate before passing judgment on its legality.

## CONCLUSION

*Amici curiae* Washington Legal Foundation and Allied Educational Foundation request that the Court reverse the judgment of the district court and direct that the petition be dismissed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I am an attorney for *amici curiae* Washington Legal Foundation (WLF), *et al*. Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point, proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 9.0), the word count of the brief is 6,987, not including the certificate as to parties, table of contents, table of authorities, glossary, certificate of service, and this certificate of compliance.

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Richard A. Samp

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of December, 2004, two copies of the foregoing Brief of Washington Legal Foundation, *et al.*, were deposited in the U.S. Mail, first-class postage prepaid, addressed to the following:

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