No. 05-184

In the Supreme Court of the United States

SALIM AHMED HAMDAN, PETITIONER

v.

DONALD H. RUMSFELD, ET AL.

On writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICUS CURIAE OFFICE OF CHIEF DEFENSE COUNSEL, OFFICE OF MILITARY COMMISSIONS IN SUPPORT OF PETITIONER [ABSTENTION INAPPROPRIATE]

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I. Interest of the Amicus[1]

The Office of Chief Defense Counsel, Office of Military Commissions was created by Department of Defense Military Commission Order No. 1.[2] The Chief Defense Counsel is tasked with detailing "one or more Military Officers who are judge advocates of any United States armed force to conduct the defense for each case before a Commission."[3] This office is thus charged with ensuring representation in the nine current, as well as any future, military commission cases. The five officers currently assigned to the Office of Chief Defense Counsel have more than six decades of combined experience as judge advocates. All five have served as prosecutors in the court-martial system, among other duties.

II. Summary of the Argument

This Court should not abstain from resolving the questions presented. This case falls within a well-established exception to the general requirement for exhaustion of military remedies before an Article III court will consider

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[1] This amicus brief is filed with the consent of the parties. Letters granting that consent have been lodged with the Clerk's Office. No counsel for a party authored this brief in whole or in part. No other person or entity made a monetary contribution to the preparation or submission of this brief.

[2] Dep't of Defense, Military Commission Order No. 1, ¶ 4.C (March 21, 2002), *available at* http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf.

[3] Dep't of Defense, Military Commission Order No. 1 (Revised), ¶ 4.C(2) (Aug. 31, 2005), *available at* http://www.defenselink.mil/news/Sep2005/d20050902order.pdf [hereinafter MCO No.1].

habeas relief: the abstention doctrine does not apply to challenges to an accused's susceptibility to trial by a military tribunal.

The abstention doctrine would not apply even if this case involved a prosecution by court-martial. *A fortiori*, abstention is not warranted here, where the challenge is to Petitioner's susceptibility to trial by military commission. Unlike the court-martial system, which Congress designed and which the Executive Branch implements, both the military commission system's procedures and substantive law were created and implemented solely by the Executive Branch. Rather than warranting deference, the military commission system's single-Branch pedigree raises separation of powers concerns.

Also in stark contrast to the court-martial system, military commissions are not designed to protect the accused's legitimate interests. For example, the military commission system protects neither an accused's right to confront the witnesses against him nor the accused's right to a speedy trial. In one of the most troubling departures from court-martial and civilian criminal practice, a military commission may consider evidence obtained by coercion or even torture. Given these and other radical departures from bedrock American criminal procedure, military commissions cannot be trusted to protect an accused's legitimate interests. Abstaining for the purpose of allowing a trial using such flawed procedures is unnecessary and inappropriate.

Additionally, the interests of Petitioner and other Guantanamo detainees being tried by military commissions will be irreparably injured if their trials are allowed to

proceed before this Court resolves the questions presented. As a United States district court recently noted in enjoining proceedings in another military commission case, an accused's right not to be tried by a commission that lacks jurisdiction would be forever lost without prejudgment consideration of the questions this case presents. Abstention could even result in an acquitted accused being forced to face a retrial, since an initial conviction by a military commission without jurisdiction would not trigger a double jeopardy bar to a second trial.

Finally, the public has an interest in the immediate resolution of the questions presented. The public has a compelling interest in ensuring that the separation of powers among the branches of the federal government is honored. Additionally, the public has an interest in ensuring that scarce military resources are not squandered on military commission proceedings that lack jurisdiction.

Accordingly, this Court should not abstain pending a final judgment by a military commission. Rather, it should consider and resolve the questions presented now.

III. Argument

THIS COURT SHOULD RESOLVE THIS SYSTEMIC CHALLENGE TO THE MILITARY COMMISSION PROCESS NOW RATHER THAN ABSTAINING UNTIL A COMMISSION CASE BECOMES FINAL

A. Introduction

This is one of those "extraordinary cases" of "peculiar gravity and general importance" meriting this Court's resolution before the proceedings below become final.[4] In 1942, this Court heard *Ex parte Quirin* contemporaneously with the military commission trial process, during a break between the parties' presentation of their cases and closing argument.[5] This case is even more pressing than *Quirin*, since the presidential order at issue there applied to only eight named alleged saboteurs[6] while President Bush's military order at issue in this case may extend to "a large population of unknowns, not yet apprehended or charged."[7] Just as in *Quirin*, the "public importance of the questions" presented and "the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty" suggest that "the public interest

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[4] *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

[5] *Ex parte Quirin*, 317 U.S. 1, 23 (1942).

[6] *See* President of the United States, Appointment of a Military Commission, Exec. Order No. 9185, 7 Fed. Reg. 5103 (July 2, 1942).

[7] LOUIS FISHER, NAZI SABOTEURS ON TRIAL 160 (2003).

require[s] that [this Court] consider and decide those questions without any avoidable delay."[8] This Court should resolve the questions presented now rather than abstaining until a military commission renders a final decision.

B. This case falls within a well-established category of military cases warranting prejudgment habeas consideration

In *Schlesinger v. Councilman*,[9] this Court analyzed the general requirement for an accused in a military justice proceeding to exhaust military remedies before seeking habeas relief. This requirement operates similarly to *Younger v. Harris*'s abstention doctrine for habeas challenges to state criminal proceedings.[10] But in *Councilman*, this Court recognized an important distinction between cases in which exhaustion of military remedies was required and other military justice cases in which habeas consideration is appropriate even before judgment: prejudgment consideration is appropriate for cases presenting "constitutional question[s]" that depend "on the status of the persons as to whom the military asserted its power."[11] In the earlier case of *Noyd v. Bond*,[12] this Court similarly noted that it appears "especially unfair to require exhaustion of military remedies when the complainants raised substantial arguments

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[8] *Ex parte Quirin*, 317 U.S. at 23.
[9] 420 U.S. 738 (1975).
[10] *Younger v. Harris*, 401 U.S. 37 (1971).
[11] *Councilman*, 420 U.S. at 759 (citing *Toth v. Quarles*, 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1 (1957); *McElroy v. Guagliardo*, 361 U.S. 281 (1960)).
[12] 395 U.S. 683 (1969).

denying the right of the military to try them at all."[13]

1. *Councilman* is inapposite because this case raises a substantial challenge to Petitioner's susceptibility to trial by military commission

This case falls squarely within the well-established category of cases for which prejudgment consideration of habeas relief is appropriate. The Court of Appeals expressly considered whether *Councilman* prevented prejudgment consideration of Petitioner's habeas challenge and concluded that it did not.[14] The court reasoned that "[e]ven within the framework of *Councilman* and *New* [*v. Cohen*[15]], there is an exception to abstention: 'a person need not exhaust remedies in a military tribunal if the military court has no jurisdiction over him.'"[16] The court explained, "The theory is that setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction."[17] Petitioner's case falls within that exception because, unlike *Councilman* and *New*, it raises "*substantial* arguments denying the right of the military to try [Petitioner] at all."[18] Additionally, the military discipline rationale underlying Article III courts' general abstention

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[13] *Id.* at 696 n.8.
[14] *Hamdan v. Rumsfeld*, 415 F.3d 33, 36-37 (D.C. Cir. 2005).
[15] 129 F.3d 639 (D.C. Cir. 1997).
[16] *Hamdan*, 415 F.3d at 36 (quoting *New*, 129 F.3d at 644).
[17] *Id.* (citing *Abney v. United States*, 431 U.S. 651, 662 (1977)).
[18] *Id.* at 36-37 (quoting *New*, 129 F.2d at 644, and citing *Councilman*, 420 U.S. at 759).

from considering challenges to ongoing court-martial proceedings does not apply to military commission proceedings against aliens, such as Petitioner.[19]

2. *Councilman* is inapposite because, unlike the court-martial system, the military commissions trying Petitioner and other Guantanamo detainees were neither established by Congress nor designed to protect the legitimate interests of those it tries

The congressional deference rationale that informed *Councilman* does not apply to habeas challenges to military commissions. In *Councilman*, this Court reasoned that there is "no injustice in requiring respondent to submit to a system established by Congress and carefully designed to protect not only military interests but his legitimate interests as well."[20] But the military commission system that Petitioner challenges is neither congressionally established nor designed to protect the legitimate interests of those it tries.

In explaining the abstention doctrine in *Councilman*, this Court emphasized that Captain Councilman was challenging a court-marital system established by Congress.[21] That rationale is absent in this case, where the first question presented challenges the Executive Branch's unilateral creation of the military commission system's "rules of

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[19] *Id.* (citing *Schlesinger v. Councilman*, 420 U.S. 738 (1975)).
[20] 420 U.S. at 759-60.
[21] *Id.*

substantive law as well as procedures."[22] This system is also implemented by officials (including the appointing authority, the presiding officers, the military commission members, and the review panel members) who are selected by Executive Branch officials without advice and consent of the Senate. The result is that the President "and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials."[23] As this Court warned in *Reid v. Covert*, "Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers."[24] The nature of the specific challenge in this case, therefore, militates against abstention.

Additionally, unlike the established court-martial system, military commissions do not balance the legitimate interests of both parties to the proceeding. Rather, the commission system fails to protect fundamental rights of a criminal accused. The military commission system's flaws include the following:

- Non-disruptive defendants can be (and in two cases—Petitioner's and *United States v. Hicks*[25]—already have been)

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[22] *Reid v. Covert*, 354 U.S. 1, 38 (1957).
[23] *Id.* at 38-39.
[24] *Id.* at 39.
[25] *See* Transcript of Record at 82-113, *United States v. Hamdan*, No. 040004 (Aug. 24, 2004), *available at* http://www.defenselink.mil/news/Nov2005/d20051110Hamdanvol6.pdf; Transcript of Record at 77-106, *United States v. Hicks*, No. 040001 (Aug. 25, 2004), *available at*

excluded from their own commission proceedings, in contrast to the rights that the Confrontation Clause[26] and Article 39 of the Uniform Code of Military Justice[27] afford to those being tried by court-martial.

- While the Sixth Amendment requires a court-martial to exclude any testimonial hearsay statements unless the accused has an opportunity to confront the declarant,[28] military commissions have no similar confrontation guarantee or even any rule generally excluding hearsay statements.[29]

- Military commissions have no rule excluding statements obtained by torture or other coercive means. When it enacted the Uniform Code of Military Justice, Congress was so concerned about the prospect of coerced

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http://www.defenselink.mil/news/Oct2005/d20051006vol6.pdf.

[26] U.S. CONST. amend. VI; *see United States v. Jacoby*, 11 C.M.A. 428, 29 C.M.R. 244 (1960) (holding that the Confrontation Clause applies to courts-martial).

[27] 10 U.S.C. § 839(b) (2000) (providing that except for members' deliberations and voting, all proceedings "shall be in the presence of the accused").

[28] *United States v. Taylor*, __ M.J. ___, 2005 WL 3338657 (A.F. Ct. Crim. App. Nov. 21, 2005) (applying *Crawford v. Washington*, 541 U.S. 36 (2004)).

[29] President of the United States, Military Order of November 13, 2001 at § 4(c)(3), 66 Fed. Reg. 57,833, 57,835 (Nov. 16, 2001) (adopting requirement that evidence have "probative value to a reasonable person" as the sole evidentiary admissibility standard).

statements that it adopted an exclusionary rule barring their introduction at courts-martial.[30] That exclusionary rule is consistent with this Court's ringing condemnation of the use of coerced confessions in civilian trials:

> The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.[31]

The commission system's design puts that pledge to the test.

- While no current commission case is death-eligible, in future commission cases the accused may be sentenced to

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[30] Uniform Code of Military Justice art. 31(d), 10 U.S.C. § 831(d) (2000) ("No statement obtained . . . through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against [the accused] in a trial by court-martial.").

[31] *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944).

death by a panel with as few as seven members.[32] In capital courts-martial, on the other hand, the accused is protected by a statute generally requiring a minimum of twelve members.[33] Additionally, an accused in a capital military commission may be sentenced to death even in the absence of aggravating circumstances that narrow the class of those eligible for the death penalty and that guide the sentencer's discretion.[34]

- An accused at a trial by military commission has no established right to speedy trial.[35] By contrast, an accused at

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[32] MCO No. 1, *supra* note 3, at ¶ 6.G ("Only a Commission that includes [the Presiding Officer and] at least seven other members may sentence an Accused to death.").

[33] Uniform Code of Military Justice art. 25a, 10 U.S.C.A. § 825a (West Supp. 2005).

[34] *Cf. Loving v. United States*, 517 U.S. 748, 755 (1996) (noting that the Eighth Amendment requires that "a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder" and assuming that Eighth Amendment capital jurisprudence applies to courts-martial (internal quotation marks omitted)). *See also* Rule for Courts-Martial 1004(c), *Manual for Courts-Martial, United States* (2005 ed.) (providing that a court-martial may not adjudge a death sentence unless "the members find, beyond a reasonable doubt, one or more" specified aggravating factors).

[35] *See* Josh Kastenberg, *The Customary International Law of War and Combatant Status: Does the Current Executive Branch Policy Determination on Unlawful Combatant Status*

a court-martial has a regulatory,[36] statutory,[37] and constitutional[38] right to a speedy trial. Nor does the commission system, unlike the court-martial system,[39] have any statute of limitations. The harm that arises from the military commission system's lack of a speedy trial right and statute of limitations is exacerbated by the absence of any credit for pretrial detention.[40] A commission accused is left susceptible to indefinite pretrial detention with no offsetting reduction of any sentence that is ultimately imposed. By contrast, an accused in a trial by court-martial is protected not

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for Terrorists Run Afoul of International Law, or Is It Just Poor Public Relations?, 39 GONZ. L. REV. 495, 530 (2003/2004) ("there is no statutory right to a speedy trial before a military commission").

[36] *See* Rule for Courts-Martial 707, *Manual for Courts-Martial, United States* (2005 ed.) (generally requiring trial within 120 days of the earlier of preferral of charges or imposition of pretrial restraint).

[37] *See* Uniform Code of Military Justice art. 10, 10 U.S.C. § 810 (2000).

[38] U.S. CONST. amend. VI; *see United States v. Mason*, 21 C.M.A. 389, 393, 45 C.M.R. 163, 167 (1972) (applying Sixth Amendment speedy trial right to courts-martial).

[39] *See* Uniform Code of Military Justice art. 43, 10 U.S.C. § 843 (2000).

[40] *See* Dep't of Defense, Military Commission Instruction No. 7, ¶ 3.A (April 30, 2003) ("Detention associated with an individual's status as an enemy combatant shall not be considered to fulfill any term of imprisonment by a military commission."), *available at* http://www.defenselink.mil/news/May2003/d20030430milcominstno7.pdf.

only by the right to a speedy trial and a statute of limitations, but also a right to credit for pretrial confinement.[41]

Thus, abstention is unwarranted for two reasons: (1) this case falls within the general exception to *Councilman*'s abstention doctrine for cases challenging the accused's susceptibility to trial by a military tribunal; and (2) unlike a court-martial, a military commission lacks procedural protections necessary to justify confidence in its ability to vindicate the accused's rights in the first instance.

C. Petitioner and other Guantanamo detainees being tried by military commission will suffer irreparable injury if this Court does not determine the viability of the military commission system before trials proceed

Following the grant of certiorari in this case, the United States District Court for the District of Columbia enjoined military commission proceedings in the case of David Hicks, another Guantanamo detainee.[42] The district court reasoned that if the case proceeded to trial "and the Supreme Court later determines that said military commission lacks jurisdictional authority, 'setting aside the judgment after trial and conviction insufficiently redresses [Petitioner's] right not

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[41] *See United States v. King*, 58 M.J. 110, 113 (C.A.A.F. 2003) ("In *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984), this Court interpreted a Department of Defense Instruction as requiring day-for-day credit against confinement for time an accused spends in lawful pretrial confinement.").

[42] *Hicks v. Bush*, 397 F. Supp. 2d 36 (D.D.C. 2005).

to be tried by a tribunal that has no jurisdiction.'"[43] The district court observed that "the crux of the irreparable injury that Petitioner faces if tried by a tribunal consequently deemed not to have jurisdiction over him" is "that he would have been tried by a tribunal without any authority to adjudicate the charges against him in the first place, potentially subjecting him to a second trial before a different tribunal."[44] As this Court has held, "An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offence."[45] So a Guantanamo detainee could be subject to a second trial even if acquitted at an initial commission proceeding if this Court were to later hold that the first commission suffered from a jurisdictional defect.

The district court also found that the public interest requires the separation of powers issue in this case to be decided before a trial by military commission begins.[46] The district court reasoned, "Since questions regarding the separation of powers are fundamental to the fabric of our democracy, it is in the public interest that any question regarding the separation of powers as applied to the military commission proceedings at issue be ultimately clarified

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[43] *Id.* at 42 (alteration in original) (quoting *Hamdan*, 415 F.3d at 36 (citing *Abney v. United States*, 431 U.S. 651, 662 (1977))).
[44] *Id.*
[45] *United States v. Ball*, 163 U.S. 662, 669 (1896).
[46] *Hicks*, 397 F. Supp. 2d at 42.

before such proceedings further ensue."[47] The court observed that the Judiciary "act[s] as a confirmation and check on the Executive's use of military commissions in particular contexts."[48] "[T]he Supreme Court's review of *Hamdan*," the court continued, "will serve as the ultimate confirmation of and check on the Executive's authority to subject Petitioner to the jurisdiction of a military commission."[49] The district court concluded, "It is in the public interest to have a final decision, leaving no doubts as to this key jurisdictional issue, before Petitioner's military commission proceedings begin."[50] The same is true of this case and those of the other Guantanamo detainees being tried by military commissions. Before any of them is subjected to proceedings that could result in a sentence of confinement for life or, in the case of some future accused, even death, this Court should determine whether commissions established under the President's Military Order of November 13, 2001, are constitutionally viable tribunals.

Resolving the questions presented now rather than abstaining until a commission proceeding becomes final would also promote another public interest: the conservation of scarce military resources. Currently, nine cases have been referred for trial by military commission. Additional referrals are likely. If this Court were to abstain, the likely consequence would be the resumption of trials in those cases that are currently stayed[51] and the continuation of

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[47] *Id.* at 43.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *See, e.g., id.* at 45 (enjoining commission proceedings in

proceedings in the remaining cases. The considerable military resources devoted to these trials will be wasted if this Court were ultimately to rule that the current commission structure suffers from a jurisdictional defect.

These harms that abstention would cause to the public interest are "both great and immediate."[52] Because the systemic issues that this case presents will recur in every military commission case, the harms that abstention would cause "cannot be eliminated by . . . defense against a single criminal prosecution."[53] Abstention is therefore inappropriate.

IV. Conclusion

For the foregoing reasons, this Court should reach the merits of the questions presented.

United States v. Hicks "pending the issuance of a final and ultimate decision by the Supreme Court in" this case).

[52] *Schlesinger v. Councilman*, 420 U.S. 738, 756 (1975) (quoting *Fenner v. Boykin*, 271 U.S. 240, 243 (1926)).

[53] *Id.* (quoting *Younger v. Harris*, 401 U.S. 37, 46 (1971)).

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