No. 05-184

# In The Supreme Court of the United States

SALIM AHMED HAMDAN,

*Petitioner,*

v.

DONALD H. RUMSFELD,
Secretary of Defense, et al.,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## BRIEF OF *AMICI CURIAE* MADELEINE K. ALBRIGHT AND 21 FORMER SENIOR U.S. DIPLOMATS IN SUPPORT OF PETITIONER SALIM AHMED HAMDAN


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## STATEMENT OF INTEREST[1]

Amici have served as Senior State Department Officials, United States Ambassadors and diplomats, and Legal Advisers to the U.S. Department of State, representing the government of the United States at home and abroad in both Republican and Democratic administrations.[2] Throughout their service to the United States, amici have consistently committed themselves to advancing the U.S. foreign policy interest of protecting and promoting the rule of law worldwide.

Amici express no view on the question whether Mr. Hamdan should be found guilty or innocent of the crimes for which he has been charged. Nevertheless, amici submit

[1] In accordance with Supreme Court Rule 37.6, Amici state that no party, person or entity other than Amici and their counsel authored this Brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this Brief. All parties have granted consent to the filing of this Amicus Curiae Brief. Letters of consent are on file with the Clerk of the Court.

[2] Amici include former Secretary of State Madeleine K. Albright, former Deputy Secretary of State Strobe Talbott, former U.N. Ambassadors Thomas R. Pickering and Donald F. McHenry, former Under Secretaries of State Peter Tarnoff and Frank G. Wisner, former U.S. Ambassadors and/or Assistant Secretaries of State Stephen W. Bosworth, James F. Collins, Robert S. Gelbard, Lincoln Gordon, Karl F. Inderfurth, Howard F. Jeter, Dennis Jett, Robert V. Keeley, Alfred H. Moses, Peter F. Romero, Cynthia P. Schneider, John Shattuck, Wendy R. Sherman, E. Michael Southwick, former Special Presidential Envoy James C. O'Brien, and former Legal Adviser to the U.S. Department of State Herbert J. Hansell. Several have retired with the rank of Career Ambassador, the highest rank that can be awarded to members of the United States Foreign Service. Amici appear in their personal capacities, and by doing so, do not intend to convey the views of their affiliated institutions on the questions presented here. The qualifications of Amici are listed in the Appendix to this brief.

this brief to demonstrate that the military commission convened by the U.S. government to try Mr. Hamdan violates the rule of law in two fundamental ways. First, the rule of law requires that the judiciary be kept separate and free from the influence of the other branches of government. Yet under the military commission system established by the President, judges are not independent from the prosecutor. Second, the rule of law bars prosecutors from unilaterally making and changing the rules applied by the judiciary. But under the military commissions established by the President, the President has not only arrogated to himself the right unilaterally to change the military commission rules, but also to create rules and practices that violate universally recognized standards of what constitutes a fair trial. Indeed, the President has constructed a system of military justice that defies the rule of law by failing to comply with the Geneva Conventions and universal human rights instruments to which the United States is a party.

Amici believe that the President's decision to use military commissions to dispense ad hoc justice to those accused of war crimes deeply undermines the U.S. foreign policy interest in promoting the rule of law. Since its Founding, the United States has been a nation dedicated to the worldwide preservation and promotion of the rule of law.[3] Promoting the rule of law abroad has long been a

[3] "[I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."), Universal Declaration of Human Rights prmbl., G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948), *available at* http://www.un.org/Overview/rights.html. *See also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a

(Continued on following page)

fundamental goal of U.S. foreign policy and a national security imperative.[4] By assigning himself the combined powers of prosecutor, judge, and legislator, the President has not only alienated allies whose partnership is vital in the war on terrorism; he has undermined our ability to criticize other countries that violate the rule of law, giving them cover to use similarly defective military commissions to crack down upon local dissent. Nor can the Executive plausibly claim that when Congress authorized the use of "necessary and appropriate" military force after September 11, it authorized creating a military commission system that so squarely contravenes the rule of law. By violating the independence of the judiciary, the military commissions undermine America's longstanding domestic and foreign policy commitment to the rule of law.

government of laws, and not of men."); Mass. Const. art. XXX (1780) (we are "a government of laws and not of men"); 19 U.S.C. § 3703(a)(1)(B) (emphasizing the importance of "the rule of law . . . and the right to due process, a fair trial, and equal protection under the law" in determining whether a sub-Saharan African country qualifies for favorable trade treatment).

[4] *See* Proclamation of the President, Dec. 10, 2004, http://www.state.gov/g/drl/rls/39883.htm (" . . . we encourage all nations to continue working towards freedom, peace, and security, which can be achieved only through democracy, respect for human rights, and the rule of law"); U.S. Dep't of State, Human Rights Day 2004, *available at* http://www.state.gov/g/drl/hr/c13573.htm.

## ARGUMENT

### I. THE MILITARY COMMISSIONS VIOLATE THE RULE OF LAW BECAUSE THE MILITARY COMMISSION JUDGES ARE NOT INDEPENDENT.

Under the Universal Declaration of Human Rights, "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal. . . ."[5] The International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14.1, S. Exec. Doc. E, 95-2, 999 U.N.T.S. 171 (hereinafter "ICCPR"), to which the United States is a party, provides that "[i]n the determination of any criminal charge against him . . . everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal." As every regional human rights instrument has recognized, only an independent judicial system can guarantee the universally-recognized right to be tried by an impartial and independent tribunal.[6]

[5] Universal Declaration of Human Rights, art. 10, G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810, at 71 (Dec. 12, 1948). The United States has long accepted key parts of the Universal Declaration, including the fair trial guarantees, as customary international law. Restatement (Third) of Foreign Relations Law of the United States § 701, cmt. d (1986) (" . . . it is increasingly accepted that states parties to the Charter are legally obligated to respect some of the rights recognized in the Universal Declaration. . . . A violation of the rights protected by customary law . . . also may be seen as a violation of the [U.N.] Charter.").

[6] *See, e.g.,* American Convention on Human Rights, Nov. 22, 1969, art. 8(1), O.A.S.T.S. No. 36, O.A.S. Off. Rec. OAS/Ser. L/V/VII. 23 Dec. 23 Rev. 6 (1979), *reprinted in* 9 I.L.M. 99 (1970) ("every person has the right to a hearing . . . by a competent, independent, and impartial tribunal, previously established by law. . . ."); [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6(1), 213 U.N.T.S. 222 ("[e]veryone is entitled to a fair and public hearing . . . by an independent and impartial tribunal by law.");

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International publicists also universally recognize that an independent judicial system "is an indispensable requisite of . . . the Rule of Law." Int'l Comm'n of Jurists, *The Rule of Law in a Free Society: A Report on the International Congress of Jurists* 11 (1959). In remarks delivered to a Chinese audience, Justice O'Connor recently underscored "the importance of a strong judiciary in achieving and maintaining the Rule of Law." Sandra Day O'Connor, *Vindicating the Rule of Law: The Role of the Judiciary*, 2 Chinese J. Int'l L. 1, 1 (2003).

To be genuinely independent, judges and courts must be kept structurally separate and free from domination by other branches of government. James Madison warned of the dangers of breaching structural separateness: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator.* Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor.*" The Federalist No. 47, at 303 (Madison) (Clinton Rossiter ed., 1961) (emphasis in original). As Justice O'Connor recently emphasized, freedom of the judiciary from domination by other parts of government is essential to the legitimacy of the entire government. Sandra Day O'Connor, *Vindicating the Rule of Law: The Role of the Judiciary*, 2 Chinese J. Int'l L. 1, 2

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Organization for African Unity (OAU), art. 7(1)(d), Doc. CAB/LEG/67/3/rev.5 (1981), *reprinted in* 21 I.L.M. 58, 59 (1982) (providing that every individual shall have "the right to be tried within a reasonable time by an impartial court or tribunal"); Cairo Declaration on Human Rights in Islam, art. 19(e), *reprinted in* U.N. Doc. A/CONF.157/PC/62/Add.18 (1990) ("A defendant is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence [sic].").

(2003) (" . . . the Founders of the United States recognized that it is essential to the legitimacy of the judiciary – indeed, to the legitimacy of the government itself – that the judiciary not be subject to domination by other parts of the government."). It is for this reason that amici, in their decades of work for the State Department, have consistently and actively promoted judicial independence as an essential component of the rule of law.[7]

The concept of judicial independence traces its roots to the Glorious Revolution in Britain, which was caused, in part, by the judiciary's perceived lack of independence from the crown.[8] Parliament fixed this problem by providing structural guarantees of independence, depriving the king of the power to remove judges, and providing that Parliament could only remove judges for bad behavior.[9] *See also* William Blackstone, 1 *Commentaries* 322 (Herbert

[7] *See* U.S. Dep't of State, Bureau of Int'l Info. Programs, *Rule of Law*, in *What is Democracy?* (1998), http://usinfo.state.gov/products/pubs/whatsdem/whatdm4.htm (last visited Dec. 17, 2005). ("it is vital that [judges] be independent of the nation's political authority to ensure their impartiality"); *see also* U.S. Agency for Int'l Development, *Guidance for Promoting Judicial Independence and Impartiality* (2002), *available at* http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm007.pdf (last visited Dec. 17, 2005).

[8] *See* Thomas I. Vanaskie, *The Independence and Responsibility of the Federal Judiciary*, 46 Villanova L. Rev. 745, 748 (2001).

[9] *See* John H. Langbein, *The Origins of Adversary Criminal Trial* 72 (2003). *See generally* Robert Stevens, The Independence of the Judiciary 3-5 (1993); Smith and Bailey on the Modern English Legal System 225 (S.J. Bailey and M.J. Gunn eds. 1991) (independence of the judiciary means "independence from improper pressure by the executive, by litigants, and by particular pressure groups. Reasons given in support of judicial independence are (1) that independence is a condition of impartiality and therefore of fair trials and (2) that it makes for a separation of powers which enables the courts to check the activities of the other branches of government.").

Broom & Edward Hadley, eds., London 1869) ("In this distinct and separate existence of the judicial functions in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservative of the public liberty.").

This struggle over judicial independence from the executive was reenacted in the American colonies, where the drafters of the Declaration of Independence complained that the king had "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence para. 11 (U.S. 1776). To ensure judicial independence, the Framers of the U.S. Constitution famously guaranteed federal judges both life tenure and undiminished compensation. U.S. Const. art. III, § 1 (all federal judges "shall hold their offices during good behavior"; federal judges' compensation "shall not be diminished during their continuance in office"); *see also* Federalist No. 78, at 465 (Hamilton) (Clinton Rossiter ed., 1961) ("The standard of good behaviour for the continuance in office of the judicial magistracy . . . is the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws"). This Court has since repeatedly enshrined this lesson in its jurisprudence. It has held that the Article III guarantees stand for the broad principle that "control over the tenure and compensation of judges is incompatible with a truly independent judiciary, free of improper influence from other forces within government." *United States v. Will*, 449 U.S. 200, 218 (1980); *see also Wiener v. United States*, 357 U.S. 349, 355 (1958).

Congress has also repeatedly and recently underscored the importance of an independent judiciary.

*See, e.g.*, S. Rep. 109-96, at 39 (2005) (forbidding funding of Khmer Rouge tribunals "unless the Secretary of State reports to the Committee that the tribunal is capable of delivering justice . . . in an impartial and credible manner."); S. Rep. 108-346, at 33 (2004) (criticizing Indonesia for convening a military tribunal in which the prosecutor and judge were insufficiently independent of each other). Nor has this bright-line rule been relaxed in a military setting, where Congress has scrupulously provided guarantees of judicial independence within the military justice system established pursuant to the Uniform Code of Military Justice (hereinafter "UCMJ"). As the U.S. Court of Military Appeals noted more than a half-century ago, the UCMJ "purports to assure to all in the military service an absolutely fair trial in which the findings and sentence are determined solely upon the evidence, and *free from all unlawful influence exerted by any military superior*." *United States v. Navarre*, 5 U.S.C.M.A. 32, 37 (1954) (emphasis added).[10]

Congress has preserved judicial independence in the military setting first, by taking steps to minimize military commanders' influence over courts-martial; prohibiting censure or reprimand of court-martial members and judges, 10 U.S.C. § 837(a), forbidding citation of court-martial performance in a member's formal reviews, 10 U.S.C. § 837(b), and criminalizing improper command influence over the judging of courts-martial, 10 U.S.C.

[10] *See also United States v. Littrice*, 3 U.S.C.M.A. 487, 491 (1953) (in the UCMJ, "Congress expressed an intent to free courts-martial members from any improper and undue influence by commanders which might affect an honest and conscientious consideration of the guilt or innocence of an accused.").

§ 898. Second, Congress has provided for review of military proceedings by the Judge Advocate General, *see* 10 U.S.C. §§ 866, 867, 3037, with those aggrieved preserving the right ultimately to petition the Supreme Court of the United States. *See, e.g.*, *Clinton v. Goldsmith*, 526 U.S. 529 (1999) (reversing the Court of Appeals for the Armed Forces). Third, Congress has insulated the Court of Appeals for the Armed Forces from military prosecutors by requiring that the judges be civilians, 10 U.S.C. § 942(b)(1), requiring their appointment for fifteen years at a time, 10 U.S.C. § 942(b)(2), and permitting their removal only for neglect of duty, misconduct, or mental or physical disability, 10 U.S.C. § 942(c).

Unlike the carefully constructed courts-martial system, the military commissions recently created by the executive branch conspicuously violate the rule of law, because they are not a court system in which the judges are structurally separate and free from influence from the President and his political appointees. Under the military commission system, the Secretary of Defense names the Appointing Authority, who then both appoints military commission judges ("members"), Rev. Military Commission Order No. 1 § 4(a)(1) (hereinafter "Military Commission Order"), *available at* http://www.defenselink.mil/news/Sep 2005/d20050902order.pdf, and refers charges to military commissions, Rev. MCO No. 1 § 6(a)(2). The Appointing Authority has broad power to remove commission members. *Id.* § 4(a)(3) (providing undefined removal power and no review of removal decisions). As a result, the President's Military Commission Order effectively permits him to serve at once as prosecutor and judge and does nothing to insulate military commission members from his influence. In addition, because the President has required

military commission members to be military officers, Rev. MCO No. § 4(a)(3), they are directly answerable to the President in his capacity as commander-in-chief. *See, e.g.*, 10 U.S.C. § 1161(a)(3), (b) (power of President to dismiss commissioned officer without court martial during wartime and power of President to drop various service-members from the rolls); 10 U.S.C. § 125(b) (power of President during hostilities to reassign or transfer). A military commission cannot be an independent court, and its commissioners cannot be genuinely independent decision-makers, so long as the military officers who serve on them must answer to the very Secretary of Defense and President who prosecute the cases before them. Indeed, conscientious military commission prosecutors have already questioned the independence of the military commission's members and Presiding Officer.[11]

Ironically, when promoting judicial independence abroad, the State Department regularly and severely criticizes other countries that exhibit the same characteristics in their own military commissions. The State Department's Annual Country Reports on Human Rights is replete with examples of countries whose judicial systems the State Department has criticized because the executive can improperly influence the judiciary by removing, transferring, reassigning, or altering the compensation of judges, or by suspending court decisions, e.g.:

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[11] Neil A. Lewis, *2 Prosecutors Faulted Trials for Detainees*, N.Y. Times, August 1, 2005, at A1; John Mintz, *Presiding Officer at Guantanamo Faces Questions*, Wash. Post, Sept. 16, 2004, at A3 (noting the inappropriately close relationship between the Presiding Officer and Appointing Authority).

- China: "[T]he judiciary was not independent. It received policy guidance from both the Government and the Party..Judges were appointed by the People's Congresses at the corresponding level of the judicial structure and received their court finances and salaries from those government bodies."[12]

- Turkmenistan: "The President's power to select and dismiss judges subordinated the judiciary to the Presidency . . . The President has the sole authority to dismiss all appointees before the completion of their terms."[13]

- Uzbekistan: "[T]he judicial branch takes its direction from the executive branch..Under the Constitution, the President appoints all judges . . . and has the power to remove them."[14]

- Libya: "[T]he judiciary was not independent . . . Qadhafi was empowered to interfere in the administration of justice by altering court judgments or replacing judges."[15]

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[12] U.S. Dep't of State, *Country Reports on Human Rights Practices, 2004: People's Republic of China* (Feb. 28, 2005), *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41640.htm.

[13] U.S. Dep't of State, *Country Reports on Human Rights Practices, 2004: Turkmenistan* (Feb. 28, 2005), *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41714.htm.

[14] U.S. Dep't of State, *Country Reports on Human Rights Practices, 2004: Uzbekistan* (Feb. 28, 2005), *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41717.htm.

[15] U.S. Dep't of State, *Country Reports on Human Rights Practices, 2004: Libya* (Feb. 28, 2005), *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41727.htm.

- Yemen: "[T]he judiciary was weak and severely hampered by . . . executive branch interference. The executive branch appoints judges, removable at the executive's discretion. There were reports that some judges were harassed, reassigned, or removed from office following rulings against the Government."[16]

"The supremacy of law," Justice Brandeis wrote, "demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring). Yet unlike the military tribunals that Congress has expressly authorized in the UCMJ, the presidentially created military commission rules nowhere provide for an appeals process that could cure the absence of judicial independence at the trial level. The members of the so-called "Review Panel" – the body that reviews decisions of the military commissions – are appointed by the Secretary of Defense, who also names the Appointing Authority. Rev. MCO No. 1 § 6(h)(4). The Military Commission Order does not guarantee Review Panel members any security of office or compensation, thus failing to assure that Review Panel members will not be removed or threatened with removal if they should rule against the government on appeal.

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[16] U.S. Dep't of State, *Country Reports on Human Rights Practices, 2004: Yemen* (Feb. 28, 2005), *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41736.htm.

The President's failure to provide for an independent appellate review process for military commissions stands in stark contrast to the State Department's frequent criticism of countries whose military court decisions are unreviewable. During the past year, for example, the United States has criticized Uganda's military justice system because "a sentence by a military court, including the death penalty, could be appealed only to the senior leadership" of the ruling party.[17]

In short, the military commission that would try Mr. Hamdan lacks structural guarantees of judicial independence, and thus more closely resembles the kind of judicial systems that the United States routinely criticizes around the world than the independent judicial system that our country has administered for over two hundred years. Despite the President's assurance that the military commission trials will be "full and fair," the Executive branch subverts the rule of law by creating and administering a system of justice which offers no guarantee that the judges will be free from undue executive influence.

## II. THE MILITARY COMMISSIONS VIOLATE THE RULE OF LAW BECAUSE THE PROSECUTOR HAS THE POWER TO SET AND CHANGE THE RULES.

Under the military commission system, the President not only controls the judges, he also makes the rules that

[17] U.S. Dep't of State, *Country Reports on Human Rights Practices, 2004: Uganda* (Feb. 28, 2005), *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41632.htm.

those judges must apply. A system where the executive has plenary control over criminal trial procedure offends the rule of law because it lacks the checks and balances that prevent arbitrariness in the administration of established law. As Justice O'Connor explained, "[w]hen the roles of lawmaker and judge are played by different state actors, the danger of governmental arbitrariness is greatly diminished. When the power to make laws is separated from the power to interpret and apply them, the very foundation of the Rule of Law – the principle that adjudication be conducted on the basis of previously established rules – is strengthened." Sandra Day O'Connor, *Vindicating the Rule of Law: The Role of the Judiciary*, 2 Chinese J. Int'l L. 1, 2 (2003).[18] Consistent with this understanding, in its efforts to promote the rule of law abroad, the United States regularly criticizes countries that substitute rule *by* law set by executive fiat for the genuine rule of law. In societies where rule by law, rather than rule of law prevails, the executive has unlimited power to set and change criminal trial procedures. *See, e.g.*, U.S. Dep't of State, *Country Reports on Human Rights Practices, 2004: Eritrea* (Feb. 28, 2005) ("[S]pecial courts . . . allowed the executive branch to mete out punishment without respect for due process.");[19] U.S.

[18] *See also* Magna Carta, Chapter 39 (1215) (limiting the king's power to make rules by providing that "[n]o freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed . . . except . . . *by the law of the land*.") (emphasis added); English Bill of Rights (1689) (establishing that "the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal"); ICCPR § 9.1 ("No one shall be deprived of his liberty except on such grounds and in accordance with such procedures *as are established by law*") (emphasis added).

[19] *Available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41602.htm.

Dep't of State, *Country Reports on Human Rights Practices, 2004: Burma* (Feb. 28, 2005) (courts appointed by the ruling party "adjudicate cases under decrees promulgated by the [ruling party] that effectively have the force of law.").[20]

In the past four years alone, the President has repeatedly utilized his plenary power over military commissions to change or to propose changing the military commission procedures five times.[21] Moreover, the President has used his plenary power to create several rules that bias the proceedings against the accused in violation of four fundamental fair trial norms recognized by this Court and U.S. treaty obligations.

First, although "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as essential to a fair trial," *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988), the President has chosen to suspend Mr. Hamdan's right to be present at his own trial, in violation of both treaty law and fundamental fairness. The right to be present at one's own trial is a core fair trial guarantee, recognized both in the United States and abroad. The Constitution guarantees the accused the right to be present at his trial. *See* U.S. Const. amend. VI. The ICCPR – which the United States has ratified and

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[20] *Available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41637.htm.

[21] *See Pentagon Alters Rules in Trials of Guantanamo Detainees*, Wash. Post, Sept. 1, 2005, at A6; *Changes Proposed for Guantanamo Trials*, Wash. Post, Mar. 27, 2005, at A12; John Mintz, *Pentagon to Alter Military Tribunal Rules*, Wash. Post, Feb. 6, 2004, at A11; John Mintz, *Pentagon to Review Rules for Tribunals*, Wash. Post, Nov. 26, 2003, at A17; Charles Lane, *Terrorism Tribunal Rights Are Expanded*, Wash. Post, Dec. 28, 2001, at A1.

signed, along with 153 other countries – provides that every criminal defendant has the right "[t]o be tried in his presence." ICCPR § 14.3(d). Nevertheless, the military commission procedures not only provide that a defendant can be excluded from his own trial, *see* Rev. MCO No. 1 § 6(b)(3), in fact Mr. Hamdan has already been so excluded. *See Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 171 (D.D.C. 2004) ("Counsel made the unrefuted assertion at oral argument that Hamdan has already been excluded from the voir dire process . . . "). The President's plenary control over the rules allowed him to mandate this drastic departure from universally accepted fair trial procedure.

Second, although the exclusion of evidence obtained through torture is a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Brown v. Mississippi*, 297 U.S. 278, 285 (1936), the President has authorized military commissions to decide cases relying upon the use of evidence obtained through torture. The President has instructed the commission to admit any and all evidence that has "probative value to a reasonable person." Rev. MCO No. 1 § 6(d)(1), with no exclusion for evidence procured by torture. Yet the Supremacy Clause, U.S. Const. art. VI, which renders ratified treaties the Supreme law of the land, expressly binds all United States governmental actors to exclude all evidence obtained through torture from any court under its jurisdiction. Under the Convention Against Torture, which the United States and 140 other countries have ratified and signed, signatories must "ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings." Convention Against Torture and Other Cruel, Inhuman, and Degrading

Treatment or Punishment, Dec. 10, 1984, art. 15, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85. By military commission regulation, the President has sought to deprive military commission defendants of this most fundamental of fair trial guarantees, a prohibition on evidence that is recognized worldwide. *See, e.g.*, *A v. Secretary of State*, [2005] U.K.H.L. 71 at ¶ 82 (excluding all evidence obtained through torture from British courts, observing that such evidence "corrupts and degrades the state which uses it and the legal system which accepts it"); *People v. Gerald and Patrick O'Brien*, [1965] I.R. 142, 148, 1 Frewen 516 ("To countenance the use of evidence extracted or discovered by gross personal violence would, in my opinion, involve the State in moral defilement."); Laws of the State of Israel, Military Justice, § 477 (1955) ("A military court shall not admit the confession of an accused as evidence unless it is convinced that the accused made it of his own free will.").

Third, the President has dispensed with trial rights guaranteed to Mr. Hamdan by the Geneva Conventions. The United States has signed and ratified the Geneva Conventions Relative to the Treatment of Prisoners of War, adopted Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 134 (hereinafter "GPW"). Under the GPW, Mr. Hamdan must be presumed to be a prisoner of war until a "competent tribunal" has determined that he is not entitled to that status. GPW art. 5. Until then, he has a right to be tried under the same procedures that the United States applies to its own soldiers. GPW art. 102. The military commissions do not, however, provide the procedural protections afforded by a U.S. court-martial. *See* Pet. 28. Even if a competent tribunal were to determine that Mr. Hamdan is an enemy combatant, he would be entitled to

be tried pursuant to "fundamentally fair" proceedings. GPW art. 3. Yet the military commission procedures fail even that test. *Id*. Despite the significant objections of high-level military and diplomatic officers, the President has simply invoked a claim of plenary power under Article II of the Constitution to set aside a binding treaty obligation and to disregard our obligations under the Geneva Conventions.[22]

Finally, the President has derogated from trial rights guaranteed by the law of war, of which the Geneva Conventions form an integral part. The Geneva Conventions codify a part of the customary international law of war. *See* Commentaries on the GPW at 471. The United States courts and Congress alike has endorsed the understanding that breaches of the Geneva Conventions violate this customary law. *See* 18 U.S.C. § 2441(c)(1) (2003) (defining violations of the law of war as breaches of the Hague or Geneva Conventions); *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995) ("the law of war [w]as codified in the Geneva Conventions."); *see also* 151 Cong. Rec. S 923, 960 (Senate Majority Leader Bill Frist echoing the view of Attorney General Alberto Gonzales that the "Geneva Conventions govern[ ] the laws of war."). Far from disputing this fact, the President has recognized the law of war as the legal basis for trying Mr. Hamdan in the first place. *See* Government Op. Cert. at 2. "If [a military defendant] cannot enjoy the immunities attaching to the character of a prisoner of war . . . [neither should he be]

[22] *See* Letters from Judge-Advocate Generals, February – March 2003, *available at* http://balkin/blogspot.com/jag.memos/pdf (arguing that U.S. failure to apply Geneva Conventions to detainees harms U.S. soldiers abroad and violates international law).

subject to their pains and penalties." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 131 (1866). If Mr. Hamdan is to be tried under the laws of war, it follows that he should also be protected by the rights guaranteed to detainees in the Geneva Conventions. Yet the President's power to change repeatedly the rules governing the commission has allowed him to rely upon the law of war to try Mr. Hamdan, while at the same time depriving Mr. Hamdan of the procedural protections that the law of war provides.

The military commission system cannot be squared with the rule of law because the prosecutor wields the power to make and change the rules that the commission's judges apply. The President's plenary power to alter trial procedures before, during, and after trials has already biased military commission trials against the accused. And because the President asserts a unilateral power to set and change trial procedures at any time, the executive is apparently free to change any and all of the military commission procedures in the future, to the detriment of the accused. Even if this Court were to find that Congress had somehow authorized the President to institute military commissions, Congress certainly did not give the President authority to create military commissions where the prosecutor can not only control the judges, but also claims the power to make and arbitrarily change the rules of decision that the judges will apply.

## III. BY OFFENDING THE RULE OF LAW, THE MILITARY COMMISSIONS UNDERMINE OUR FOREIGN POLICY.

Amici believe that the executive branch's formation and operation of military commissions that violate the rule of law has undermined America's ongoing efforts to

promote the rule of law abroad and to protect U.S. citizens from unfair trials in other countries. Not only have these actions given ammunition to other nations who wish to view the United States as hypocritical, they have also been used by such nations to justify their own repressive policies, citing the U.S.'s deviations from the rule of law. Ironically, military commissions that were intended to mete out punishments upon terrorists now actually hinder the U.S.'s ability to combat terrorism. The flawed system of military commissions alienates current and potential allies and deprives us of the credibility we need effectively to fight a war against terrorism.

### A. The Military Commissions Undermine our International Efforts to Promote the Rule of Law

Promoting the rule of law has long been an important priority of U.S. foreign policy. Yet convening military commissions that lack judicial independence and claiming unfettered authority to unilaterally establish and amend rules in violation of fundamental fair trial guarantees not only undermines the rule of law, but also diminishes the moral authority the United States regularly invokes to promote the rule of law abroad. As amicus former Secretary of State Madeleine Albright has explained, "[n]o other aspect of our policy has done as much [as the Guantanamo detentions and trials] to squander support for the United States and to create doubts about our commitment to our own ideals."[23] In an internal

[23] Statement of Madeleine K. Albright, Nat'l Comm. on Terrorist Attacks upon the United States, Mar. 23, 2004, *available at* www.9-11commission.gov/hearings/hearing8/albright_statement.pdf.

memorandum written in 2002, the prior Secretary of State in the current Administration, Secretary Colin Powell, expressed his own concern that the executive's policies would "undermine public support among critical allies" and would have "a high cost in terms of negative international reaction."[24] A growing chorus of voices, including members of the current administration, has echoed these views.[25]

The flawed U.S. military commissions have visibly undermined a long United States diplomatic tradition of vociferously objecting to foreign use of military commissions. During the 1990s, for example, the U.S. vigorously protested to (and ultimately imposed economic sanctions upon) Nigeria for its military trials of human rights activist Ken Saro-Wiwa and eight others (all of whom were later executed), as well as the conviction by military tribunal of Olusegun Obasanjo, who after the U.S. protest was eventually elected (and now serves as) Nigeria's President.[26]

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[24] Memorandum from Colin L. Powell, Secretary of State, to Counsel to the President 2 (Jan. 26, 2002), *available at* http://www.slate.com/features/whatistorture/LegalMemos.html.

[25] *See, e.g.*, Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. Times, Oct. 24, 2004, at A1 (John A. Gordon, a retired Air Force general and former deputy C.I.A. director who served as both the senior counterterrorism official and homeland security adviser on President Bush's National Security Council staff, stated that "[t]here was great concern that we were setting up a process that was contrary to our own ideals.")

[26] U.S. Dep't of State, *Country Reports on Human Rights Practices, 1996: Nigeria* (Jan. 30, 1997), *available at* http://www.state.gov/www/global/human_rights/1996_hrp_report/nigeria.html ("The Government's reliance on tribunals, which operate outside the constitutional court system, and harsh decrees prohibiting judicial review seriously

(Continued on following page)

The United States has registered particularly strong diplomatic protests when U.S. citizens are subjected to military commission proceedings. When U.S. citizen Lori Berenson was sentenced to life in prison before hooded judges by a secret Peruvian military court, the U.S. rightly protested,[27] demanding a trial that met "internationally accepted standards of openness, fairness, and due process."[28] Similarly, U.S. diplomats criticized the Laotian authorities for orchestrating the trial of U.S. citizen Naw Karl Mua, alleging that his trial failed to meet "international standards of justice."[29] When the United States so visibly deviates from the rule of law, it blunts the force of its own criticism. The U.S. system of military commissions now endangers Americans overseas by undermining our government's ability to protest effectively when our own citizens are subjected to unfair foreign trial procedures.

Several of our diplomatic partners have already taken note of the United States' double standard. For example, Colombians have argued that for the United States, "[anti-terrorism measures] are to defend democracy, liberty, and

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undermine the integrity of the judicial process and often result in legal proceedings that deny defendants due process, as in the 1995 cases of Ken Saro-Wiwa and eight others (who were executed) and former Head of State Olusegun Obasanjo (who was convicted by a secret military tribunal).").

[27] Clifford Krauss, *20-Year Sentence for New Yorker After 2nd Terrorism Trial in Peru*, N.Y. Times, June 21, 2001, at A1.

[28] U.S. Dep't of State, *Country Reports on Human Rights Practices, 2000: Peru* (Feb. 23, 2001), *available at* http://www.state.gov/g/drl/rls/hrrpt/2000/wha/827.htm.

[29] Briefing by Richard Boucher, Spokesman, U.S. Dep't of State (June 30, 2003), *available at* http://lists.state.gov/SCRIPTS/WA-USIAINFO.EXE?A2=ind0307a&L=dosbrief&D=1&O=D&F=&S=&P=175.

the citizens' rights, but in our country they are called authoritarian measures that violate human rights."[30] Moreover, an increasing number of nations have used the United States as an example to justify their deviations from the rule of law.[31] In Indonesia and the Philippines, "local governments are exploiting Sep. 11 and the war against terrorism to stifle" democratic movements.[32] In Indonesia, the military for a time cited America's use of Guantanamo as a detention site to justify building an offshore prison camp to hold suspected terrorists from Aceh.[33] As Daniel Benjamin, a former National Security Council official, has noted, "[t]oo many regimes have used the war on terror to put excessive pressure on groups they view as threatening."[34] In Egypt, for example, the

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[30] *See Legislacion: Arma de Doblo Filo*, Semana, Dec. 12, 2003, *cited in* Neil Hicks, *The Impact of Counter Terror on the Promotion and Protection of Human Rights: A Global Perspective* 4-5 (Sept. 2004), *available at* http://www.humanrightsfirst.org/defenders/pdf/Storrs_speech_091104.pdf.

[31] *Cf.* Jamie Fellner, *Prisoners of War in Iraq and at Guantanamo; Double Standards*, Int'l Herald Tribune, Mar. 31, 2003 ("At risk are not only the rights of the individuals who are detained today: by ignoring the clear mandates of international law, the United States invites every other country, including Iraq, to do the same.").

[32] Tim Shorrock, *U.S. Narrow Focus on Terror a Mistake*, Asia America Voices, www.ips.org/asiaamerica/asianvoices/indonesia.html (Statement of Osman Bakar, Professor at Georgetown University).

[33] Jane Perlez, *Indonesia Says Drive Against Separatists Will Not End Soon*, N.Y. Times, July 9, 2003, at A3.

[34] *Id.*; *see also* Shehu Sani, *U.S. Actions Send a Bad Signal to Africa; Inspiring Intolerance*, Int'l Herald Trib., Sept. 15, 2003 ("The insistence by the Bush administration on keeping Taliban and Al Qaeda captives in indefinite detention in Guantanamo Bay, Cuba, instead of jails in the United States – and the White House's preference for military tribunals over regular courts helps create a free license for tyranny in Africa.").

government extended for another three years its controversial emergency law, which allows it to detain indefinitely suspected national security threats, to ban public demonstrations, and to try citizens before military tribunals.[35] President Mubarak justified the extension by directly referring to the military commissions, which, according to President Mubarak, proved that Egypt was "right from the beginning in using all means, including military trials," to combat terrorism.[36]

The UN Special Rapporteur on Independence and the Judiciary has summarized the trend this way:

> Based on the doctrine of counter-terrorism and sometimes even taking inspiration from the status of "enemy combatant," the governments of many States have adopted or strengthened legal instruments giving them powers of detention beyond all judicial control which, depending on the context, they use to detain terrorist suspects, political opponents, refugees or asylum seekers.[37]

Were this Court to uphold the flawed U.S. military commissions, it would further diminish our moral authority abroad and give cover to foreign governments

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[35] Sarah Meyers, *Egyptian Parliament Extends Emergency Laws by Three Years*, World Markets Research Ctr., Feb. 24, 2003.

[36] He went on to say, "There is no doubt that . . . September 11 created a new concept of democracy that differs from the concept that Western states defended before these events, especially in regard to the freedom of the individual." Steve Negus, *Egyptian Justice, US-Style*, Nation, Jan. 28, 2002, at 7.

[37] *See* Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, U.N. ESCOR, Comm'n on Human Rights, 61st Sess., para. 36, Doc. No. E/CN.4/2005/60 (2005), *available at* http://www.ohchr.org/english/issues/judiciary/annual.htm.

who would "follow our lead" in taking measures that violate the rule of law in the name of fighting terrorism.

### B. Violations of the Rule of Law by Military Commissions Will Compromise the United States' Ability to Fight the War on Terror

The military commissions have strained the relationship of the United States with its closest ally, the United Kingdom. In critiquing the military commissions, Britain's attorney general noted that, "[w]e in the UK have been unable to accept that the US military tribunals proposed for those detained at Guantanamo Bay offer sufficient guarantees of a fair trial in accordance with international standards."[38] British Foreign Secretary Jack Straw has observed that "the military commissions, as presently constituted, would not provide the type of process which we would afford British nationals."[39] And in its annual human rights report for 2004, the UK Foreign Office stated that Her Majesty's "[g]overnment made clear to the US that the UK had strong reservations about the military commissions."[40]

Other allies have been similarly critical of the U.S. military commission system. A foreign ministry spokesman for the Government of Spain has said, "if we're talking about a tribunal in the United States with summary procedures and military judges, then these are

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[38] Vikram Dodd, *Blair Makes Secret Plea to Bush on Guantanamo*, Guardian (UK), June 26, 2004, at 1.

[39] *Britons Freed*, Guardian (UK), Feb. 20, 2004, at 5.

[40] U.K. Foreign & Commonwealth Office, *Annual Report on Human Rights, 2003* at 19 (Sept. 2003).

not the same conditions that would characterize a trial in Spain or France or England or anywhere else in Europe."[41] A spokesman for the European Commission has warned that if a U.S. military commission should apply the death penalty, "this [action] would make the international coalition [against terrorism] lose the integrity and credibility it has so far enjoyed."[42]

The U.S. 9/11 Commission has observed that "[d]issension either at home or abroad on how the United States treats captured terrorists only makes it harder to build the diplomatic, political, and military alliances necessary to fight the war on terror effectively."[43] Accordingly, the 9/11 Commission originally recommended that the U.S. develop guidelines for the treatment of detainees in close cooperation with our allies. In a recent status report, the Commission noted that this objective still remains unfulfilled. *Id.* at 8-9.

The President has repeatedly emphasized that promoting the rule of law abroad is vital to the national security of the United States.[44] Officials of our government regularly assert that good governance and promotion of

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[41] Sam Dillon & Donald G. McNeil Jr., *Spain Sets Hurdle for Extraditions*, N.Y. Times, Nov. 24, 2001, at A3.

[42] Jimmy Burns & Jean Eaglesham, *UK to Confront US over Secret Terror Tribunals*, Financial Times, July 5, 2003, at 1.

[43] *See* 9/11 Public Discourse Project. *Report on the Status of 9/11 Commission Recommendations* at 9 (Nov. 14, 2005), *available at* http://www.9-11pdp.org/press/2005-11-14_report.pdf.

[44] *See* President Bush, Second Inaugural Address (ensuring national security "is not primarily the task of arms . . . Freedom, by its nature, must be chosen, and defended by citizens, and sustained by the rule of law and the protection of minorities."), *available at* http://www.whitehouse.gov/news/releases/2005/01/20050120-1.html.

the rule of law must be part of any comprehensive long-term policy to combat and prevent terror.[45] Yet at the same time, the Executive Branch has developed a system of military commissions that cannot be squared with our own concepts of the rule of law. When the U.S. adopts a tool that is facially inconsistent with the rule of law, it undermines its own credibility in promoting the rule of law abroad, and needlessly sacrifices a critical tool in the global fight against terrorism.

Finally, the Executive Branch claims that when Congress enacted the statutory Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), it somehow authorized the military commissions as a "necessary and appropriate" incident to the war on terrorism. Yet the Executive Branch has nowhere shown that Congress deemed it "necessary" to create an alternative system of military courts when the constitutional system of civilian courts is open and functioning, or that the flawed military commission system is in fact an "appropriate" tool in that important struggle. As this brief has demonstrated, far from being necessary or appropriate, the ill-conceived military commissions have actually undermined our efforts to fight the war on terror. Ironically, a system of military commissions that was originally designed to punish terrorists has become a major impediment to our own ability effectively to fight a war on terror.

[45] *See* Paula J. Dobriansky, Undersecretary of State for Global Affairs, Remarks to the Baltimore Council on Foreign Affairs (Feb. 9, 2004), *available at* http://www.state.gov/g/rls/rm/2004/29184.htm; Kofi A. Annan, *A Global Strategy for Fighting Terrorism*, Toronto Globe and Mail, Mar. 11, 2005, *available at* http://www.un.org/News/ossg/sg/stories/articleFull.asp?TID=3&Type=Article.

## CONCLUSION

To be perceived as providing credible justice in the war on terror, the United States must hold trials that are fair and impartial both in fact and appearance. The current system of military commissions provides neither. Not only do these military commissions betray our commitment to the rule of law, they damage our reputation abroad and undermine our ability to promote the global rule of law as an antidote to terrorism. Nor can the Executive plausibly argue that in enacting the AUMF, Congress authorized as either "necessary" or "appropriate" these ongoing violations of the rule of law.

For the foregoing reasons, this Court should reverse the judgment of the U.S. Court of Appeals for the D.C. Circuit and hold that the rule of law – embodied in the fair trial guarantees of our Constitution and international treaty obligations – bars the *ad hoc* and partial justice offered by the current system of military commissions.

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January 6, 2006

## APPENDIX

**Madeleine K. Albright** served as U.S. Secretary of State and as U.S. Ambassador and Permanent Representative to the United Nations.

**Stephen W. Bosworth** served as Ambassador to the Republic of Korea, Ambassador to the Philippines, Ambassador to Tunisia, Director of the State Department Policy Planning Staff, Principal Deputy Assistant Secretary for Inter-American Affairs, and Deputy Assistant Secretary for Economic Affairs.

**James F. Collins** served as U.S. Ambassador to the Russian Federation and as Ambassador-at-Large and Special Advisor to the Secretary of State for the New Independent States of the former Soviet Union. He also served at the White House on the National Security Council Staff as Director for Intelligence Policy and as Deputy Executive Secretary at the Department of State.

**Robert S. Gelbard** served as Presidential Envoy to the Balkans, Ambassador to Indonesia and Bolivia, and Assistant Secretary of State for International Narcotics and Law Enforcement.

**Lincoln Gordon** served as U.S. Ambassador to Brazil and Assistant Secretary of State for American Republic Affairs.

**Herbert J. Hansell** served as the Legal Adviser of the U.S. Department of State, Member of the Permanent Court of Arbitration, The Hague, and Senior Adviser and Ambassador to the Mideast Peace Negotiations. He served as Adviser to the United States Trade Representative on international investment, and as Adviser to the American

Law Institute Restatement of the Foreign Relations Law of the United States.

**Karl F. Inderfurth** served as Assistant Secretary of State for South Asian Affairs and U.S. Representative for Special Political Affairs to the United Nations.

**Howard F. Jeter** served as Deputy Assistant Secretary of State for African Affairs, U.S. Ambassador to Nigeria and Botswana, and Special Presidential Envoy to Liberia.

**Dennis Jett** served on the National Security Council, was Ambassador to Mozambique and Peru and has had postings in Argentina, Israel, Malawi, and Liberia.

**Robert V. Keeley** served as Career Foreign Service Officer for 34 years, Ambassador to Mauritius, Zimbabwe, Greece, and Deputy Assistant Secretary of State for African Affairs.

**Donald F. McHenry** served as former United States Ambassador and Permanent Representative to the United Nations.

**Alfred H. Moses** served as U.S. Ambassador to Romania and as the President's Special Emissary for the Cyprus Problem.

**James C. O'Brien** served as Special Presidential Envoy for the Balkans, as Principal Deputy Director of the State Department Policy Planning Staff, and as a State Department official.

**Thomas R. Pickering** served as the Under Secretary of State for Political Affairs and was the U.S. Ambassador and Permanent Representative to the United Nations. A Career Ambassador, during his diplomatic career, he also

served as Assistant Secretary of State for Oceans, Environment and Science, Ambassador to The Russian Federation, India, Israel, El Salvador, Nigeria, The Hashemite Kingdom of Jordan, and as Executive Secretary of the Department of State and Special Assistant to the Secretary.

**Peter F. Romero** served as Assistant Secretary of State for the Western Hemisphere and as U.S. Ambassador to Ecuador.

**Cynthia P. Schneider** served as U.S. Ambassador to the Netherlands.

**John Shattuck** served as Assistant Secretary of State for Democracy, Human Rights and Labor, and Ambassador to the Czech Republic.

**Wendy R. Sherman** served as Counselor of the Department of State, Special Advisor to the President and Secretary of State on North Korea, and Assistant Secretary of State for Legislative Affairs.

**E. Michael Southwick** served as Ambassador to Uganda, Deputy Assistant Secretary of State for International Organization Affairs, and as Principal Deputy Assistant Secretary of State for Democracy, Human Rights, and Labor.

**Strobe Talbott** served as Deputy Secretary of State and Ambassador-at-large and Special Advisor to the Secretary of State for the former Soviet Union.

**Peter Tarnoff** served as Under Secretary of State for Political Affairs.

**Frank G. Wisner** is a Career Ambassador, who served as U.S. Ambassador to India, the Philippines, Egypt, and Zambia. He also served as Under Secretary of Defense for Policy, Under Secretary of State for International Security Affairs, and Senior Deputy Assistant Secretary of State for African Affairs.