No. 05-184

In The

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

- versus -

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

Respondents.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS as *AMICUS CURIAE* IN SUPPORT OF THE *PETITIONER*

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GLOSSARY

AW -	Article(s) of War
CSRT -	"Combatant Status Review Tribunal"
DoD -	Department of Defense
EO -	Executive Order
GTMO -	U.S. Naval Base, Guantanamo Bay, Cuba
JAG -	Acronym for "Judge Advocate" - uniformed military lawyer of each branch certified by TJAG to perform judge advocate duties
MCI # -	Military Commission Instruction Number ___ .
MCM -	Manual for Courts-Martial (date)
MCO # -	Military Commission Order Number ___.
POWs -	Prisoners of War
TJAG -	The Judge Advocate General - statutory position of the highest ranking uniformed lawyer for each military service
UCMJ -	Uniform Code of Military Justice

AMICUS CURIAE STATEMENT OF INTEREST[1]
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The National Association of Criminal Defense Lawyers ["NACDL"] is a non-profit corporation with a subscribed membership of more than 13,000 national members, including military defense counsel, public defenders, private practitioners and law professors, and an additional 35,000 state, local and international affiliate members. The American Bar Association recognizes the NACDL as one of its affiliate organizations and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases, both civilian and military. Among the NACDL's objectives are ensuring justice and due process for persons accused of crime, promoting the proper and fair administration of criminal justice and preserving, protecting and defending the adversary system and the U.S. Constitution. The NACDL's *Military Law Committee* is co-chaired by two members with over 50 years of combined military JAG experience.

The NACDL's interest in this case is two-fold.[2] First, the exercise of military jurisdiction via "military commissions" is a little known component of military jurisprudence and is being fundamentally misapplied herein. Second, the structure and current procedures contravene established military and international law.

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[1]No counsel for a party authored this Brief in whole or in part. No person, entity or organization other than the *Amicus Curiae* made a monetary contribution to the preparation and submission of this Brief or to counsel.

[2]Counsel for the Parties have consented to *Amicus Curiae* filing this Brief and such have been filed with the Court.

SUMMARY OF ARGUMENT

Military commissions as part of our jurisprudence were created out of "military necessity" during the Mexican-American War of the 1840's. The necessity was that *in personam* and subject-matter jurisdiction for courts-martial were strictly limited by statute and did not cover civilians, Prisoners of War [POWs], or "war" crimes.[3] Commissions were first used in areas of Mexico under martial law where the civilian courts were not functioning and generally used established courts-martial procedures. In 1863, Congress statutorily recognized these "war courts."

In the intervening years and especially after the enactment of the *Uniform Code of Military Justice* [UCMJ],[4] Congress extensively exercised its "war powers" with considerable legislation pertaining to "military commissions," to include specifically recognizing the right of confrontation, under its textual grants of authority in Article I, § 8, U.S. Constitution. Furthermore, consistent with the provisions of the various 1949 *Geneva Conventions* ratified by the United States, Congress has expanded the *in personam* jurisdiction of the UCMJ, to now include Petitioner for any purported "war crimes," thus negating any actual military necessity for convening a military commission. The military commissions created by Respondents are "incompatible with the express or implied will of Congress. . . ."[5] Constitutionally, there is no "inherent" Presidential authority to create these military commissions and the challenge to their jurisdiction by Petitioner via *habeas corpus* has long been recognized in our military law:

. . . United States courts may, on writ of habeas

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[3]*But see* 18 U.S.C. § 2441, *War Crimes* (enacted in 1996); and 10 U.S.C. § 818 (General court-martial jurisdiction for "war crimes").

[4]Codified at 10 U.S.C. §§ 801 *et seq.*

[5]*Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 637 (1952)(Jackson, J., concurring).

corpus, inquire into the legality of detention of a person held by military authority, at any time, either before or during trial or while serving sentence . . . .[6]

I. "MILITARY COMMISSIONS"

A. Basic History

Before 1847, the military "commission" was an unknown entity.[7] Prior to assuming command of U.S. forces during the Mexican War, General Winfield Scott recognized that there was no legal jurisdiction to try offenders, civilian or military, during a foreign occupation.[8] No federal statute existed either authorizing or establishing a mechanism for trying offenders, so Scott drafted an Order establishing proposed military tribunals.[9] The Secretary of War "recommended legislation that would authorize a military

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[6]*Manual for Courts-Martial* (1917), 18 [hereinafter "MCM"].

[7]Military tribunals other than courts-martial existed. *See generally,* Fisher, *Military Tribunals: Historical Patterns and Lessons,* CRS Report for Congress (July 9, 2004), available on-line at: http://www.fas.org/irp/crs/RL32458.pdf (last accessed January 3, 2006) [hereinafter "Fisher, *Tribunals*"]. Regardless of the nomenclature, the weight of scholarly opinion is that they originated in 1847 during the Mexican War. *See,* Winthrop, *Military Law and Precedents,* 2nd ed., at 832 (1920 reprint) [hereinafter "Winthrop"]; Davis, *A Treatise on the Military Law of the United States,* 2nd ed., at 307 *et seq.,* (1909); Winthrop, *Digest of Opinions of the Judge Advocate General,* at 324 *et seq.,* (1880). Notably, the leading pre-Civil War military law treatise, copyrighted in 1846, makes *no* mention of "military commissions." DeHart, *Observations on Military Law* (1859 pub.).

[8]Fisher, *Tribunals,* 11-12; Winthrop, 832.

[9]Scott created two tribunals: one, "military commissions" for conventional criminal activity, the other was the "council of war" for violations of the "laws of war." Winthrop, *op cit.* By the Civil War these two tribunals had morphed into a single entity, the "military commission."

tribunal, but [Congress] declined to act."[10] The Constitutional authority for military commissions thus began in Justice Jackson's "zone of twilight."[11]

While *Amicus Curiae* is not aware of any authority whereby the constitutionality of General Scott's tribunals or their jurisdiction were legally challenged, the unilateral[12] actions of the military regarding other aspects of the Mexican War, did not fare well. In *Fleming v. Page,*[13] this Court emphatically rejected the military's attempt to declare a captured Mexican city part of the United States.[14] In an analogous situation to General Scott's military tribunals, this Court condemned the military's attempt to unilaterally - but under purported Executive authority - create a Prize Court in Mexico.[15]

Jecker is fundamental in analyzing the Respondents' position and the Court of Appeal's claims of Presidential power under the law of war. This Court simply and squarely *rejected* that claim, holding: "[N]either the President nor any military officer can establish a court in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals in prize cases, ***nor to administer the laws of nations.***" 54 U.S. at 515 [emphasis added].

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[10]Fisher, *Tribunals,* 12 (footnote omitted).

[11]*Youngstown, supra,* 635-38 (1952) (Jackson, J., concurring). *Amicus* submits that there is no *inherent* Presidential power to create such military commissions under our Constitution absent Congressional authorization.

[12]"Unilateral" here is used in the context that there was no express Congressional authorization for the military's actions.

[13]50 U.S. 603 (1850).

[14]"[The President's] conquests do not ... extend the operation of our institutions and laws beyond the limits before assigned to them ***by the legislative power.***" 50 U.S. at 615 [emphasis added].

[15]*Jecker v. Montgomery,* 54 U.S. 498, 512-16 (1852).

Modern American usage of military commissions[16] has been limited to the World War II era. Three significant commission cases were decided by this Court - *Quirin,*[17] *Yamashita,*[18] and *Madsen.*[19] *None* of these cases offer any precedential value to the case *sub judice*, as the limited *in personam* jurisdiction of the then Articles of War was replaced by an expansive *in personam* jurisdictional statute when Congress enacted Article 2, UCMJ, in 1950.[20]

B. The "Necessity" Requirement.

> Military necessity . . . consists in the necessity of those measures which are indispensable for securing the ends of war and which are lawful according to modern usage and usages of war.[21]

Dr. Lieber was a special advisor to Lincoln and his War Department as a recognized expert on the laws of war. Yet, he clearly noted - and the United States adopted - that "military necessity" is limited by the law of war and is not a "blank check" for unfettered Executive action.

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[16]*Amicus* does not include the various *international* military tribunals post-WW II, *e.g.,* Nüremberg and Tokyo, nor those sanctioned under U.N. auspices.

[17]*Ex parte Quirin,* 317 U.S. 1 (1942). *Quirin* did not address the *procedural* and evidentiary issues in that *habeas corpus* action.

[18]*In re Yamashita,* 327 U.S. 1 (1946).

[19]*Madsen v. Kinsella,* 343 U.S. 341 (1952). There are other "military commission" cases from this era, but these are the legally significant ones relevant here.

[20]10 U.S.C. § 802. This took effect in 1951, *after Madsen's* trial.

[21]F. Lieber, *Instructions for the Government of Armies of the United States in the Field,* (1898) [reprint of War Department, General Order No. 100 (April 23, 1863)].

Winthrop in his treatise explains the *legitimate* necessity concept in relation to military commissions and the conundrum faced by General Scott in Mexico:

> The *occasion* for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offenses defined in a written code. It does not extend to many criminal acts, especially of civilians, peculiar to a time of war . . . .[22]

Our military has consistently construed military "necessity" as an *emergency* power, as another respected military scholar noted during the height of WW II and *after* the *Quirin* decision:[23] "[M]ilitary commissions are extraordinary bodies called upon to act in abnormal situations . . . [and] the extent of their power will often raise difficult questions of law."[24]

Fairman's conclusions were not aberrations, but were

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[22]Winthrop, at 831. *Three* facts are key in examining this. Winthrop's observations were made before Congress passed the "concurrent jurisdiction" statute in 1916, currently at 10 U.S.C. § 821; *second,* they were made before Congress enacted a greatly expanded *in personam* jurisdiction statute in 1950, 10 U.S.C. § 802; and *third,* they were prior to the ratification of the 1949 *Geneva Conventions*' limitations on military commissions' jurisdiction. There simply is no "occasion" for using commissions today.

[23]Fairman, *The Law of Martial Rule,* 2nd ed., Chapter X, (1943) ["When the emergency had passed, it is believed that the military tribunals should at once desist from the trial of alleged offenses. . . ." (p. 268)] [hereinafter, "Fairman"]. *See also, United States v. Russell,* 80 U.S. 623, 628 (1872) [Union forces had commandeered a steamer in 1864]: "[I]t is the emergency . . . that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified." The trial of Mr. Hamdan by military commission (versus court-martial) is hardly necessitated at this date by any "war time" emergency.

[24]Fairman, 278.

distillations of military law at the time, including another Civil War era expert, Army Lieutenant Colonel Benét.[25] Benét noted that in "carrying on war," crimes are committed that were not triable by courts-martial nor any civil court - hence, the *jurisdictional* "necessity" for trial by military commission.[26] Five years after Benét's conclusions, the question was presented to the Attorney General. During the Medoc Indian War of 1873, the issue of whether the classic war crime of "perfidy" could be tried by a military commission, arose. Under a flag of truce to discuss a peace treaty, Medoc warriors killed the United States' negotiators. Noting that "no civil tribunal has jurisdiction," the Attorney General concluded that a military commission had jurisdiction to try the offenders.[27]

Winthrop provides the basis for this "necessity" jurisdiction:

> . . . Military Commissions have become adopted as authorized tribunals in this country in time of war. ***They are simply criminal war courts, resorted to for the reason that the jurisdiction of Courts Martial, creatures as they are of statute, is restricted by law*** and cannot be extended to include certain classes of offences ***which in war would go unpunished*** in the absence of a provisional forum for the trial of offenders. [emphasis added][28]

The United States' military formally adopted this

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[25]Benét, *A Treatise on Military Law and the Practice of Courts-Martial,* 6th ed., Chapter XV, "Military Commissions," (1868).

[26]*Id.,* 203.

[27]14 Opn. Atty Gen 249, 252 (June 7, 1873).

[28]Winthrop, *Digest of Opinions of the Judge Advocate General,* 325 (1880). However, the basis for this "necessity" no longer exists due to the expanded *jurisdictional* parameters of the UCMJ.

rationale in the 1908 *Manual for Courts-Martial.*[29] Or, as a noted Civil War historian characterized the legal commentary during that era, they "saw trials by military commission as plugging loopholes in the law in wartime . . . ."[30]

This Court in the context of civilian citizens, has created a relevant corollary to the "necessity" rule: "The exigencies which have required military rule ***on the battlefront*** are not present in areas where no conflict exists."[31] Guantanamo Bay, whatever else it might be, is not a battlefield nor the *situs* of a conflict involving Mr. Hamdan.[32]

Finally, we respectfully submit that the question of the "existence of military necessity is justiciable. . . ."[33] As the *Yasui* Court astutely observed: "[I]f the necessity did not exist, until some political or military authority has faith enough in the position to proclaim a state of martial law, a court which is in fact open, should not find the existence of necessity as a fact."[34]

That is the exact status here - an *ex post facto* decision by the Respondents claiming a fictitious "necessity" to try Petitioner by an *atypical* "military commission." The Executive has the prerogative to try Hamdan, but a false claim of "necessity" cannot imbue jurisdiction in a military commission.

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[29]*MCM* (1908), 6. ["Military Commissions, for the trial of offenders against the laws of war . . . [are] founded in necessity."]

[30]Neely, *The Fate of Liberty: Abraham Lincoln and Civil Liberties,* 180 (1991) [hereinafter "Neely"].

[31]*Reid v. Covert,* 354 U.S. 1, 34-5 (1957) [emphasis added].

[32]Professor Randall in his seminal work, *Constitutional Problems Under Lincoln, rev. ed.,* at xviii (1951), posits: "In thinking of 'military necessity,' one should ask: Necessity for what? . . . If wrongfully applied, military necessity may be a fraud." Chief Justice Rehnquist apparently concurred: "It is all to easy to slide from a case of genuine military necessity . . . to one where the threat is not critical and the power either dubious or non-existent." *All The Laws But One,* 224 (1998).

[33]*United States v. Yasui,* 48 F.Supp. 40, 52 (D. Ore., 1942), *aff'd on other grounds,* 320 U.S. 115 (1943).

[34]*Id.*

Military commissions are creations of necessity - ***not*** the necessity of war, but the necessity of having some "court" available to exercise criminal jurisdiction. Thus, if a general court-martial has both *in personam* and *subject-matter* jurisdiction over Petitioner, no military necessity exists legally or factually, for the use of a military commission.

II. CONGRESSIONAL ACTION

A. Legislative History.

Congress did not act on General Scott's 1847 request for specific legislation authorizing military commissions. That was not a symbol of benign neglect as Congress, to include the Continental Congress, had always taken an active role in exercising its *legislative* prerogatives over military justice. Thus:

- On June 30, 1775, the first *American* "Articles of War" were enacted;[35]
- On September 20, 1776, the *revised* Articles of War were enacted;[36]
- On May 31, 1786, Congress revised portions of the Articles of War;[37]
- On April 10, 1806, Congress substantially rewrote the entire Articles of War;[38]
- On July 17, 1862, Congress authorized the appointment of a "Judge Advocate General," "to whose office shall be returned, for revision, the

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[35]Winthrop, 953.

[36]*Id.*, 961.

[37]*Id.*, 972.

[38]2 Stat. 359 (1806). It should be noted that Congress in Article 74 [2 Stat. at 368] recognized the right of *actual* confrontation when authorizing the limited use of depositions in *non-capital* proceedings. *Crawford v. Washington,* 541 U.S. 36 (2004).

> records and proceedings of all courts-martial and ***military commissions . . . .***"[39]

Thereafter, on September 24, 1862, Lincoln suspended the privilege of *habeas corpus* by Proclamation and directed that:

> . . . all Rebels and Insurgents, their aiders and abettors . . . shall be subject to martial law and liable to trial and punishment by Courts Martial or Military Commission....[40]

As part of the *Military Conscription Act* of March 3, 1863,[41] Congress for the first time exercised its Article I, § 8, power to expressly provide for trial by *military commission* in two separate areas:

1. Section 30, provided for trial by military commission or general court-martial for murder and other crimes of violence by members of the U.S. military; and
2. Section 38, authorized the trial of spies by military commission or general court-martial.

On that same date, Congress also passed the *Habeas Act*,[42] which ultimately formed the statutory basis for the decision in *Ex parte Milligan.*[43] That legislation demonstrated a profound commitment by Congress that the rule of law, not the dictates of the President, would govern those in military custody. Or, as Professor Randall, the noted Lincoln scholar, observed:

> Whereas arrest and releases had previously been at the discretion of the executive, it was now

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[39]12 Stat. 598, § 5 (1862). Mandating "revision" proceedings and records retention are *indicia* of Congressional control.

[40]As quoted in Neely, *op cit.,* 64-6.

[41]12 Stat. 731 (1863).

[42]12 Stat. 755 (1863).

[43]71 U.S. 2 (1866).

> intended that the further holding of prisoners should depend upon ***judicial procedure.*** [emphasis added][44]

Congress further demonstrated its active role involving military commissions with an 1864 amendment to the 1863 *Act.*[45] Specifically, Congress delegated to various subordinate military commanders, consistent with the 1863 Act, the authority to approve certain sentences, stating that § 21 "shall apply as well to the sentence of military commissions as to those of courts-martial . . . ."[46] If anyone at that time thought that the President had "inherent" power and control over military commissions, this 1864 legislation (as well as the 1863 *Habeas Act*) would have been superfluous. *Milligan,*[47] long ago rejected that concept.

After the surrender of the South, Congress effectively placed it under martial law and expressly provided via the *Reconstruction Acts,* for trials by military commissions.[48] But, it was not just the President who felt Congressional scrutiny over the role of military commissions. One McCardle was detained for trial by military commission and sought *habeas corpus* relief. On appeal to this Court and after oral argument but prior to a decision, Congress passed legislation *revoking* this Court's appellate jurisdiction over his *habeas* appeal.[49] Thus, the appeal was dismissed "for want of jurisdiction."[50]

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[44]Randall, *The Civil War and Reconstruction,* 400 (1937).

[45]13 Stat. 356 (July 2, 1864); § 1, modified § 21 of the 1863 Act.

[46]*Id.*

[47]*Ex parte Milligan,* 71 U.S. 2 (1866).

[48]*See, e.g.,* 14 Stat. 428 (1867).

[49]15 Stat. 44 (March 27, 1868).

[50]*Ex parte McCardle,* 74 U.S. 506 (1868). Whether or not this amounted to a *de facto* suspension of the *writ of habeas corpus* under Art.

(continued...)

Congress had now expressly demonstrated its control over military commissions to *both* of the other branches of the federal government. This "expressed will" of Congress under its Article I authority, leaves the President herein little room for discretion under Justice Jackson's third, *Youngstown* category.[51]

In 1874, Congress modified the *Judge Advocate General Act*,[52] mandating that he "shall receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry and ***military commissions***. . . ." This directive, which is still in effect,[53] demonstrates strong (and continued) Congressional interest in the military commission process - something hardly indicative of inherent and unrestricted *Executive* power as claimed herein. *Amicus* respectfully submits that the Commission's rules of procedure called "Instructions," totally violate this statute as the TJAG "revision" process[54] was simply eliminated by Respondents' procedures.[55] The President as Commander-in-Chief, cannot supercede an express act of Congress passed pursuant to its "war powers." *Little v. Barreme,* 6 U.S. (2 Cr.) 170 (1804), settled that issue.

Congressional control over the Commander-in-Chief, as relevant herein, is perhaps best demonstrated by the Act of March 1, 1875: "the President is hereby authorized . . . to make and publish regulations for the government of the Army ***in***

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[50](...continued)
I, § 9, U.S. Const. was not decided.

[51]*Youngstown, supra,* 637-38.

[52]18 Stat. 244 (June 23, 1874).

[53]10 U.S.C. § 3037(c)(3).

[54]The TJAG "revision" process for military commissions under § 3037 is different from that used in courts-martial. 10 U.S.C. § 860(e). This differentiation emphasizes extensive Congressional control over this process.

[55]*See* MCI No. 9, *Review of Military Commission Proceedings* (Revised) (October 11, 2005). All of the MCI's are available on-line at: http://www.defenselink.mil/news/Aug2004/commissions_instructions.html

accordance with existing laws."[56] Anything to the contrary, *viz.,* the MCIs herein, is *ultra vires* under *Barreme, supra.*

The *1916 Articles of War,*[57] constituted a major revision in military jurisprudence and unless placed into the proper construct, will plague the analysis of "military commissions."[58]

Prior to 1916, the *in personam* jurisdiction of courts-martial, was with a few well-defined exceptions, limited to members of our military, while the *subject-matter* jurisdiction was limited to crimes specified in the Articles of War. The new 1916, Article 12, [59] provided *in personam* jurisdiction for general courts-martial over "any person who by the law of war

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[56]18 Stat. 337 (1875)[emphasis added]. That limited delegation is still the law also. 10 U.S.C. § 836(a).

[57]39 Stat. 650 *et seq.* (1916).

[58]To understand the 1916 Articles of War in the context of military commissions, it is imperative to understand the *pre*-1916 jurisprudence. *See, e.g.*, Brig. Gen. E. Dudley, LL.D., USA (ret), *Military Law and the Procedure of Courts-Martial,* 3rd ed. (1910):

> [Military commissions] are organized under the laws of war and under martial law, as a ***military necessity***, for cases involving persons and offenses outside the powers and duties conferred upon the statutory tribunals and therefore beyond the jurisdiction of courts provided for in the Rules and Articles of War. [*Id.*, 17]
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> * * * * *
>
> During the existence of war . . . the military commander is authorized, by the established customs and usages of the laws of war, to organize tribunals for the trial of offenders and offenses, under those laws, ***not subject to ordinary civil or military tribunals.*** In the service of the United States such tribunals are called "military commissions." [*Id.*, 312][emphasis added].

Thus, the "necessity" for a military commission was (a) a lack of *in personam* jurisdiction; or (b) a lack of subject-matter jurisdiction, *i.e.,* "beyond the jurisdiction" of courts-martial.

[59]39 Stat. at 652.

is subject to trial by military tribunals. . . ."[60] This Congressional expansion of court-martial jurisdiction over war crimes and war criminals was feared by the Army Judge Advocate General, General Crowder, to be susceptible to an interpretation that military commissions would become extinct.

To insure that did not happen, Crowder proposed a totally new Article 15,[61] which stated that Article 12, "shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect to offenders or offenses that by the law of war may be triable" by military commission. Congress was shrinking the sphere of "military necessity" for commissions, while simultaneously expanding the jurisdiction of courts-martial.[62]

In practice Crowder's expansive concept of concurrent jurisdiction was historically rejected by the military itself, until the matter *sub judice.*[63]

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[60]*Id.* Again, Congress was taking control - taking the *ad hoc* jurisdiction of military commissions and placing "offenders and offenses" under the Articles of War.

[61]39 Stat. at 653.

[62]General Crowder, when he first proposed Article 15 to Congress in ***1912,*** gave the following rationale:

> I was influenced to propose the article 15, largely perhaps by experience during our second intervention in Cuba. It was not very long after that intervention . . . until two soldiers were charged with homicide of some natives. ***There was no civil court of the United States*** with jurisdiction. Plainly the ***court-martial could not try them,*** as the condition was not war. [emphasis added].

As quoted in *Madsen, supra,* 353, n. 20. This rationale is consistent with the "military necessity" doctrine which is the underlying premise for military commissions. It is also consistent with other historical analysis of Article 15. *See also,* Wiener, *Civilians Under Military Justice,* 305 (1967).

[63]*Compare, U.S. ex rel. Wessels v. McDonald,* 265 F. 754 (E.D. NY, 1920), *app. dismissed per stip.* 256 U.S. 705 (1921). Wessels, an undercover German naval officer, was arrested in New York City during WW I as an enemy alien. Thereafter, "he was arrested by the Naval

(continued...)

> Except where [commissions] have been invested by statute with a jurisdiction concurrent with courts-martial, their authority cannot be extended to the trial of offenses which are specifically, or in general terms, made punishable by courts-martial by the Articles of War or other statutes. (citation omitted) [64]

Amicus submit that this statement reflects the correct (and current) state of the law under the UCMJ. There is no *in personam* nor subject-matter jurisdictional *necessity* to trigger the lawful convening of a military commission to try Hamdan.

B. Comprehensive Legislation - the UCMJ.

After the Second World War, Congress again revamped military law. The result was the UCMJ.[65] It represents a comprehensive and *uniform* exercise of the "war power" textually conferred to Congress in Article I, § 8, of the Constitution. The initial and perhaps most profound change was with the significantly expanded provisions for *in personam* jurisdiction in UCMJ Articles 2 and 3, 10 U.S.C. §§ 802-803. Once again, Congress was taking control by expanding the jurisdiction of courts-martial while simultaneously shrinking

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[63](...continued)
authorities on the charge of being a spy, and is now to be tried by a court-martial of the Navy." *Id.,* 758. He sought *habeas* relief, claiming that he should be tried in federal court. There is no *indicia* that a military commission was considered under Crowder's premise.

[64]Tillotson, *The Articles of War Annotated,* 33 (1942). The current version of Article of War 15, is Article 21, UCMJ, 10 U.S.C. § 821. In view of the expansive *in personam* jurisdiction in the UCMJ [10 U.S.C. § 802], President Truman appears to have adopted Colonel Tillotson's analysis in promulgating the *MCM* (1951), p. 17.

[65]64 Stat. 107 (1950).

the penumbra of "military necessity."[66]

1. Jurisdictional Aspects of the UCMJ.

In addition to the comprehensive expansion of persons now subject to the provisions of the UCMJ, Congress continued in a slightly modified format the provisions of Articles of War 12 and 15 - now Articles 18 and 21, UCMJ [10 U.S.C. §§ 818 and 821]. Article 18, UCMJ, 10 U.S.C. § 818, provides general court-martial jurisdiction over two categories of people:

1. "Persons subject to this chapter;" [67] and
2. "Any person who by law of war is subject to trial by a military tribunal."

Thus, the phrase "any person" makes § 818 truly concurrent with § 821. But, the reverse is *not* true, as 10 U.S.C. § 821's "military commission" jurisdiction is *limited to* "offenders or offenses that by statute[68] or by the law of war[69] may be tried by military commissions. . . ."

Mr. Hamdan is simply *not* an "offender" who is subject

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[66]*Cf., Yamashita, supra,* 19-20, where the Court concluded that the *lack* of Article 2, AW, *in personam* jurisdiction justified trial by military commission which did not comply with the procedural requirements in the then AW. As discussed *infra,* there is *in personam* UCMJ jurisdiction over Hamdan, thus the UCMJ legislatively moots *Yamashita* on this point.

[67]*See,* 10 U.S.C. §§ 802 and 803.

[68]The only statutes authorizing trial by military commission are 10 U.S.C. § 904, *Aiding the Enemy;* and § 906, *Spies.*

[69]*Amicus Curiae* knows of ***no*** "offenders or offenses" that may be tried by military commission under the "law of war." Article 102 of the 1949 *Geneva Convention (III) Relative to the Treatment of Prisoners of War* [GPW], 6 U.S.T. 3316, 3394 (ratified after the UCMJ), mandates trial by the same forum as our military forces are subject to, *viz.,* courts-martial. Art. 102, GPW, moots the interpretation of Art. 63, of the 1929 Geneva Convention in *Yamashita, supra,* 20-23. By 1951, during the Korean War, the government apparently abandoned the *Yamashita* interpretation as Art. 63 was cited as *support* in an annotation to Art. 18, UCMJ, 10 U.S.C. § 818, for general court-martial jurisdiction. *MCM* (1951), at 419.

to the jurisdiction of a military commission under the plain language of § 821. There is no "necessity" to use a commission to insure that any purported "war crimes" do not go unpunished, because Congress has specifically made Mr. Hamdan subject to the *in personam* jurisdiction of the UCMJ and specifically general court-martial jurisdiction under 10 U.S.C. § 818, via *two* provisions in § 802(a):

* * * * *

> (9) Prisoners of war[70] in custody of the armed forces.
>
> * * * * *
>
> (12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, ***persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States*** and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands. [emphasis added]

We respectfully submit that unless and until a competent tribunal determines otherwise, Hamdan is presumptively entitled to POW status.[71] Furthermore, Respondents cannot deny that Mr. Hamdan is a prisoner within Guantanamo Bay

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[70]If there is a *bona fide* "war on terror" that justifies prosecuting Hamdan for alleged "law of war" violations, after he was captured on a battlefield, it is a *non sequitur* to say that he is not a "prisoner of war." That is a *factual* question. Whether he is entitled to POW *privileges* under the GPW is a legal question to be resolved under Art. 5, GPW.

[71]Art. 5, GPW. The Court below erred when it concluded Hamdan can raise his Art. 5, GPW, issue before his military commission. *Hamdan v. Rumsfeld,* 415 F.3d 33, 43 (DC Cir. 2005). The *limited* subject-matter jurisdiction of the military commission precludes overruling the President's decision. 32 C.F.R. § 9.3 (2005). The Court below was also in error when it held, "The President found that Hamdan was not a prisoner of war . . ." *Hamdan,* 415 F.3d at 43. The Presidential "finding" of July 3, 2003, involving Mr. Hamdan never addresses Hamdan's POW status. Available at http://www.defenselink.mil/news/Dec2005/d20051215prtbHamdan.pdf [last accessed: January 4, 2006].

Naval Base, an "area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States" *viz.,* in Cuba - a place that Respondents placed him at while presumably knowledgeable of the UCMJ's provisions.[72] The Respondents simply cannot claim that some mythical military necessity obviates the clear, plain and written will of Congress that Petitioner is subject to the UCMJ by being confined at our Naval Base in Cuba. There is no "concurrent" jurisdiction because there is no underlying jurisdictional *necessity* for a military commission trial in Hamdan's case.

2. *Congress Has Preempted the Field of Military Commissions.*

While General Scott in 1847 may have acted in a "zone of twilight" in the then absence of Congressional authority, today Respondents' actions fly in the face of and are incompatible with the expressed will of Congress.

In addition to the provisions of 10 U.S.C. §§ 818 and 821, discussed above, Congress has enacted legislation pertaining to military commissions in twenty other statutes.[73] These include *inter alia;* (1) Mandating that procedures, modes of proof and rules of evidence in military commissions be consistent with U.S. District Courts *and* the UCMJ;[74] (2)

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[72]*Cf.,* 10 U.S.C. § 802(a)(7), providing UCMJ *in personam* jurisdiction over "Persons in custody of the armed forces serving a sentence imposed by a court-martial." *Kahn v. Anderson,* 255 U.S. 1 (1921).

[73]*See,* Appendix "A" hereto, containing the statutory excerpts.

[74]10 U.S.C. § 836. This is hardly the case herein. "[T]he President may not exceed" the "boundaries" of § 836(a). *Loving v. United States,* 517 U.S. 748, 772 (1996). Furthermore, the Court below was simply wrong in its analysis of *Madsen, supra,* [415 F.3d at 43]. Madsen was tried in February 1950 [343 U.S. at 344], and the UCMJ went into effect in 1951 and played no part in the *Madsen* analysis. The Court below also ignored the legislative history of 10 U.S.C. § 836(a), at *Hearings,* House - (continued...)

Making it a crime to "knowingly and intentionally" fail to enforce or comply with the UCMJ's procedural rules;[75] and (3) Mandating that both the Army and Air Force Judge Advocates General "receive, revise and have recorded the proceedings of . . . military commissions;"[76]

This comprehensive pattern of legislation which is totally *inconsistent* with the procedures and regulations pertaining to the military commission Petitioner is facing, defeats any claim that Congress has somehow authorized the Respondents' actions herein. It also belies any legitimate "military necessity" to try Hamdan by military commission.

III. INTERNATIONAL LAW AND MILITARY COMMISSIONS.

It is axiomatic that "all Treaties made . . . shall be the supreme Law of the Land . . . ." Art. VI, § 2, U.S. Const.

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[74](...continued)
Subcomm. of the Armed Services Comm.; 81st Cong., 1st Sess. [HR 2498] [Testimony Concerning Proposed Article 36, UCMJ]:

Rep. Rivers: "As a result of this, neither the President nor any of the three services have any authority to agree on any rules of procedure ***contrary to the discussion before this committee or the intent of Congress.***"

Mr. Larkin: "I think that is provided, Mr. Rivers: 'shall not be contrary to or inconsistent with this code.'" [at 1015];
* * * * *

Rep. Elston: "The President is bound by this code?"

Col. Dinsmore: "I think so, yes, sir." [at 1016-17].

[75]10 U.S.C. § 898. Notably, 32 C.F.R. Pt. 10, *Military Commission Instructions*, § 10.4 warns military commission participants that a failure to observe applicable procedures may result in "punitive measures imposed under 10 U.S.C. 898. . . ." This coupled with the Military Order of November 13, 2001 [66 F.R. 57833] which directs the military commission at issue herein, which invoked *inter alia* 10 U.S.C. §§ 810 and 836, would strongly suggest that the procedural aspects of the UCMJ *do apply* herein.

[76]10 U.S.C. §§ 3037(c)(3) and 8037(c)(3). The present commission procedures and rules totally ignore these Congressional mandates.

Furthermore, treaties have long impacted on our generic military law, to include the Commander-in-Chief: "It is certainly true that the execution of a contract between nations is to be demanded from, and . . . superintended by the executive of each nation . . . ."[77] Chief Justice Marshall went on to conclude: "[I]n great national concerns where individual rights, acquired by war, are sacrificed for national purposes, the contract . . . ought always to receive a construction conforming to its manifest import . . . ."[78]

A. Military Law, International Law and Military Commissions.

> International treaties further restrict the jurisdiction of military commissions. . . . [the U.S.] has entered into several treaties that affect how or when it can use commissions and the minimum due process necessary at a commission.[79]

Our military jurisprudence has long considered military commissions as "an agency for administering international law."[80] Manifest from that is the premise that treaties govern military commissions.[81] Furthermore, as one commentator notes: "The significance of Geneva Conventions III and IV to

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[77]*The Schooner Peggy,* 5 U.S. (1 Cr.) 103, 109 (1801).

[78]*Id.,* 110. Marshall's observations were echoed by one of the *Quirin* prosecutors, Army TJAG, General Cramer: "In this total war, the rule of law rather than the rule of man, must be preserved." Cramer, *Military Commissions: Trial of the Eight Saboteurs,* 17 Wash. L. Rev. 247 (1942).

[79]MacDonnell, *Military Commissions and Courts-Martial,* March 2002 *Army Lawyer* 19, 30 [citing the four 1949 *Geneva Conventions*].

[80]Miller, *Relation of Military to Civil and Administrative Tribunals In Time of War,* 7 Ohio St. L.J. 188, 193, n. 10 (1941).

[81]Green, *The Military Commission,* 42 Am. J. Int'l L. 832, 838 (1948).

the jurisdictional boundaries of military commissions is considerable."[82]

As early as 1917, the Army TJAG was asked to render a formal opinion concerning German POWs, international law and military commissions. In an Opinion dated December 27, 1917, it was noted that the provisions of the *Hague Convention* of 1909, "are good evidence of what is just and acceptable under international law."[83] The opinion further notes that under AW 12 of the 1916 *Articles of War*, a general court-martial had "jurisdiction" over the POWs. Of remarkable interest however, is the Opinion's recommendation that "it is inadvisable to resort to a . . . military commission in such case."[84]

B. Presidential Precedents.

From at least the time of Calvin Coolidge, American Presidents have *ordered* our military to observe and comply with international law in general and applicable treaties in particular. While the NACDL disagrees strenuously with the Respondents' position that the *Geneva Conventions* (and other treaties) provide no authority for Petitioner's relief herein, their arguments ignore two key facts. First, there is a long history in our military jurisprudence of complying with *international* law and treaties.[85] Second, Presidents have long *ordered* their military subordinates to observe and comply with international law by promulgating appropriate regulations.[86]

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[82]MacDonnell, *op cit.,* 33.

[83]*Opinions of the Judge Advocate General of the Army,* April-December 1917, 276 (1919).

[84]*Id.,* ¶ 6. This Opinion although given shorly after the 1916 "concurrent jurisdiction" statute was enacted, is thus consistent with the "military necessity" concept of military commission jurisdiction.

[85]*See, e.g., The Schooner Peggy, supra.*

[86]*See* DoD Instruction 2000.14 (1994), ¶ 4.1.3, mandating that (continued...)

By Executive Order ["EO"] dated November 29, 1927, President Coolidge promulgated *MCM* (1928).[87] He observed: "The sources of military jurisdiction include the Constitution and international law . . . ." *Id.*,1, ¶ 1. When the UCMJ was enacted in 1950, President Truman promulgated *MCM* (1951).[88] Since many of Truman's military advisors and counsel were the same individuals who worked with Congress on the UCMJ, the *MCM* (1951) is considered to be an authoritative treatise on military jurisprudence and the intent of the UCMJs drafters. Truman's MCM stated the following:

1. "The sources of military jurisdiction include the Constitution and international law. International law includes the law of war. [1, ¶ 1];[89]

2. (Military Commissions) "Subject to any applicable rules of international law or to any regulation prescribed by the President . . . these tribunals ***will be guided*** by the applicable principles of law and rules of procedure and evidence prescribed for courts-martial." [1, ¶ 2][emphasis added];[90]

3. "Certain limitations on . . . military tribunals to adjudge punishments under the law of war are prescribed in international conventions. . . ." [18, ¶ 14b];

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[86](...continued)
"actions to combat terrorism outside the United States . . . comply with applicable Status of Forces Agreements (SOFAs), other international agreements and memoranda of understanding." *See also,* DoD Directive 5100.77 (1998), ¶ 3.1, defining the *Law of War* as encompassing "all international law for the conduct of hostilities binding on the United States . . . including treaties and international agreements to which the United States is a party . . . ." and ¶ 4.1, noting that "It is DoD policy to ensure that . . . [t]he law of war obligations of the United States are observed and enforced by the DoD Components." The DoD publications are available at: http://www.dtic.mil/whs/directives/ [last accessed, January 4, 2006].

[87]Since then all MCMs have been issued as Executive Orders.

[88]EO 10214 (February 8, 1951).

[89]All references here are to *MCM* (1951) [page __, ¶ __].

[90]This self-proclaimed exemption is limited by 10 U.S.C. § 836(a).

4. [Note] "See Articles 45-67, inclusive, Geneva Convention of 27 July 1929 (Prisoners of War)." [413, Art. 2(9), UCMJ];

5. [Note] "Pertinent treaties or executive agreements should be consulted . . . ." [414, Art. 2(12), UCMJ];

6. [Note] " . . . The limitations on the discretion of military tribunals to adjudge punishments against prisoners of war are prescribed in the Geneva Convention on Prisoners of War, 27 July 1929 . . . ." [419, Art. 18, UCMJ];

7. "Congress has adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts and as further defined and supplemented by the Hague Convention." (Citation omitted) [420, Art. 21, UCMJ];

The *MCM* (1969),[91] provided similar instructions and observations. Subsequent MCMs are in accord: *see, MCM* (1984);[92] *MCM* (1995)[93] [same]; and *MCM* (2000)[94] [same]. Most notably, the *MCM* (2005)[95] issued by the President, did ***not*** change any of the foregoing provisions regarding international law, treaties or military commissions.

With this historical *Executive* precedent, *Amicus* respectfully submits that Respondents' position that the *Geneva Conventions* provide no authority for Petitioner's relief, is not only totally without merit, but ignores 76 years of precedent, to include amendments made to the *MCM* during this litigation,

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[91]EO 11476 (June 19, 1969).

[92]EO 12473 (April 13, 1984). RCM 201(a)(3) and its Discussion cites the 1949 *Geneva Convention Relative to Civilians in Time of War*; the Discussion to RCM 201(f)(1)(B)(ii), also cites to this; while Appendix 21's Analysis of the "Sources of military jurisdiction," cites the 1949 *Geneva Convention on Prisoners of War.*

[93]EO 12960 (May 12, 1995).

[94]EO 13140 (October 6, 1999).

[95]Incorporating EO 13262 (April 11, 2002), and EO 13365 (December 3, 2004).

which totally failed to alter or even distinguish this precedent.

IV. UNLIKE THE PROCEDURES HEREIN, MILITARY COMMISSIONS HAVE HISTORICALLY USED THE SAME RULES OF PROCEDURE AND EVIDENCE AS GENERAL COURTS-MARTIAL.

General Scott, the "inventor" of military commissions, mandated that they use "the court-martial procedures of the Articles of War."[96] Winthrop in his seminal work notes that military commissions "will ordinarily be governed upon all important questions, by the established rules and principles of law and evidence."[97] Tillotson's treatise in 1942, concluded:

> In the absence of statutory regulation . . . military commissions are governed as to forms of procedure by the laws of war. The rules which apply to general courts-martial have almost uniformly been applied. . . . their proceedings have been similar and similarly recorded. . . .[98]

The first major treatise to be published after the UCMJ went into effect in 1951, contains authoritative analysis, under Article 36(a), UCMJ, 10 U.S.C. § 836(a):

> Power to prescribe the procedure, including modes of proof . . . was also conferred. The legislative policy with respect to these policies is fairly well declared by the Uniform Code considered as a whole, and as explained in the hearings in the committees of Congress. The

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[96]Note, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission,* 89 Va. L. Rev. 2005, at 2028 (2003) [hereinafter "Tribunal Note"].

[97]Winthrop, 842; *see also,* Dudley, *op cit.,* 314.

[98]Tillotson, 34; *see also,* Tribunal Note, 2039-44.

> powers to prescribe regulations are powers to fill up the details. To the power to prescribe the procedure and modes of proof is coupled a standard, the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts, so that ***the President cannot be said to have an unfettered discretion in exercising the power*** despite the fact that the standard need be followed only 'so far as he deems practicable.' The power does not extend to the making of any rule which affects the substantive rights of an accused person . . . . [emphasis added][99]

While the commentators generally agreed that military commissions would use the same procedures and evidentiary rules as general courts-martial, the actual practices and regulations of the Army after Colonel Winthrop's death in 1899, offer compelling proof that the current procedures are in derogation of accepted military law and practice.

Army Field Manual ["FM"] 27-5, *Basic Field Manual of Military Government* (30 July 1940),[100] stated the generally accepted rule: "The procedure of military commissions ***shall be the same as that of general courts martial***, except insofar as obviously inapplicable." [¶ 27; emphasis added]. Of particular note countering any suggestion that the aberrational procedures

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[99]Brig.Gen. J. Snedeker, *Military Justice Under the Uniform Code*, 31 (1953). The author goes on to note, "Any powers he [The President] possesses to issue regulations relating to military justice must therefore stem from legislation." *Id.,* 39. General Snedeker after examining the jurisdictional issues discussed *supra,* concluded: "[A] military commission, in the absence of martial law or military government, ***has no jurisdiction*** . . . ." *Id.,* 150-51. [emphasis added].

[100]Relevant excerpts are provided in Appendix "B" at A-8, *infra.*

used in *Quirin, supra,* have (or had) any precedential value,[101] is the 1943 edition of FM 27-5, (promulgated a year after *Quirin*). By now the FM[102] was a joint Army and Navy regulation and noted, " . . . ***military commissions follow the procedure of general Army or Navy courts martial,*** except where such procedure is plainly inapplicable. . . ." [¶ 44; emphasis added].

In FM 19-40, *Handling Prisoners of War* (3 November 1952),[103] which post-dated the UCMJ and anticipated the ratification of the 1949 Geneva Conventions, the Army noted: "*. . . **no proceedings*** or punishments contrary to the provisions of the *Geneva Convention relative to the Treatment of Prisoners of War* are allowed." [¶ 12; emphasis added]. Lastly, the 1956 edition of FM 27-10, [104] discusses Art. 102, GPW:

> *Interpretation.* Prisoners of war, including those accused of war crimes against whom judicial proceedings are instituted . . . ***are entitled to the same procedural safeguards accorded to military personnel of the United States who are tried by courts-martial under the Uniform Code of Military Justice or by other military tribunals under the laws of war.*** (See *UCMJ, arts. 2 (9), 18, and 21.).* [¶ 178(b); emphasis added].

A. The *Quirin* and *Yamashita* Anomalies.

Quirin's precedential value is first limited by the fact that significant procedural and evidentiary issues (the deviations

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[101]*See generally* Fisher, *Nazi Saboteurs on Trial* (2003).

[102]*See* Appendix "B" *infra.*

[103]*Id.*

[104]*Id.;* a 1976 revision was made, but does not affect the paragraphs relevant herein. As of January 5, 2006, this FM is still the current version.

from courts-martial practice) were not decided by the Court.[105] Second, the military itself essentially abandoned the procedures utilized in *Quirin,* as the 1943 FM 27-5, *supra,* and current FM 27-10, *supra,* show.[106] For roughly 100 years, the military had successfully used the court-martial model for conducting military commission trials, without any major problems. Indeed, in the subsequent Nazi "invader" prosecution, the government retreated significantly from the *Quirin* model, back towards the court-martial model (albeit not completely).[107] Thus, *Quirin* other than being of historical interest, offers no support for the Respondents.

The *Yamashita* decision offers no help to the Respondents. As noted above, the decision held that because Article 2, AW, did not encompass General Yamashita, he could not avail himself of the procedural protections within the Articles of War. 327 U.S. at 18-20.[108] The UCMJ's expansive Article 2, 10 U.S.C. § 802, *in personam* jurisdictional provisions clearly encompasses Hamdan, and *Yamashita* cannot support the aberrant procedures and rules Respondents are seeking to use in Hamdan's military commission trial.

Quirin and *Yamashita* were aberrations from the long-standing principle that the "rules" governing military commission proceedings and the evidence used therein, would be those most familiar to the members of such commissions, the rules and procedures for courts-martial. Article 36, UCMJ, 10 U.S.C. § 836, allows for no other interpretation. *See, e.g., Hammond v. Squire,* 51 F.Supp 227, 228 (W.D. Wash. 1943) [*Habeas* case from Military Commission], which observed:

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[105]*See* Tribunal Note, 2053 *et seq.*, and Mason, *Inter Arma Silent Legis: Chief Justice Stone's Views,* 69 Harv. L. Rev. 806 (1956).

[106]This also assumes that the military did more than acquiesce to the atypical process and procedures in *Quirin,* handled primarily by the Attorney General personally. *See* Fisher, *Nazi Saboteurs on Trial* (2003).

[107]*Colepaugh v. Looney,* 235 F.2d 429 (10th Cir. 1956), *cert. denied,* 352 U.S. 1014 (1957). *Compare,* Tribunal Note, *supra,* 2059-61.

[108]*See also,* Tribunal Note, *supra,* 2064 *et seq.*

"[T]he military commission so designated was in all respects a court organized as a naval court martial, and its proceedings were conducted in keeping with the rules governing such a tribunal. . . ."

B. The Procedures Denied.

Amicus would note that the source document for the military commissions *sub judice* is the President's Military Order [PMO] of November 13, 2001,[109] as supplemented by the MCOs and MCIs.[110] These procedures have virtually no relation to contemporary courts-martial procedures and rules, and as one commentator has noted, they mark "a half-century leap backward in military legal norms" and "seem to reflect the deliberate incorporation of outmoded rules of procedure that fail to meet contemporary standards of justice."[111]

Specifically, by way of illustration only, *Amicus* would note that military commission defendants are *denied* the following procedural rights guaranteed in general courts-martial under the UCMJ:[112] (1) prohibiting pretrial punishment [§ 813]; (2) charges signed under oath based on personal knowledge or investigation [§ 830]; (3) a formal pretrial investigation with confrontation rights [§ 832]; (4) right against former jeopardy [§ 844]; (5) equal opportunity with prosecution to obtain evidence and witnesses [§ 846]; (6) "legal and competent evidence" [§ 851(c)(1)];[113] (7) a vote of three-fourths of the members for all sentences in excess of 10 years (versus two-thirds) [§ 852(b)(2)]; (8) judicial appeals [§§ 866, 867 & 867a];

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[109]66 Fed.Reg. 57833 (November 16, 2001).

[110]All are officially available on-line at: http://www.defenselink.mil/news/commissions.html [last access: 01/05/06].

[111]Tribunal Note, 2019-20.

[112]All § references are to 10 U.S.C. § ___.

[113]PMO § 4(c)(3), only requires evidence having "probative value to a reasonable person."

(9) a designated military judge to preside [§ 826]; and (10) the right of the accused to be present at all stages of the proceedings [§ 839(a)].

All of the aforementioned UCMJ rights foster justice and the appearance of justice, and as this Court can judicially note, have not impaired military prosecutions of even the most complex cases.[114] Unlike the situation in *Loving, supra,* there is absolutely no *indicia* that Congress has delegated broad powers pertaining to military commissions. To the contrary, it has *limited* Executive discretion in the context of procedures, etc., by prohibiting those "contrary to or inconsistent with" the UCMJ's framework of procedures and modes of proof [10 U.S.C. § 836(a)], as well as the entire legislative scheme.

CONCLUSION

> Certainly, it cannot be assumed that the mere existence of a state of war begot of necessity the military power asserted . . . .[115]

If one traces the "evolution" of what is now 10 U.S.C. § 802, Congress - not the President - has steadily expanded both the *in personam* and subject-matter jurisdiction of courts-martial to both persons and crimes that had not been covered prior to 1863. The doctrine of "military necessity" which spawned military commissions has been steadily eroded since Congress first spoke on this subject. Historical and legal analysis show an inverse relationship between the expansion of courts-martial jurisdiction and the shrinking jurisdiction of military commissions. That coupled with the provisions of the 1949 *Geneva Conventions* mandating a trial forum as applicable to our own military, *viz.,* courts-martial, constitutionally precludes Respondents from trying Mr. Hamdan by military commission - especially as they are now constituted.

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[114]*See, e.g., Loving v. United States, supra.*

[115]*Caldwell v. Parker,* 252 U.S. 376, 385 (1920) [WW I case].

By enacting Article 2(a)(12), UCMJ, 10 U.S.C. § 802(a)(12), Congress has clearly and expressly provided for *in personam* jurisdiction over Petitioner because of the *situs* of his incarceration at our Guantanamo Bay Naval Station. Additionally, through comprehensive legislation Congress has pre-empted the field pertaining to military commissions. As Justice Jackson observed in *Youngstown,* "Courts can sustain exclusive presidential control . . . only by disabling the Congress from acting upon the subject."[116] The Executive cannot ignore or countermand a law passed pursuant to a specific, textual grant of constitutional power to Congress, much less directly violate such a law. Yet, with respect to the power that Congress gave the Army and Air Force TJAGs to "receive, revise and have recorded the proceedings of . . . military commissions;"[117] the President has done just that with the Instructions promulgated for the military commissions herein - instructions that are an anathema to 160 years of military jurisprudence.

The decision of the Court below should respectfully be ***reversed.***

Respectfully Submitted,

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[116]343 U.S. at 637-38.

[117]10 U.S.C. §§ 3037(c)(3) and 8037(c)(3).

APPENDIX A

5 U.S.C. § 551: [Administrative Procedure Act]

(1) "agency" . . . does not include–

* * * * *

(F) courts martial and military commissions;

5 U.S.C. § 701:

* * * * *

(b) For the purpose of this chapter--

(1) "agency" . . . does not include–

* * * * *

(F) courts martial and military commissions;

10 U.S.C. § 802:

(a) The following persons are subject to this chapter:

* * * * *

(9) Prisoners of war in custody of the armed forces.

* * * * *

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

10 U.S.C. § 818:

Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death

when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to ***trial by a military tribunal*** and may adjudge any punishment permitted by the law of war. . . .

10 U.S.C. § 821:

The provisions of this chapter conferring jurisdiction upon courts-martial 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, provost courts, or other military tribunals.

10 U.S.C. § 828:

Under such regulations as the Secretary concerned may prescribe, the convening authority of a . . . ***military commission***, . . . shall detail or employ qualified court reporters, who shall record the proceedings of and testimony taken before that . . . ***commission***. Under like regulations the convening authority of a . . . ***military commission***, . . . may detail or employ interpreters who shall interpret for the . . . ***commission.***

10 U.S.C. § 831:

(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may

be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence ***before any military tribunal*** if the statement or evidence is not material to the issue and may tend to degrade him.

* * * * *

10 U.S.C. § 836:

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, ***military commissions*** and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, ***but which may not be contrary to or inconsistent with this chapter.***

10 U.S.C. § 837:

(a) . . . No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or ***any other military tribunal*** or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. . . .

10 U.S.C. § 847:

(a) Any person not subject to this chapter who -

(1) has been duly subpenaed to appear as a witness before a . . . ***military commission***, . . . or before any military or civil officer designated to take a deposition to be read in evidence before such a court, commission, or board;

* * * * * and

(3) willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which that person may have been legally subpenaed to produce;
is guilty of an offense against the United States.

* * * * *

(c) The United States attorney or the officer prosecuting for the United States in any such court of original criminal jurisdiction shall, upon the certification of the facts to him by the military . . . ***commission***, . . . file an information against and prosecute any person violating this article.

10 U.S.C. § 848:

A . . . ***military commission*** may punish for contempt any person who uses any menacing word, sign, or gesture in its presence . . . .

10 U.S.C. § 849: Depositions.

* * * * *

(d) A duly authenticated deposition taken upon reasonable notice to the other parties, so far as otherwise admissible under the rules of evidence, may be read in evidence or, in the case of audiotape, videotape, or similar material, may be played in evidence ***before any military . . . commission*** in any case not capital . . .

10 U.S.C. § 850:

(a) In any case not capital . . . the sworn testimony, contained in the duly authenticated record of proceedings of a court of inquiry, of a person whose oral testimony cannot be obtained, may, if otherwise admissible under the rules of evidence, be read in evidence by any party before a court-martial or ***military commission*** if the accused was a party before the court of inquiry and if the same issue was involved or if the accused consents to the introduction of such evidence.

10 U.S.C. § 898:

Any person subject to this chapter who -

(1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter; or

(2) knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused;

shall be punished as a court-martial may direct.

10 U.S.C. § 904:

Any person who -

(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or

(2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly;

shall suffer death or such other punishment as a court-martial or ***military commission*** may direct.

10 U.S.C. § 906:

Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a ***military commission*** and on conviction shall be punished by death.

10 U.S.C. § 3037: [Army] Judge Advocate General, Assistant Judge Advocate General, and general officers of Judge Advocate General's Corps: appointment; duties.

* * * * *

(c) The Judge Advocate General, in addition to

other duties prescribed by law -

* * * * *

(3) ***shall receive, revise, and have recorded the proceedings of*** courts of inquiry and ***military commissions.***

10 U.S.C. § 8037: [Air Force] Judge Advocate General, Deputy Judge Advocate General: appointment; duties

* * * * *

(c) The Judge Advocate General shall, in addition to other duties prescribed by law -

(1) ***receive, revise, and have recorded the proceedings of*** courts of inquiry and ***military commissions***; and . . . .

18 U.S.C. § 203:

(a) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly-

(1) demands, seeks, receives, accepts, or agrees to receive or accept any compensation for any representational services, as agent or attorney or otherwise, rendered or to be rendered either personally or by another--

* * * * *

(B) at a time when such person is an officer or employee or Federal judge of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States, in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court, court-martial, officer, or any civil, ***military, or naval commission***; or

* * * * *

shall be subject to the penalties set forth in section 216 of this title.

18 U.S.C. § 3156:

(a) As used in sections 3141-3150 of this chapter–

* * * * *

(2) the term "offense" means any criminal offense, other than an offense triable by court-martial, ***military commission***, provost court, or other military tribunal . . .

* * * * *

(b) As used in sections 3152-3155 of this chapter–

* * * * *

(2) the term "offense" means any Federal criminal offense . . . (other than a Class B or C misdemeanor or an infraction, or an offense triable by court-martial, ***military commission,*** provost court, or other military tribunal).

18 U.S.C. § 3172:

As used in this chapter–

* * * * *

(2) the term "offense" means any Federal criminal offense . . . (other than a Class B or C misdemeanor or an infraction, or an offense triable by court-martial, ***military commission,*** provost court, or other military tribunal).

18 U.S.C. § 3261:

* * * * *

(c) Nothing in this chapter may be construed to deprive a court-martial, ***military commission,*** provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, ***military commission,*** provost court, or other military tribunal.

APPENDIX "B"

ARMY REGULATIONS

Field Manual [FM] 27-5, ***Basic Field Manual of Military Government*** (30 July 1940):

[p, 14] ¶ 27. "PROCEDURE.-a. *Military commissions.-The* procedure of military commissions ***shall be the same as that of general courts martial***, except insofar as obviously inapplicable." [emphasis added];

[p. 17] ¶ 29(c). "Military commissions will keep a separate record of the trial of each case in form ***as nearly as practicable like that of a general court martial.***" [emphasis added];

FM 27-5, Army and Navy Manual of ***Military Government and Civil Affairs*** **(22 December 1943)**:

[p. 51-2] ¶ 40(a) "... ***In general, the rules for army or navy general courts martial will serve as a guide in determining the compositions of military commissions***, including the designation of law members, trial judge advocates, and necessary assistants. The provision for a law member, ***with powers and duties similar to those of a law member of an army general court martial***, promotes sound decisions on matters of law and speed in procedure, and is recommended for such military commissions for both the army and the navy." [emphasis added];

[p.55] ¶ 44 [Procedure] (b): "**Military Commissions.** It is generally advisable to direct that ***military commissions follow the procedure of general Army or Navy courts martial,*** except where such procedure is plainly inapplicable. . . ." [emphasis added].

[p.57] ¶ 46 [Records] (b): "**Military Commissions.,** Military commissions should keep records similar to those of Army or Navy general courts martial."

[p. 58] ¶ 58 [Review] (b): "**Military Commissions.** No sentence of a military commission may be carried into effect until its record shall have been examined by the staff judge advocate of the officer appointing the commission or his successor (see A. W. 46); nor may the sentence of any military commission be carried into effect until it shall have been approved by the appointing officer."

FM 19-40, *Handling Prisoners of War* (3 November 1952):

[iii] **FOREWORD** "The Geneva Conventions of 1949, many provisions of which have been incorporated in this manual, have at the date of publication not come into force as to the United States and are accordingly not yet binding on the United States or its forces. Until the coming into force of the Conventions the provisions of this manual will be given effect only to the extent that the United States has, acting unilaterally and by special directives, directed that the provisions of the Geneva Conventions of 1949 will be applicable in certain designated areas."

[1] ¶ 2. **Scope.** "This manual covers pertinent aspects of the Geneva Conventions of 1949 that pertain to the treatment of prisoners of war. It covers operations of capturing troops; collection; interrogation; evacuation; handling prisoners of war in division, corps, army, and communications zone areas; disciplinary measures; utilization of prisoner-of-war labor; and operations and functions of the military police prisoner-of-war processing company and the military police guard company."

[4] ¶ 5(c). "Such [1949] Geneva Conventions as are binding on the United States in a conflict are binding on all United States troops in the same manner as the Constitution and laws of the United States." (*Sic* - as in original)

[6] ¶ 6(b). "Should any doubt; arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories listed above, such persons shall enjoy the protection of the *Geneva Convention relative to the Treatment of Prisoners of War* ***until such time as their status has been determined by a competent tribunal.***" [emphasis added].

[13] ¶ 12. "As prisoners of war are subject to the laws, regulations, and orders in force in the armed forces of the detaining power, designated officers in the Armed Forces of the United States and military tribunals of the United States are authorized to impose disciplinary and judicial punishment, respectively, pursuant to the provisions of the Uniform Code of Military Justice and the *Manual for Courts-Martial, United States, 1951.* However, if any law, regulation, or order of the United States declares acts committed by a prisoner of war to be punishable, whereas the same acts would not be punishable if committed by a member of the Armed Forces of the United States, such acts entail disciplinary punishments only. **In any event, no proceedings or punishments contrary to the provisions of the *Geneva Convention relative to the Treatment of Prisoners of War* are allowed."** [emphasis added].

FM 27-10, *The Law of Land Warfare* (18 July 1956).[118]

[p. 11] ¶ 13. "... While general courts-martial have concurrent jurisdiction with military commissions, provost courts, and other types of military tribunals to try any offender who by the law of war is subject to trial by military tribunals *(UCMJ, art. 18),* it has generally been held that military commissions and similar tribunals have no jurisdiction of such purely military offenses specified in the Uniform Code of

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[118]A *revision* ("change" in military parlance) was filed in 1976 *amending* portions of the FM, none affect the paragraphs quoted herein.

Military Justice as are expressly made punishable by sentence of court-martial (except where the military commission is also given express statutory authority over the offense *(UCMJ, arts. 104, 106)). **In practice, offenders who are not subject to the Uniform Code of Military Justice but who by the law of war are subject to trial by military tribunals, are tried by military commissions, provost courts, or other forms of military tribunals.***" [emphasis added].

[p. 68-9] ¶ 178(b) [discussing GPW, Art. 102] "*Interpretation.* Prisoners of war, including those accused of war crimes against whom judicial proceedings are instituted, are subject to the jurisdiction of United States courts-martial and military commissions. ***They are entitled to the same procedural safeguards accorded to military personnel of the United States who are tried by courts-martial under the Uniform Code of Military Justice or by other military tribunals under the laws of war.*** (See *UCMJ, arts. 2 (9), 18, and 21.)*." [emphasis added].