No. 05-184

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

—v.—

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Regulations

International Materials

Other Authorities

INTEREST OF *AMICUS*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU was founded in 1920, largely in response to the curtailment of liberties that accompanied America's entry into World War I, including the prosecution of political dissidents and the denial of basic due process rights for non-citizens. In the intervening eight decades, the ACLU has frequently appeared before this Court during other periods of national crisis when concerns about security have been used by the government as a justification to abridge individual rights. This case raises those issues once again. The military commission rules developed by the executive branch call into question both our nation's commitment to fair process, even for those accused of war crimes, and to the system of checks and balances that was designed to safeguard against the abuses of concentrated power. The ACLU therefore has a significant interest in the proper resolution of this case.

STATEMENT OF THE CASE

On November 13, 2001, President Bush issued an order establishing a system of military commissions with jurisdiction to try designated non-citizens for certain alleged terrorist offenses. "Detention, Treatment, and Trial of

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[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part and no person other than *amicus curiae*, its members or its counsel made a monetary contribution to this brief.

Certain Non-Citizens in the War Against Terrorism," 66 Fed.Reg. 57,833. Although that initial order has been supplemented by a series of additional orders and instructions promulgated by the Department of Defense over the past four years, key elements of the commissions have remained unchanged. Commission members are not insulated from command influence. The same senior officials who must approve any charges against a detainee also hear any appeal from a conviction. There is no provision in the rules for ultimate review by an Article III court, and there is no bar to the introduction of coerced testimony in commission proceedings.

Nearly two years after his initial capture in Afghanistan, Hamdan was designated for trial before a military commission after the President declared "that there is reason to believe that [Hamdan] was a member of al Qaeda or was otherwise involved in terrorism directed against the United States." *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 155 (D.D.C. 2004) (internal citation omitted). In essence, the government contends that Hamdan served as Osama bin Laden's driver and bodyguard, and that he participated in a conspiracy to commit terrorism.

Hamdan filed a petition for habeas corpus, which was granted by the district court on two principal grounds. *Id.* First, the district court ruled that Hamdan must to be tried in accordance with the Uniform Code of Military Justice (UCMJ) unless and until a "competent tribunal" determines that he is not entitled to prisoner of war status, as required by the Geneva Conventions. *Id.* at 165. Second, the district court held that the military commission rules developed by the President and the Defense Department were inconsistent with the UCMJ because they did not adequately protect Hamdan's right to confront the evidence and witnesses against him. *Id.* at 172.

The court of appeals disagreed. *Hamdan v. Rumsfeld,* 415 F.3d 33 (D.C. Cir. 2005). It rejected Hamdan's claim that the President had exceeded his authority by establishing military commissions that Congress had never authorized. *Id.* at 38. Contrary to the district court, it concluded that the Geneva Conventions were not judicially enforceable, *id.* at 40, and that any challenge to the adequacy of the commission procedures under the Geneva Conventions could not be brought in any event until the proceedings were concluded. *Id.* at 42. Finally, the court of appeals held that the confrontation rights in the UCMJ cited by the district court applied only to courts martial and not to military commissions. *Id.* at 42-43.

SUMMARY OF ARGUMENT

For reasons set forth at length in other briefs, the President does not have unilateral authority to establish military commissions in the absence of congressional authorization, and the Authorization for Use of Military Force in Afghanistan cannot be read as a "blank check" enabling the President to do whatever he chooses as long as he describes it as a part of the war against terrorism. *Hamdi v. Rumsfeld,* 542 U.S. 507, 536 (2004). Given the structural deficiencies highlighted in this brief, it is implausible to assume that Congress ever in fact authorized the military commission system that Hamdan is challenging.

The military commission rules, as they now exist, do not guarantee an independent trial court, do not provide for impartial appellate review, and do not prohibit the use of coerced testimony despite extensive evidence that coercive interrogation techniques have been used at Guantánamo Bay and elsewhere. In short, they do not provide a fair trial

before a fair tribunal under any recognized set of legal standards, whether those standards are derived from the Constitution, our international treaty commitments, customary international law, or the Uniform Code of Military Justice. At a minimum, this Court should require a clear statement from Congress before it is deemed to have departed so dramatically from established legal norms. Here, there is none.

The fundamental unfairness of these military commissions is further compounded by their discriminatory reach. Congress has authorized military commissions in the past, but it has never previously drawn a distinction between citizens and non-citizens. That is not surprising. By their very nature, military commissions impose punishment, and both this Court and Congress have repeatedly insisted that punishment be imposed under a uniform set of rules that applies to citizens and non-citizens alike. There is no reason in this case to test the limits of that constitutional rule. But there is ample to reason to be skeptical of any claim that Congress authorized the President to abandon that tradition of evenhanded treatment without discussion and *sub silentio.*

ARGUMENT

I. THERE IS NO BASIS FOR ASSUMING THAT CONGRESS INTENDED TO AUTHORIZE MILITARY COMMISSION RULES THAT FAIL TO MEET EVEN THE MINIMUM STANDARDS OF IMPARTIALITY AND FAIRNESS

The military commission system devised by the President and Secretary of Defense to prosecute detainees whose guilt they have already publicly declared is so

fundamentally flawed that the "risk of erroneous deprivation of a detainees's liberty" – or even his life – "is unacceptably high." *Hamdi,* 542 U.S. at 532-33 (2004). The commission system fails to afford defendants the most rudimentary and irreducible requirements of a fair trial, including an impartial arbiter of fact and law, an adequate and neutral review process, and protection against the use of coerced and unreliable evidence.[2] Moreover, the commission's flawed rules are subject to change, *ad hoc* and on the fly, by the very officials who devised and administer them, such that defendants have no guarantee that the rules will not be altered during trial to suit the government's political objectives.

Far from a handful of procedural shortcomings that could perhaps be corrected through post-conviction review, the flaws inherent in the commission system are structural in nature and demand an immediate remedy because they preclude altogether an impartial and reliable evaluation of guilt or innocence. Though the government has elsewhere argued otherwise, it is beyond reasonable dispute that the government cannot operate military tribunals without affording *some* fundamental rights to terrorism suspects; otherwise, nothing would prevent the government from

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[2] The military commission system contains numerous additional serious deficiencies that, at a minimum, are less likely to be remedied because of the structural flaws discussed above. For example, the rules permit the use of secret evidence to which defendants and their civilian lawyers will have no access, even if that evidence is not classified (Military Commission Order ("MCO") No. 1 § 6(D)(5)); there is no remedy for the systemic violation of defendants' speedy trial rights; defendants do not have the power to require the commission to subpoena witnesses or documents, even if such evidence is crucial to the defendant's case; and proceedings may be held in secret and may exclude the defendant and his civilian counsel, notwithstanding counsel's security clearance, and with no requirement of findings on the record setting forth the reasons for court closure (MCO No. 1 § 6(B)(3)).

simply executing the detainees without any trial at all. *Cf. Gherebi v. Bush,* 374 F.3d 727, 738 (9th Cir. 2004) (noting government's argument that no legal authority would prevent it from "engaging in acts of torture" or "summarily executing" Guantánamo detainees).

By any recognized legal standard, these commissions are manifestly deficient. Were Congress expressly to authorize such biased and arbitrary proceedings, this Court would be squarely faced with substantial questions as to the scope and applicability of protections guaranteed by the Constitution, our treaty obligations, customary international law, and the Uniform Code of Military Justice. In the absence of such express authorization, this Court should not construe a general force authorization enacted days after the terrorist attacks, or any other general statutory provision, as providing authority for military commissions that are so fundamentally inconsistent with existing law and past practice.

A. The Military Commission Process Violates The Core Principle Of Impartial Adjudication

This Court has held that "a fair trial in a fair tribunal is a basic requirement of due process," and that "a necessary component of a fair trial is an impartial judge." *Weiss v. United States,* 510 U.S. 163, 178 (1994) (internal citation omitted). Fairness requires not only "an absence of actual bias in the trial of cases," but also rules and safeguards "to prevent even the probability of unfairness." *In re Murchison,* 349 U.S.133, 136 (1955). The military commissions at issue do not merely lack important protections against partiality: by their very structure and composition, they promote the appearance of bias.

Under the commission system, an "Appointing Authority" controls the make-up of the commission panel, the procedure of the commission itself, and, through its influence and predisposition on issues, also potentially controls the verdict of the commission. The Appointing Authority, who is himself appointed by the Secretary of Defense, selects the commission members, including the presiding officer, and may remove them for "good cause." MCO No. 1 § 4(A)(1) and (3). At the same time, the Appointing Authority is responsible for approving and referring criminal charges to the commission on behalf of the executive branch. *Id.* at 6(A)(2). Thus, the very same entity that chooses the judge and jury possesses, as the charging prosecutor, a vested interest in the result.[3]

Meanwhile, there is no requirement that commission members, with the exception of the presiding officer, have any legal experience. Indeed, a member of the commission in Petitioner Hamdan's case, since removed, conceded under questioning by defense counsel that he was unfamiliar with the Geneva Conventions. *See* John Hendren, *Military Trial Opens with a Challenge*, L.A. Times, Aug. 25, 2004. Although recent amendments have shifted some legal responsibilities away from commission members and towards the presiding officer, commission members retain the authority to rule on questions of evidence. MCO No. 1 §§ 4(A)(6) and 6(D)(1). Other legal decisions, including any dispositive questions, will be decided by the Appointing Authority himself on an interlocutory basis. *Id.* at 4(A)(5)(e).

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[3] The original Appointing Authority was Deputy Secretary of Defense Paul Wolfowitz, *see* MCO No. 2, who had previously declared that "the only people that would be subjected to these commissions are . . . guilty of serious terrorist crimes against the United States." Wolfowitz Interview with Jim Lehrer, News Hour, *available at* http://www.dod.gov/transcripts/2002/t03222002_t0321wol.html.

The absence of independence and impartiality is evident not only in the structure of the military commissions but in their actual composition: the presiding officer is an intimate and longtime friend of the Appointing Authority and has stated that he does not believe Guantánamo detainees possess any "speedy trial" rights;[4] some commission members were involved in the capture and interrogation of enemy forces in Afghanistan;[5] and one member, since removed from the commission, has admitted calling the Guantánamo detainees "terrorists."[6] These are not the individuals whom the executive branch would appoint to a tribunal were fairness – or even the appearance of fairness – its paramount concern. Rather, the composition of the tribunal is consistent with the accusation by former members of the prosecuting team that the commission's members were handpicked to ensure conviction.[7]

The structural and actual bias of the commission system is fundamentally at odds with constitutional due process requirements, and is inconsistent with international human rights law and with the UCMJ. As this Court has recently held, due process requires, at a minimum, that defendants be afforded "a fair opportunity to rebut the

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[4] John Hendren, *Military Trial Opens with a Challenge*, L.A. Times, Aug. 25, 2004.

[5] *See* Vanessa Blum, *Defense Lawyer Challenges Impartiality of Guantánamo Commission Members,* Legal Times, Aug. 26, 2004.

[6] *See* Toni Locy, *U.S. Tribunal Could Lose Members,* USA Today, Sept. 14, 2004, at 5A.

[7] One former member of the military prosecution team has charged that the commission members who will sit as both judge and jury over the tribunals were "handpicked and will not acquit [the] detainees," and has characterized the entire process as "rigged." Neil A. Lewis, *2 Prosecutors Faulted Trials for Detainees,* New York Times, Aug. 1, 2005. A second former commission prosecutor has described the commission system as a "severe threat to the reputation of the military justice system and even a fraud on the American people." *Id.*

Government's factual assertions before a neutral decisionmaker." *Hamdi,* 542 U.S. at 533. The impermissible fusing of prosecutorial and judicial functions is particularly problematic. As this Court as explained, "[i]t would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations." *In re Murchison,* 349 U.S. at 137. Having been involved in the "accusatory process," a judge "cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *Id.* This Court has "jealously guarded" the right to trial by a judge who has no stake in the outcome, because the principle of impartiality "ensur[es] that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerico, Inc.,* 446 U.S. 238, 242 (1980).

Similarly, international human rights law codified in numerous instruments, has long mandated that every person facing criminal punishment has the right to trial by a competent, independent, and impartial tribunal established by law.[8] The Universal Declaration of Human Rights provides unambiguously that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." G.A. Res. 217 A (III), U.N. GAOR, 3rd Sess., Art. 10, 1948. (Universal Declaration of Human Rights). The International Covenant on Civil and Political Rights likewise mandates that, "[i]n the determination of any criminal charge against

[8] *See generally* Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders Aug. 26, 1985 to Sept. 6, 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985).

him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." G.A. Res. 2200 A (XXI), U.N. GAOR, 21st Sess., Art. 14, Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966). That principle, and indeed that language, is echoed in numerous treaties and conventions, including the Third and Fourth Geneva Conventions,[9] the American Convention on Human Rights,[10] the American Declaration of the Rights and Duties of Man,[11] the European Convention,[12] and the African Charter.[13]

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[9] *See* fns 18-20, *infra,* and accompanying text.

[10] "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature." American Convention on Human Rights, Jul. 18, 1978, 1144 U.N.T.S. 123, Art. 8(1) (American Convention). The Convention was signed by the United States on June 1, 1977, but never ratified.

[11] "Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment." American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, *reprinted in* Basis Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82doc.6rev.1 at 17(1992), 1948, Art. XXVI. (Adopted May 2, 1948, by the Ninth International Conference of American States, Bogota, Columbia. As a member state of the Organization of American States (OAS), the United States is bound by the Charter of the OAS (Bogota, 1948) as amended by the Protocol of Buenos Aires, ratified by the United States on April 23, 1968. In accordance with the OAS Charter, the United States is bound to respect the provisions of the American Declaration of the Rights and Duties of Man.)

[12] "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Convention on the Protection of Human Rights and Fundamental Freedoms, Art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 222 (European Convention).

The right to be tried before an impartial tribunal is so basic that the United Nations Human Rights Committee has declared it "an absolute right that may suffer no exception"[14] and has underscored the particular importance of impartiality when military or special courts try civilians.[15] Impartiality "implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties."[16] The European Court has emphasized that judges must not have a "preconceived view on the merits of a case."[17]

The Geneva Conventions have codified this core principle with respect to both prisoners of war and civilians in wartime. The Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III) requires that "[i]n no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally

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[13] "Every individual shall have the right to have his cause heard. This comprises ... the right to be tried within a reasonable time by an impartial court or tribunal."). African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, Art. 7(1), OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

[14] *González del Río v. Peru*, (263/1987), 28 October 1992, Report of the Human Rights Committee, vol. II, (A/48/40), 1993, at 20.

[15] "The Committee notes the existence, in many countries, of military or special courts which try civilians . . . . While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14." U.N. Human Rights Committee, General Comment No. 13: Equality before the courts on the right to a fair trial and public hearing by an independent court established by law (13 April, 1984)

[16] *Karttunen v. Finland*, (387/1989), 23 October 1992, Report of the Human Rights Committee, vol. II, (A/48/40), 1993, at 120, para. 7.2

[17] *Fey v. Austria*, 24 February 1993, 255 Eur. Court. H.R. Ser. A 13, para. 34

recognized." Geneva III, Art. 84, Oct. 21, 1950, 75 U.N.T.S. 135. Willfully depriving a prisoner of war of the rights of a fair and regular trial as prescribed in the Convention, or ordering the same, is a grave breach of the Convention, and is a crime under United States law.[18]

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV) mandates equivalent fair trial protections for any nationals of a state bound by the Convention who, in the case of a conflict or occupation, find themselves in the hands of an adverse party. Geneva IV, Art. 4, Oct. 21, 1950, 75 U.N.T.S. 287. Like Geneva III, moreover Geneva IV proscribes as a grave breach the willful deprivation of the rights of a protected person to a fair and regular trial.[19] Additional Protocol I to the Geneva Conventions,[20] which supplements the rules for protected persons under Geneva IV, mandates that sentences may not be passed, nor penalties executed, except pursuant to a conviction pronounced by an impartial and regularly constituted court.[21] Finally, Common Article Three of the Conventions, which is applicable irrespective of the status of the conflict with Al Qaeda, requires that any trial occur before a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Geneva I-IV, Art. 3(1)(d).

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[18] 18 U.S.C. § 2441

[19] Geneva IV, Art 147. *See also* Art. 5, which allows suspension for some rights mandated by Geneva IV, but reiterates that persons shall not be deprived of the right to fair and regular trial.

[20] Protocol Additional to the Geneva Conventions of Aug. 2, 1949 and Relative to the Protection of Victims of International Armed Conflicts, Art. 147 Dec. 7, 1978, 1125 U.N.T.S. 3 (Additional Protocol I). The U.S. signed but did not ratify Protocol I.

[21] Additional Protocol I, Art. 75(4).

This commitment to fairness and impartiality is also reflected in the UCMJ, which contains numerous safeguards to prevent against bias in the courts-martial system, including an independent judiciary outside the chain of command, 10 U.S.C. § 826(a); selection criteria for courts-martial members that turn on age, education, training, experience, length of service, and judicial temperament, 10 U.S.C. § 825(d)(2); and supervision of the system by Judge Advocates General, "who have no interest in the outcome of a particular court-martial." *Weiss v. United States*, 510 U.S. 163, 180 (1994). All of these protections are notably absent from the military commission rules.

In response to widespread criticism and embarrassing media accounts, the government has recently announced some modifications to the system, but those modifications do not address the inherent flaws in the military commission system. The *ad hoc* changes were made more than a year into the process, without notice to or any input from defense counsel, and were made by the very officials in charge of the prosecutions. There is no guarantee – procedural or substantive – that these same officials will not make further changes at *any* stage of the commission proceedings. As a result, the commission process remains wholly at the whim of those who have a decidedly vested interest in securing convictions.

B. The Commission Process Violates The Core Principle Of Adequate Appellate Review

There is little chance that the deficiencies that mar the military commission process will be meaningfully addressed on appeal. That is because initial review of the commission's decision is entrusted to the same Appointing Authority who referred the charges, selected the

commission's members, and previously ruled on dispositive matters and defense motions. MCO No. 1 § 6(H)(3). It is hard to conceive of a situation in which an Appointing Authority, whose prestige has been so intertwined with a prosecution, would reverse the very convictions that he had sought. And the appeal process is no less skewed at its higher levels.

The Secretary of Defense has appointed a review panel comprised of four members. The panel cannot plausibly be deemed an impartial arbiter. Two members of the review panel served on the Department of Defense panel that crafted the very trial procedures that are likely to form an important basis for appeal. *See* Stephen J. Fortunato, Jr., *A Court of Cronies,* In these Times (June 28, 2004). Another panel member wrote, in a published op-ed piece, that "[i]t is clear that the September 11 terrorists and detainees, whether apprehended in the United States or abroad, are protected neither under our criminal-justice system nor under the international Law of War." *Id.* The fourth member is a close friend of Secretary Rumsfeld, has a vacation home near the Secretary of Defense's, and once bought property from him. *Id.* Under any legal standard, each of the members of the review member should properly be subject to recusal.[22]

The review panel is fundamentally flawed in its procedures as well as its composition. It is not required to read any defense submission or to hear oral argument. MCO No. 1 § 6(H)(4). Because the panel must issue its written

[22] *See, e.g.,* 28 U.S.C. § 455(a) ("Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be question"); *id.* at (b) (same, where judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding").

ruling within 75 days of receipt of the case,[23] defense counsel will have little time to prepare its appellate papers for possible inclusion in the panel's deliberations. *Id.* As with the commission below, the review panel's members may be removed for "good cause," and replaced by the Secretary of Defense – who, along with the President, is the final reviewer of the commission's decision. Military Commission Instruction No. 9 § 4(B)2; MCO No. 1 § 6(H)(5) and (6). The rules do not provide for direct appeal of the executive's determination to any civilian court, including this Court.

That such a system of review falls well below minimal constitutional requirements is beyond dispute. As this Court has stated, a "situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him." *Tumey v. Ohio,* 273 U.S. 510, 534 (1927). It is the "general rule" that "officials acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided." *Id at 522.* The President and the Secretary of Defense, who created these commissions and whose political reputations are bound up in them, and who by design serve as the appellate forum of last resort, have made no effort to hide their views of the tribunal defendants. The President has stated, for example: "I know for certain these are bad people." Guy Dinmore and Cathy Newman, *Iraq Controversies Mar Ovations for Blair,* Financial Times, July 18, 2003. And Secretary Rumsfeld has characterized Guantánamo detainees as "among the most dangerous, best-trained, vicious killers on the face of the Earth." Jess Bravin,

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[23] Prior to the August 31, 2005 amendments, the review was to have been completed within 30 days.

Jackie Calmes, & Carla Ann Robbins, *Status of Guantánamo Bay Detainees is Focus of Bush Security Team's Meeting,* Wall Street Journal, January 28, 2002, at A16.[24]

This utterly deficient appellate review process directly contravenes universal human rights principles as well. For example, the Third Geneva Convention requires that "[e]very prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial." Geneva III, Art. 106. Similarly, the Fourth Geneva Convention, which governs the treatment of civilians, provides that "[a] convicted person shall have the right to appeal provided for by the laws applied by the court. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so." Geneva IV, Art.73.

In crafting appellate rules for courts-martial, Congress enacted a series of requirements that in no way resemble the political rubber-stamp afforded by the commission system. Under the UCMJ, review of a guilty finding in a court-martial is conducted by a judge advocate who has *not* "acted in the same case as an accuser, investigating officer, member of the court, military judge, or counsel . . . ." 10 U.S.C. § 864. An appeal of a conviction then proceeds to a Court of Criminal Appeals comprised of a three-judge panel conforming to uniform rules of procedure, 10 U.S.C. § 866, and, subsequently, to the Court of Appeals for the Armed Forces, 10 U.S.C. § 867. The Court of

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[24] *See also* remarks by Secretary Rumsfeld to Greater Miami Chamber of Commerce (Feb. 13, 2004), *available at* www.defenselink.mil ("[T]he people in U.S. custody are . . . enemy combatants and terrorists who are being detained for acts of war against our country.").

Criminal Appeals is composed of civilian judges who serve fixed terms of 15 years and are not subject to removal by the prosecuting entity. Finally, direct review is available in this Court. 10 U.S.C. § 867a.

By appointing themselves final arbiters of the commission's verdicts, the President and Secretary of Defense have insulated themselves from the political embarrassment that a reversed conviction might cause. By creating a system utterly devoid of checks and balances, they have deprived defendants of fundamental legal protection against executive errors and misdeeds.

C. The Commission Process Permits The Use Of Evidence Obtained Through Coercive Interrogation

This Court has long held that confessions obtained through torture or other "methods . . . revolting to the sense of justice" may not be used in judicial proceedings. *Brown v. Mississippi,* 297 U.S. 278, 286 (1936). Likewise, Congress has prohibited the extraction of incriminating statements through compulsion in court-martial proceedings, and provided that "[n]o statement obtained from any person . . . through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial." 10 U.S.C. § 831(d). Under the commission system however, evidence "shall be admitted if, in the opinion of the Presiding Officer [or a majority of the commission] . . . the evidence would have probative value to a reasonable person." MCO No. 1 § 6(D)(1). This rule is an invitation to torture. In effect, the commissions have been set up to allow the same people who extract information from detainees through torture to use this evidence to adjudicate the guilt or innocence of the defendant.

The fundamental prohibition against the use of evidence secured through torture serves dual functions, protecting both the reliability and the integrity of judicial proceedings. As this Court has explained, "[t]he abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano v. New York*, 360 U.S. 315, 320-321 (1959). Thus, this Court has committed itself to "enforc[ing] the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will." *Blackburn v. Alabama*, 361 U.S. 199, 206-07 (1960). Our Constitution's commitment to human rights is to be contrasted with the attitudes of "governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture"; as this Court has pledged, "[s]o long as the Constitution remains the basic law of our Republic, America will not have that kind of government." *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944).

The prohibition against torture under international law is universal and obligatory, and proscribes in all instances the use at trial of evidence secured through torture.[25] In a recent unanimous ruling, the British law lords

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[25] *See, e.g.*, Universal Declaration of Human Rights, Article 5 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"); The Convention Against Torture and Other Cruel,

resoundingly reaffirmed that principle, holding that evidence obtained through torture was inadmissible, regardless of its source. As Lord Carswell explained: "The objections to the admission of evidence obtained by the use of torture are twofold, based, first, on its inherent unreliability and, secondly, on the morality of giving any countenance to the practice . . . . [T]orture is torture, whoever does it, judicial proceedings are judicial proceedings, whatever their purpose – the former can never be admissible in the latter. " *A and others v. Secretary of State for the Home Department (No 2),* [2005] W.L.R. 193, para. 147, 150 H.L.(D) (internal citation omitted).[26] This principle is reflected in Common Article

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Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, U.N. GAOR, 42nd Sess., June 26, 1987, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], Art. 2(1) and (2) ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction," and "No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture."); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX) U.N. GAOR, 30th Sess., Dec. 9, 1975, U.N. Doc. GA/3452 (1975) ("Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings."); American Convention, Art. 5(2) ("No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."); European Convention, Art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment. ");*see also Filartiga v. Pena-Irala,* 630 F.2d 876, 884 (2d Cir. 1980) ("Having examined the sources from which customary international law is derived – the usage of nations, judicial opinions and the work of jurists – we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between the treatment of aliens and citizens.").

[26] *Available at* http://www.publications.parliament.uk/pa

Three of the Geneva Conventions, which unequivocally prohibits torture, *see* Geneva I-IV, art. 3(1)(a), and in the Third Geneva Convention, which specifies that "[n]o moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused." Geneva III, art. 99.

Unfortunately, concern about the use of torture to secure evidence is far from speculative. Pursuant to litigation under the Freedom of Information Act, the ACLU has obtained concrete evidence that detainees at Guantánamo Bay have been abused during interrogations and during the regular course of their detention. Detainees have been subjected to beatings, sometimes resulting in loss of consciousness; stress positions; extreme temperatures for extended periods of time; sexual humiliation; sexual assault; religious humiliation and manipulation of religious symbols; loud music and strobe lights; sleep deprivation; denial of food and access to bathrooms; and other techniques described by government officials as "highly aggressive."[27] One document recounts the observations of an FBI agent posted to Guantánamo:

> On a couple of occasions, I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defecated on themselves and had been left there for 18, 24 hours or more. On one occasion, the air conditioning had been turned down so far and the temperature was so cold in the room,

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/ld200506/ldjudgmt/jd051208/aand.pdf.

[27] Voluminous documentation of the above is *available at* http://www.aclu.org/torturefoia.

> that the barefooted detainee was shaking with cold .... On another occasion, the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night ....[28]

The possibility that evidence secured through the methods described above might form the basis for a conviction – or even a sentence of death – infects the legitimacy of the entire commission process. Indeed, the absence of an express prohibition against the use of such tainted evidence creates an irresistible incentive for the prosecutors of the detainees to become their torturers.

II. THE DISTINCTION BETWEEN CITIZENS AND NON-CITIZENS IN THE MILITARY COMMISSION RULES IS UNSUPPORTED BY HISTORY OR CONGRESSIONAL ACTION

The petitioner in this case is facing trial before a military commission that only has jurisdiction over "non-citizens." A United States citizen charged with identical acts could only be prosecuted in federal court. There is no reason to believe that Congress authorized this differential treatment, and powerful reasons to believe that it did not.

First, it is apparently unprecedented. *See* Neal K. Katyal and Laurence H. Tribe, "*Waging War, Deciding Guilt: Trying the Military Tribunals,*" 111 Yale L.J. 1259,

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[28] *See* http://www.aclu.org/torturefoia/released/FBI.121504.5053.pdf.

1298 (2002). By most accounts, the United States began using military commissions in 1847 during the Mexican-American War. David Glazier, *Kangaroo Court or Competent Tribunal? Judging the 21st Century Military Commission*, 89 Va. L. Rev. 2005, 2027 ("It is generally agreed that the real origin of the military commission dates from the Mexican War of 1846-1848"). Unlike the Order in this case, however, the Order used in the Mexican-American War subjected both citizens and non-citizens to military tribunals. Louis Fisher, Congressional Research Service, *Military Tribunals: Historical Patterns and Lessons* 12 (quoting memoir stating that "all offenders, Americans and Mexicans, were alike punished" under Order); Glazier, *supra*, at 2030 (noting that "a majority of the persons tried by military commissions in Mexico were American citizens"). That tradition of evenhanded treatment has been maintained ever since, including during the Second World War, the last time military commission trials were used by the United States. *See Ex parte Quirin*, 317 U.S. 1, 37 (1942) (finding that both citizens and non-citizens were subject to World War II military commissions).

Second, this Court has held for more than a century that the government cannot impose a separate regime of punishment on non-citizens. In *Wong Wing v. United States*, 163 U.S. 228 (1896), the government sentenced four Chinese citizens to sixty days at hard labor for violating the immigration laws and ordered them deported at the conclusion of their sentence. *Id.* at 234; *see also id.* at 239 (Field, J., concurring and dissenting). The Court left the deportation order undisturbed, but invalidated the 60-day sentence because it had been imposed without the constitutional protections afforded to citizens charged with a criminal offense. *Id.* at 237-38. The Court acknowledged that the federal government has wide latitude to regulate immigration, and may, in that capacity, differentiate between

citizens and non-citizens. *Id.* at 237. But the Court left no doubt that where the government "sees fit to . . . subject[] the persons of such aliens to infamous punishment," *id.*, the ability to discriminate came to an end, and "aliens shall not be held to answer for a capital or other infamous crime" without the protections afforded citizens under the Fifth Amendment. *Id.* at 238.[29]

Since *Wong Wing*, this Court has repeatedly reaffirmed that the federal government's authority to distinguish between citizens and non-citizens under the immigration laws does not confer any authority on the government to discriminate against non-citizens when imposing punishment. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 694 (2001) (citing *Wong Wing* for the rule that, in the context of "punitive measures . . . all persons within the territory of the United States are entitled to the protection of the Constitution") (internal quotation and citation omitted). *See also Chan Gun v. United States*, 9 App. D.C. 290, 1896 WL 14831 at *5 (D.C. Cir. 1896) (citing *Wong Wing* for the proposition that "[w]hen . . . the enactment goes beyond arrest and necessary detention for the purpose of deportation and undertakes also to punish the alien for his violation of the law, the judicial power will intervene and see that due provision shall have been made, to that extent, for a regular judicial trial as in all cases of crime"); *Rodriguez-Silva v. INS*, 242 F.3d 243, 247-48 (5th Cir. 2001) (noting that although the federal government has wide latitude to set "criteria for the naturalization of aliens or for their admission to or exclusion or removal from the United States," it is settled that "an alien may not be punished criminally without

[29] Cf. *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (stressing that "the central aim of our entire judicial system . . . is [that] all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court") (internal quotations omitted).

the same process of law that would be due a citizen of the United States," citing *Wong Wing*).

Third, the *Wong Wing* principle is also reflected in a series of important congressional statutes. For example, 42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to . . . give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Although 42 U.S.C. § 1981 does not expressly mention alienage, it has long been understood to protect non-citizens against unequal treatment. *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410, 419 (1948) (reiterating that the protections of 42 U.S.C. § 1981 "extend to aliens as well as to citizens") (citing additional cases).

The same point is explicitly made in 18 U.S.C. § 242, which provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an

> alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned...

The point here is not that either statute necessarily applies to this case, but merely that both statutes are part of the backdrop against which any congressional action or inaction regarding military commissions must be understood. Put another way, it is reasonable to expect that Congress would have been explicit if it meant to authorize a system of differential punishment for non-citizens that is inconsistent with historic practice, general constitutional principles, and longstanding legal rules that mandate equality in the administration of justice, when it considered its response to the terrorist attacks of September 11, 2001.

Finally, it is worth noting that the government, moreover, vigorously fought against the notion that Congress had authorized different treatment for citizens and non-citizens when it was defending its designation of two American citizens, Yaser Hamdi and Jose Padilla, as "enemy combatants." This Court agreed in *Hamdi*, holding that the Authorization for Use of Military Force in Afghanistan allowed the government to detain anyone captured on the battlefield in Afghanistan as an "enemy combatant," regardless of citizenship. *Hamdi,* 542 U.S. at 518-19. It is therefore disingenuous for the government now to read the AUMF as endorsing a distinction between citizens and non-citizens that it previously and strenuously disavowed.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

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