

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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**CA No. 1:04-CV-1519-JR  
Judge James Robertson**

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Lieutenant Commander CHARLES SWIFT,  
as next friend for SALIM AHMED HAMDAN,

*Petitioner*

v.

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

*Respondents.*

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**BRIEF OF AMICI CURIAE  
INTERNATIONAL LAW PROFESSORS  
LISTED HEREIN IN SUPPORT OF PETITIONER**

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**BRIEF OF AMICI CURIAE  
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**SUMMARY OF ARGUMENT**

Military commissions qualify as “war courts” and therefore their jurisdiction is limited in terms of context and time to a circumstance of actual war, and in terms of place to a theater of war or a war-related occupied territory. Guantanamo, Cuba is neither in a theater of war nor a war-related occupied territory and thus, a military commission situated there does not have lawful jurisdiction. Further, some of the crimes that might be charged are not within the competence of a military commission. A serious violation of the separation of powers exists because the military commissions at Guantanamo do not comply with Article I, Section 8, clause 9 of the U.S. Constitution, which requires that tribunals be constituted as “inferior to the Supreme Court” and thus, subject to its ultimate control.

Some of the present Department of Defense (DOD) rules of procedure and instructions for military commissions do not comply with international law, which is the constitutionally-based supreme law of the United States binding on the President and federal courts. Some DOD

rules and instructions have a potential to create violations of international law. As currently established, with its present procedures, the military commissions do not have lawful jurisdiction and their use would create violations of law that cannot rightly be countenanced by the judiciary.

## ARGUMENT

### I. Presidential Power to Create a Military Commission and Jurisdictional Competence

#### A. Limitations With Respect to Place

The President's power as Commander-in-Chief to set up a military commission and the jurisdictional competence of a military commission apply only during an actual war, and within a war zone or a war-related occupied territory. *See, e.g., The Grapeshot*, 76 U.S. 129, 132-33 (1869) (jurisdiction exists "wherever the insurgent power was overthrown"); William Winthrop, *Military Law and Precedents* 836 (2d. 1920); Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 Mich. J. Int'l L. 1, 5 & n.14, 25 n.70, 26-27 (2001) [hereinafter Paust, *Military Commissions*]; *see also Madsen v. Kinsella*, 343 U.S. 341, 348 (1952) (a military commission is proper in a war-related occupied enemy territory "in time of war"); *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) ("occupied enemy territory"); *In re Yamashita*, 327 U.S. 1, 326 (1946) (Murphy, J., concurring) ("[o]nly when a foreign invasion or civil war actually closes the courts"); *Coleman v. Tennessee*, 97 U.S. 509, 515 (1878) ("when...in the enemy's country"); 97 U.S. at 517 (when occupation of enemy territory occurs). As Colonel William Winthrop recognized in his classic study of military law: "A military commission...can legally assume jurisdiction only of offences committed within the field of command of the convening commander," and regarding military occupation, "cannot take cognizance of an

offence committed without such territory.... The place must be the theater of war or a place where military government or martial law may be legally exercised; otherwise a military commission...will have no jurisdiction....” Winthrop, *supra*, at 836. The military commission set up within the United States during World War II and recognized in *Ex parte Quirin* had been created during war for prosecution of enemy belligerents for violations of the laws of war that occurred within the United States and within the convening authority’s field of command – the Eastern Defense Command of the United States Army. 317 U.S. 1, 22 n.1 (1942) (discussing petitioners had also been charged with war-time espionage, but the Supreme Court merely approved military commission jurisdiction to try violations of the laws of war).

What is unavoidably problematic with respect to military commission jurisdiction at Guantanamo, Cuba is the U.S. military base at Guantanamo is neither in a theater of actual war nor in a war-related occupied territory. *See, e.g.,* Paust, *Military Commissions, supra*, at 25 n.70. *See also Rasul v. Bush*, 124 S.Ct. 2686 (2004) (Kennedy, J., concurring) (describing Guantanamo, Cuba as territory “far removed from any hostilities”). Consequently, a military commission at Guantanamo is not properly constituted and is without lawful jurisdiction. Further, alleged violations of the laws of war during war in Afghanistan or Iraq did not occur in Cuba.

Another problem with respect to prosecution of certain persons in a military commission at Guantanamo involves an absolute prohibition under the laws of war. Any person who is not a prisoner of war and who is captured in occupied territory in Afghanistan or Iraq may not be transferred out of occupied territory. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 49, 75 U.N.T.S. 287, 6 U.S.T. 2516,

T.I.A.S. No. 3365 [hereinafter GC or Geneva Civilian Convention]<sup>1</sup> expressly mandates that “[i]ndividual or mass forcible transfers...of protected persons from occupied territory...are prohibited, regardless of their motive.” GC, art. 49.<sup>2</sup> Further, “unlawful deportation or transfer” is not merely a war crime; it is also a “grave breach” of the Geneva Convention. GC, art. 147;

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<sup>1</sup> The Geneva Convention applies to the wars in Afghanistan and Iraq even though the U.S. cannot be at “war” with al Qaeda. Al Qaeda, however, can be covered under certain provisions of the Convention if captured during war in Afghanistan or Iraq. *See, e.g.*, Paust, *Military Commissions, supra*, at 5-8 n.16; Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 Yale J. Int’l L. 325, 325-28 (2003).

<sup>2</sup> *See* GC, art. 76 (“persons accused of offences shall be detained in the occupied country”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 85(4)(a) [hereinafter Geneva Protocol I]; IV Commentary, Geneva Convention Relative to the Protection of Civilian Persons in Time of War 278-80, 363 (ICRC, Jean S. Pictet ed. 1958) [hereinafter IV Commentary]; Paust, *Military Commissions, supra*, at 24 n.68. Additionally, rights and duties under the Geneva Conventions must be applied “in all circumstances.” *See, e.g.*, GC, arts. 1, 3, 27. Importantly, any detainee who is not a prisoner of war has certain protections under the Geneva Civilian Convention and common article 3, which now applies in an international armed conflict (*i.e.*, there are no gaps in Geneva law that leave a person without any protections). *See, e.g.*, GC, arts. 3, 5, 13, 16, 27-33; U.S. Dep’t of Army Field Manual 27-10, *The Law of Land Warfare* 31, ¶ 73, 98, 247(b) (1956) [hereinafter FM 27-10]; IV Commentary, *supra*, at 14, 58, 595; Paust, *Military Commissions, supra*, at 6-8 n.15; William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int’l L. 319, 321-22 (2003) (William H. Taft, IV is the legal adviser for the United States Department of State). Further, the 1949 Geneva Conventions contain express and implied rights and can be self-executing. *See, e.g.*, Jordan J. Paust, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int’l L.J. 503, 515-17 (2003) [hereinafter Paust, *Judicial Power*]. Additionally, they are “executed” by congressional legislation in, for example, 10 U.S.C. §§ 818, 821. *See also* Paust, *Judicial Power, supra*, at 517 (discussing the Alien Tort Claims Act and habeas statutes). Moreover, the President has an unavoidable constitutional duty to faithfully execute the law. *See, e.g.*, U.S. Const., art. II, § 3; *infra* Part I.C.

That the U.S. has been an occupying power in Afghanistan and Iraq is well-known. *See, e.g.*, U.N.S.C. Res. 1438, U.N. SCOR, 58th Sess., 4761st mtg. pmb., U.N. Doc. S/RES/1483 (2003) (addressing U.K. and U.S. recognitions); Jordan J. Paust, *The U.S. as Occupying Power Over Portions of Iraq and Special Responsibilities Under the Laws of War* (May 2003), available at [http://www.nimj.org/documents/occupation\(1\).doc](http://www.nimj.org/documents/occupation(1).doc); Paust, *Military Commissions, supra*, at 24 n.67.

IV Commentary, *supra* note 2, at 280, 599. *See also* Geneva Protocol I, *supra*, note 2, art. 85(4)(a). To correct such violations of the laws of war, persons who are not prisoners of war and who were captured in occupied territory and eventually found at Guantanamo or other areas under U.S. control outside of occupied territory should be returned to the territory where they were captured.

### **B. Limitations With Respect to Time**

The President's power and a military commission's jurisdiction are limited in terms of time to a circumstance of actual war until the point when peace is finalized. *See, e.g., Madsen v. Kinsella*, 343 U.S. 341, 346-48 (1952) (recognizing that military commission power is "related to war" and acknowledging them as "war courts" that the President "may, in time of war, establish"); *In re Yamashita*, 327 U.S. 1, 11-13 (1946) (discussing that such power exists after cessation of hostilities "at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government."); 327 U.S. at 20 n.7 (finding that a military commission is a "war court"); *Ex parte Quirin*, 317 U.S. 1, 28 (1942); *The Grapeshot*, 76 U.S. (9 Wall.) 129, 132-33 (1869) (permitting jurisdiction "so long as the war continued" and "during war"); *Cross v. Harrison*, 57 U.S. 164, 190 (1853) (permitting jurisdiction until a "treaty of peace"); 24 Op. Att'y Gen. 570, 571 (1903); 11 Op. Att'y Gen. 297, 298 (1865); Jordan J. Paust, M. Cherif Bassiouni, et al., *International Criminal Law* 309-10 (2d. 2000); Winthrop, *supra*, at 86 (jurisdiction of military commissions "is determined by the existence and continuance of war"), 831 (jurisdiction is tied to the war powers, "exclusively war-court"), 837 ("An offence...must have been committed within the period of the war or of the exercise of military government.... jurisdiction...cannot be maintained after the date of a peace...."); *Digest*

*of Opinions of the Judge Advocate General* 1067 (1912); Major General Henry W. Halleck, *Military Tribunals and Their Jurisdiction*, 5 Am. J. Int'l L. 958, 965-66 (1911), reprinted in Mil. L. Rev. Bicentennial Issue 15, 21 (1975); Michael A. Newton, *Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes*, 153 Mil. L. Rev. 1, 15 (1996); Paust, *Military Commissions*, *supra*, at 5 & n.14, 9, 25 n.70; Committee on Military Affairs and Justice of the Association of the Bar of the City of New York, *Inter Arma Silent Leges: In Times of Armed Conflict, Should the Laws be Silent? - A Report on the President's Military Order of November 13, 2001* at 25-26 n.68, 28 (2001); S. Rep. No. 64-130, at 40 (1916) (finding it is a "war court").

As Major General Henry Halleck wrote early during the last century, military commissions "are established by the President, by virtue of his war power as commander-in-chief, and have jurisdiction of cases arising under the laws of war," adding: "[they] are war courts and can exist only in time of war." Halleck, *supra*, at 965-66 (General Halleck was a General during the Civil War and a prominent international legal scholar who participated in the creation of the 1863 Lieber Code on the laws of war). Similarly, in 1865 Attorney General Speed formally advised the President:

A military tribunal exists under and according to the Constitution in time of war. Congress may prescribe how all such tribunals are to be constituted, what shall be their jurisdiction, and mode of procedure. Should Congress fail to create such tribunals, then, under the Constitution, they must be constituted according to the laws and usages of civilized warfare. They may take cognizance of such offences as the laws of war permit.... In time of peace neither Congress nor the military can create any military tribunals, except such as are made in pursuance of that clause of the Constitution which gives to Congress the power "to make rules for the government of the land and naval forces.

11 Op. Att'y Gen. 297, 298 (1865).

From the Attorney General’s opinion, one can recognize that relevant presidential power is tied to a war circumstance and law of war competencies such as the ability of a war-related occupying power to set up a military commission to try violations of the laws of war in accordance with the laws of war. Congress can regulate the jurisdiction and procedure of military commissions, but must do so consistently with international law. Specifically, the requirements of international law “are of binding force upon the departments and citizens of the Government, though not defined by any law of Congress” and neither Congress nor the Executive can “abrogate them or authorize their infraction.” *See, e.g.*, 11 Op. Att’y Gen. at 298-300; *Madsen v. Kinsella*, 343 U.S. 341, 348-49 (1952); *see also Dooley v. United States*, 182 U.S. 222, 231 (1901) (describing executive military powers are ““regulated and limited...directly from the laws of war””), *quoting* 2 Henry W. Halleck, *International Law* 444 (1st ed. 1861); *infra* Part I.C.

### **C. Crimes Triable Before Military Commissions**

Since their authority is tied to war powers, military commissions generally have jurisdiction only over war crimes.<sup>3</sup> In 10 U.S.C. Sections 818 and 821, Congress has only

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<sup>3</sup> *See, e.g.*, Human Rights First, *Trials Under Military Order: A Guide to the Final Rules for Military Commissions* 2, 8 (revised ed. June 2004) [hereinafter Human Rights First Report], available at [http://www.humanrightsfirst.org/us\\_law/PDF/detainees/trials\\_under\\_order0604.pdf](http://www.humanrightsfirst.org/us_law/PDF/detainees/trials_under_order0604.pdf); Alberto R. Gonzales, *Martial Justice, Full and Fair*, N.Y. Times, Nov. 30, 2001, at A27 (“The [2001 presidential] order only covers foreign enemy war criminals... [they] must be chargeable with offenses against the international laws of war”). *See also Madsen v. Kinsella*, 343 U.S. at 348-49; *Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950) (“the military commission is a lawful tribunal to adjudge enemy offenses against the laws of war.”); *Duncan v. Kahanamoku*, 327 U.S. at 313-14, 322-23; 11 Op. Att’y Gen. at 298 (“they may take cognizance of such offenses as the laws of war permit”); Winthrop, *supra* at 831, 836-37; Halleck, *supra*, at 965-66 (they “have jurisdiction of cases arising under the laws of war”); Newton, *supra*, at 15, 19-21 (stating that jurisdiction apparently exists only over violations of the laws of war); *O’Callahan v. Parker*, 395 U.S. 258, 267 (1969) (“court-martial jurisdiction cannot be extended to reach any person not a

expressly conferred military commission jurisdiction for prosecution of “offenders or offenses that by statute or by the law of war may be tried by military commissions.” Such a congressional grant of competence, without additional grants of jurisdiction over offenders or offenses by statute, limits the offenders and offenses that are triable to those that the law of war permits to be tried in a military commission. The Supreme Court has also recognized that when Congress enacted the 1916 Articles of War, which contained similar language, Congress “gave sanction” to uses of a “military commission contemplated by the common law of war.” *In re Yamashita*, 327 U.S. at 19; *see also* 327 U.S. at 20 n.7 (a military commission is a “war court”). Section 4 (A) of the President’s 2001 Military Order states that accused shall be tried for “offenses triable by military commission.” Military Order of Nov. 13, 2001, § 4(A), 66 Fed. Reg. 57,833 (Nov. 16, 2001). Thus, one open question is whether the law of war allows a military commission to address crimes other than war crimes.

In practice, some military commissions have addressed other crimes under international law that occurred during war (such as crimes against humanity occurring during World War II) when, but only when, the military commissions were convened in war-related occupied territory.

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member of the Armed Forces...no matter how intimate the connection between their offense and the concerns of military discipline... [C]ourts-martial have no jurisdiction over nonsoldiers, whatever their offense”); 395 U.S. at 302 (“we deal with peacetime offenses, not with authority stemming from the war power. Civil courts were open. The offenses were committed within our territorial limits, not in the occupied zone of a foreign country.”); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 13-14 & n.4 (1955) (ex-service persons are not subject to prosecution in military courts-martial re: murder, yet the case did not involve congressional power to punish offenses against the laws of war). A resolution of the American Bar Association in 2002 recommended that the military commissions prosecute only war crimes. *See* Jeff Blumenthal, *ABA Votes to Favor Curbs on Bush’s Military Tribunals*, *The Legal Intelligence*, Feb. 5, 2002, at [www.law.com/cgi-bin/gx.cgi/AppLogic=FTContentSerer?pagename=law/View&c=Art 2/5/2002](http://www.law.com/cgi-bin/gx.cgi/AppLogic=FTContentSerer?pagename=law/View&c=Art 2/5/2002) [hereinafter A.B.A. res.].

*See, e.g.*, Paust, Bassiouni, et al., *supra*, at 288-93. The Supreme Court has stated that “jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language of art. I, § 8,” concerning offenses against the law of nations. *Reid v. Covert*, 354 U.S. 1, 21 (1957). Yet, a war-related occupying power actually has a greater competence under the international law of war to maintain law and order in the occupied territory and to prosecute various crimes. *See, e.g.*, GC, arts. 64, 66-68, 71-75, 147; Hague Convention No. IV Respecting the Laws and Customs of War on Land, Annex, art. 43 (Oct. 18, 1907), League of Nations Treaty Series vol. XIV (1929), No. 2138, T.S. No. 539, 36 Stat. 2277. International law is a constitutionally-based part of the law of the United States and law that the President is bound faithfully to execute here or abroad in time of peace or war. *See, e.g.*, U.S. Const., art. II, § 3; Jordan J. Paust, *International Law as Law of the United States* 7-9, 169-92, 488, 493-94 (2d ed. 2003) (documenting the consistent recognition in many cases and opinions for some 200 years and the unanimous views of the Founders and Framers, demonstrating also why *The Paquete Habana*, 175 U.S. 677 (1900) is one such case and has been seriously, if not unprofessionally, misread by others); Paust, *Judicial Power*, *supra* note 2, at 517-22; *see also* U.S. Const., art. III, § 2, VI, cl. 2. In view of this constitutional duty, the President actually has an enhanced power to execute laws of war that confer powers on a war-related occupying power to prosecute such crimes. Concerning the enhancement of Executive power by international law, *see, e.g.*, Paust, *supra* at 9, 16, 44-47 n.55, 79, 82, 180, 185, 457, 468-69, 480-81. Congress has also conferred such a competence in 10 U.S.C. § 821 (“offenses that...by the law of war may be tried”), as the law of war with respect to war-related occupation permits the trial of such offenders and offenses. Thus, when the United States is exercising a war-related occupying

power, a military commission in such territory could prosecute crimes other than war crimes because of a special competence conferred by the law of war concerning war-related occupation. Where the United States is not such an occupying power, it is apparent that military commission jurisdiction is permissible in a theater of war but will be limited to prosecution of war crimes.

Military commissions at Guantanamo are not within a theater of war or war-related occupied territory and have no such jurisdiction. See *supra* Part I.A. Even if they were constituted in an actual theater of war such as Afghanistan or Iraq, questions have been raised whether the current list of crimes set forth in Military Commission Instruction No. 2 is improper. Crimes that are not prosecutable as war crimes are listed as such despite a statement that the “crimes and elements derive from the law of armed conflict, ...the law of war” and “constitute violations of the law of armed conflict or offenses that, consistent with that body of law, are triable by military commission.” Military Commission Instruction No. 2, *Crimes and Elements for Trials by Military Commission*, at 1-2, § 3(A) (rev. ed. Apr. 30, 2003) [hereinafter Instruction No. 2]. For example, Human Rights First stated that the list includes crimes that are not war crimes and that offenses prosecutable by military commission must occur during an armed conflict to which the laws of war apply. See Human Rights First Report, *supra* note 3, at 2, 8-9, 13.

The list includes some crimes that are not war crimes per se, but conduct relevant to some of the crimes, such as “hijacking or hazarding a vessel or aircraft” and “terrorism,” could constitute a war crime during actual war. Instruction requires that “[t]he conduct took place in the context of and was associated with armed conflict.” See Instruction No. 2, *supra*, at 13-14, § 6(B)(1)(a)(3) and (2)(a)(4). In a given case, a hijacking can involve hostage-taking covered

under the Geneva Civilian Convention. *See* GC, arts. 3(1)(b), 34. Some might involve cruel or inhumane treatment, and so forth. In fact, terrorism is not new to the laws of war and some forms of “terrorism” are war crimes. *See, e.g.*, GC, art. 33; Geneva Protocol I, *supra* note 2, art. 51; Paust, Bassiouni, et al., *supra*, at 32 (list of war crimes adopted by the Responsibilities Commission of the Paris Peace Conference in 1919); Jordan J. Paust, *Terrorism and the International Law of War*, 64 *Mil. L. Rev.* 1 (1974). Further, the definitional elements of “terrorism” are too broad since they do not require an intent to produce “terror” or intense fear or anxiety but merely an intent to “intimidate or coerce.” *See* Instruction No. 2, § 6(B)(a)(4). Minimum standards of fairness and common sense definitions require that terrorism involve an intent to produce “terror” in or to “terrorize” a given human target.

Some crimes on the list can be war crimes if they are committed against persons or property protected from attack or destruction by the laws of war. These could involve murder or destruction of property (*See* Instruction No. 2, *supra*, at 13-14, § 6(B)(3)-(4)) if in a given context

the murder or destruction were war crimes.<sup>4</sup> Yet, some of the crimes listed are merely crimes

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<sup>4</sup> “Murder,” for example, involves the unlawful killing of a human being, but some persons in some contexts can be lawfully killed during a war. As an example, once a person is “taking no active part in the hostilities” “violence to life..., in particular murder” of such a person would be both murder and a war crime covered by common Article 3(1)(a) of the Geneva Conventions. *See also* GC, arts. 32, 147. It would not matter whether the perpetrator was “military or civilian.” FM 27-10, *supra* note 2, at 178, ¶ 499. Yet, is the unlawful killing of one soldier by a fellow soldier that constitutes “murder” under domestic law a war crime merely because it happens in a theater of war? Similarly, is “murder” by a noncombatant or unlawful belligerent necessarily a war crime if committed in a theater of war? Professor Yoram Dinstein suggests that one becomes subject to domestic prosecution for any applicable domestic crimes over which there is jurisdiction. The law of war “merely takes off a mantle of immunity from the defendant, who is therefore accessible to penal charges for any offense committed against the domestic legal system.” Yoram Dinstein, *The Conduct of Hostilities under the Law of*

against the state or “pure political offenses” and are not war crimes. Concerning the concept of “pure political offenses,” see, e.g., Paust, Bassiouni, et al., *supra*, at 332-33, 367-69. These include: “aiding the enemy, spying, perjury or false testimony, and obstruction of justice related to military commissions.” See Instruction No. 2, *supra*, at 14-16, § 6(B)(5)-(8). See also *Smith v. Shaw*, 12 Johns. 257, 265 (N.Y. Sup. Ct. 1815) (holding a civilian who allegedly was an enemy spy exciting mutiny and insurrection during war cannot be detained by the U.S. military for trial in a military tribunal); *In re Stacy*, 10 Johns. 328, 332 (N.Y. Sup. Ct. 1813) (habeas writ issued in wartime against a military commander holding a civilian charged with treason in aid of the enemy, since U.S. military did not have jurisdiction despite the alleged threat to national security). Spying as such is not a war crime. See, e.g., Paust, Bassiouni, et al., *supra*, at 854; FM 27-10, *supra* note 2, at 33, ¶¶ 77, 78(c). The Report also correctly notes that definitions of “armed conflict” are too broad with respect to the laws of war and that an attempted jurisdictional reach through such a definition and concepts such as “associated with” an armed conflict are potentially improper. See Human Rights First Report, *supra* note 3, at 9-12, addressing Instruction No. 2, *supra*, at 3, § 5(B)-(C).

## **II. A Violation of the Separation of Powers**

In any event, a serious violation of the separation of powers exists with respect to the attempt by the President in his 2001 Military Order to preclude any judicial review of U.S. military commission decisions concerning offenses against the laws of war and other

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*International Armed Conflict* 31 (2004). See also *Ex parte Quirin*, 317 U.S. at 28-31, 35-37, 44 (prosecution of combatants who engaged in combatant operations of sabotage out of uniform in violation of the laws of war); Myres S. McDougal & Florentino P. Feliciano, *Law and Minimum World Public Order* 712 (1961); Paust, *supra* note 1, at 331-32 (regarding combatant immunity).

international crimes over which there is concurrent jurisdictional competence in federal district courts. See U.S. Dep't Defense, Military Commission Order No. 1, Mar. 21, 2002, § 7(B)(1)-(2), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>. See also *id.* §§ 6 H (4)-(6), 7 B. He cannot do so lawfully. See, e.g., Paust, *Military Commissions*, *supra*, at 10-11, 15; Paust, *Judicial Power*, *supra* note 2, at 518-24. Additionally, under Article I, Section 8, clause 9 of the United States Constitution, Congress merely has power “[t]o constitute Tribunals inferior to the Supreme Court” and, thus, tribunals subject to ultimate control by the Supreme Court. See also James E. Pfander, *Federal Courts: Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 Tex. L. Rev. 1433, 1454-56 (2000) (“Like other provisions of Article I that operate as restrictions on legislative power, the Inferior Tribunals Clause underscores the inability of Congress to fashion new courts to displace the constitutional supremacy of the one supreme court.”). For this reason, the congressional authorization for creation of military commissions in 10 U.S.C. § 821 is necessarily subject to the constitutional restraint contained in Article I, Section 8, clause 9 and the President’s attempt to preclude any form of judicial review is constitutionally improper whether or not a military commission has support in a general congressional authorization. The Supreme Court has already recognized the propriety of habeas review concerning detention at Guantanamo. See *Rasul v. Bush*, 124 S.Ct. 2686 (2004); see also Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 Mich. J. Int’l L. 677, 690-94 (2002) [hereinafter Paust, *DOD Rules*]; Paust, *Judicial Power*, *supra* note 2, at 517 & n.47, 519-20 n.67. It is not unlikely that the Court will insist that there be habeas review with respect to military commissions if not other forms of review.

### III. Problems Concerning Present DOD Rules of Procedure for Military Commissions

Since 9/11, we have witnessed the deliberate creation of rules of procedure for U.S. military commissions that would violate human rights and Geneva law guarantees<sup>5</sup> and can create war crime civil and criminal responsibility for those directly participating in their creation and application if the military commission rules are not changed and are utilized. *See, e.g.*, Paust, *DOD Rules*, *supra*, at 694; Paust, *Military Commissions*, *supra*, at 4 n.12, 10 n.18, 28 n.81; Wallach, *supra* note 5, at 45-46. We have seen a refusal to even disclose the names of persons detained and false executive claims are made before our courts and media that human beings have no human rights or Geneva law protections, no right of access to an attorney or to their Consulate, and no right of access to a court of law to address the propriety of their detention without trial. *See generally Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); Paust, *Judicial Power*, *supra* note 2, at 503-04, 520-524 (also addressing numerous cases recognizing judicial power to

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<sup>5</sup> *See, e.g.*, Steven W. Becker, “*Mirror, Mirror on the Wall...*”: *Assessing the Aftermath of September 11<sup>th</sup>*, 37 Val. U. L. Rev. 563, 580-86 (2003); Paust, *Military Commissions*, *supra* at 10-18; Paust, *DOD Rules*, *supra* at 677-90; Joshua Rozenberg, *Law Chief Calls on US to Give Terror Suspects Fair Trial*, *The Daily Telegraph* (London), Sept. 19, 2003, at 1 (U.K.’s Attorney General Goldsmith identifies some of the British complaints about lack of a jury, secret hearings, restrictions on counsel for the accused, and the lack of judicial review); Evan J. Wallach, *Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?*, *The Army Lawyer* 18, 40, 43-45 (Nov. 2003); *see generally* Michal R. Belknap, *A Putrid Pedigree: The Bush Administration’s Military Tribunals in Historical Perspective*, 38 Cal. W. L. Rev. 433 (2002); Lord Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, Twenty-Seventh FA Mann Lecture, *British Inst. of Int’l & Comp. Law* (Nov. 25, 2003) at 11-12, 18, *available at* <http://www.nimj.org/documents/Guantanamo.pdf>; Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 Geo. Wash. L. Rev. 649 (2002); Lawyers Comm. for Human Rights, *Assessing the New Normal: Liberty and Security for the Post-September 11 United States* 57-58, 60-61 (2003), *available at* <http://www.lchr.org/pubs/descriptions/Assessing/AssessingtheNewNormal.pdf>; *Blair Wants Britons’ Legal Status Resolved*, *Hous. Chron.*, Oct. 23, 2003, at A23 (Prime Minister Tony Blair reiterated concerns “about the form of trial that they [U.K. nationals] will have under a military commission”).

review Executive or military decisions,). *See also* Alberto R. Gonzales, Memorandum for the President (Jan. 25, 2002), *available at* <http://www.msnbc.msn.com/id/4999148/site/newsweek>; John Yoo & Robert J. Delahunty, Memorandum for William J. Haynes II, General Counsel, Department of Defense (Jan. 9, 2002), *available at* <http://www.msnbc.msn.com/id/5025040/site/newsweek>.

Present DOD rules for military commissions would assure denial of the customary and treaty-based human rights to trial before a regularly constituted, competent, independent, and impartial court;<sup>6</sup> to counsel of one's choice and to effective representation;<sup>7</sup> to fair procedure and fair rules of evidence, including the right to confrontation and examination of all witnesses against an accused (an important due process guarantee that can be violated, for example, by use of unsworn written statements, declassified summaries of evidence, testimony from prior trials or proceedings, certain forms of hearsay, other testimony from witnesses who do not appear before

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<sup>6</sup> *See, e.g.*, Paust, *DOD Rules*, *supra* at 687-88; A. Christopher Bryant & Carl Tobias, *Quirin Revisited*, 2003 Wis. L. Rev. 309, 360-61 (2003); Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. Rev. 1, 10-12, 58-59 (2002); Harold Hongju Koh, *The Case Against Military Commissions*, 96 Am. J. Int'l L. 337, 338-39 (2002); Detlev F. Vagts, *Which Courts Should Try Persons Accused of Terrorism?*, 14 Eur. J. Int'l L. 313, 322 (2003); *see also* Norman Abrams, *Anti-Terrorism and Criminal Enforcement* 330-31 (2003); Justice Sandra Day O'Connor, *Vindicating the Rule of Law: The Role of the Judiciary*, 2 Chinese J. Int'l L. 1, 3-4 (2003) (quoting the Declaration of Rights of the Massachusetts Constitution, art. 29, which "framed by John Adams, boldly declares, 'It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit,'" and adding: "Individual judicial independence is necessary if each case is to be resolved on its own merits, according to the facts and the law.").

<sup>7</sup> *See, e.g.*, Paust, *DOD Rules*, *supra*, at 690; Human Rights First Report, *supra* note 3, at 2-3, 17-18, 21-24.

the military commission, and reports);<sup>8</sup> to review by a competent, independent, and impartial court of law;<sup>9</sup> and to various other human rights, including freedom from discrimination on the basis of national origin (since only aliens will be subject to prosecution before the military commissions), rights to equality of treatment and equal protection, and “denial of justice” to aliens.<sup>10</sup> Relevant customary human rights to due process are also incorporated through common Article 3 of the Geneva Conventions as minimum due process guarantees for all persons in any armed conflict, regardless of their status otherwise as combatants or noncombatants and whether or not the due process requirements are mirrored elsewhere in the Conventions. *See, e.g.*, GC,

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<sup>8</sup> *See, e.g.*, Koh, *supra* note 6, at 339; Paust, *DOD Rules, supra*, at 678-79, 688-89; Human Rights First Report, *supra* note 3, at 3-4, 27-28, 30; Military Defense Attorneys and Counsel, DOD Office of Military Commissions, letter to the United States Senate Armed Forces and Judiciary Committees (June 1, 2004), *available at* [http://pegc.no-ip.info/omc\\_def\\_letter\\_20040601.html](http://pegc.no-ip.info/omc_def_letter_20040601.html).

<sup>9</sup> *See, e.g.*, Paust, *DOD Rules, supra*, at 678-79, 685-86; Human Rights First Report, *supra* note 3, at 4, 31-32. The Executive’s military “Review Panel” may not overturn a conviction, reverse or amend a decision, or order dismissal or release of the person (or order anything else), because it bound to “either (a) forward the case to the Secretary of Defense with a recommendation as to disposition, or (b) return the case to the Appointing Authority for further proceedings” if a majority of the panel decides that “a material error of law occurred.” Military Commission Order No. 1, *supra*, § 6(H)(4). Further, only one member of the panel must be a lawyer, since only one member must “have experience as a judge,” and no member of the panel must have been a judge with expertise in the laws of war, international law more generally, or criminal law more generally. *See id.* § 6(H)(4). The final “decision” in such a “review” and “recommendation” system will be made by the Secretary of Defense or the President. *Id.* § 6(H)(2), (6). *See also Reid v. Covert*, 354 U.S. 1, 36 n.66 (1957) (“Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments...”) (quoting Alexander Hamilton, *The Federalist* No. 78 (1788)).

<sup>10</sup> *See, e.g.*, Paust, *Military Commissions, supra*, at 10-17; Paust, *DOD Rules, supra*, at 678-85 (including impermissible discrimination on the basis of national origin, denial of equal access to courts and to equality of treatment and equal protection of the law, “denials of justice” in violation of customary international law, and denial of the human right to fair, meaningful and effective judicial review of the propriety of detention).

art. 3(1)(d); Paust, *Judicial Power*, *supra* note 2, at 511 n.27, 514 & n.32; Paust, *DOD Rules*, *supra*, at 678 n.9.

Clearly, the DOD rules can create violations of international law. Yet, where possible, they should be construed consistently with the President's requirement of a "full and fair trial," since in case of a potential clash between lawful portions of the President's Military Order and subsequent DOD rules of procedure or military commission instructions the lawful portions of the Military Order must prevail. *See* Military Commission Order No. 1, *supra*, §§ 7(B), 8. Additionally, since the Executive is bound by international law, the Military Order and subsequent DOD rules and instructions should be construed consistently with international legal requirements wherever possible. Even federal statutes must be interpreted and applied consistently with international law. *See, e.g., Cook v. United States*, 288 U.S. 102, 120 (1933); *The Charming Betsy*, 6 U.S. (6 Cranch) 64, 117-18 (1804); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801); 11 Op. Att'y Gen. at 299-300 (1865); 9 Op. Att'y Gen. 356, 362-63 (1859) ("law...must be made and executed according to the law of nations"); Paust, *supra*, at 99, 120, 124-25 nn.2-3. In cases where the Military Order or DOD rules or instructions are unavoidably violative of international law, international law must prevail as supreme law of the United States that restrains the President even when exercising his share of the war power. *See* Part I.B-C; Paust, *supra*, at 7-9, 169-92, 488, 493-94, and cases cited therein.

#### **IV. Exhaustion of Remedies**

The amici hereby incorporate the portions of the defendant's brief which demonstrate that parties brought before an illegally constituted and constitutionally unauthorized commission

do not have to endure the illegal processes of the commission, in the guise of “exhaustion of remedies,” before challenging the validity of the commission itself.

## **V. Conclusion**

Military commissions are “war courts” and their jurisdiction is limited in terms of context and time to a circumstance of actual war and in terms of place to a theater of war or a war-related occupied territory. Guantanamo, Cuba is not in a theater of war or war-related occupied territory and, thus, a military commission situated there does not have lawful jurisdiction. Some of the crimes that might be charged are also not within the competence of a military commission. A serious violation of the separation of powers exists because the military commissions at Guantanamo do not comply with Article I, Section 8, clause 9 of the U.S. Constitution, which requires that tribunals be constituted “inferior to the supreme Court” and, thus, subject to its ultimate control.

Some of the present DOD rules of procedure and instructions for military commissions do not comply with international law, which is constitutionally-based supreme law of the United States binding on the President and the courts. Some DOD rules and instructions have a potential to create violations of international law and to violate the President’s requirement of a “full and fair trial.” They should be interpreted consistently with international law or changed if compliance is not possible.

*Amici curiae* International Law Professors request that the Court deny Respondent’s cross-motion to dismiss the petition.

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