No. 05-184

IN THE
Supreme Court of the United States

SALIM AHMED HAMDAN,
Petitioner,

v.

DONALD H. RUMSFELD, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

Brief of The American Jewish Committee, People for the American Way Foundation, The Rutherford Institute, and Trial Lawyers for Public Justice as *Amici Curiae* in Support of Petitioner
[Commissions: Rights of Presence and Confrontation]

Jeffrey P. Sinensky
Kara H. Stein
THE AMERICAN JEWISH COMMITTEE
165 East 56th Street
New York, NY 10022

John W. Whitehead
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville,VA 22901

Marvin L. Gray, Jr.
Jeffrey L. Fisher
Counsel of Record
Kristina Silja Bennard
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

Counsel listing continued on Inside Cover

Additional Counsel for *Amici Curiae*

Elliot M. Mincberg
Deborah Liu
PEOPLE FOR THE AMERICAN WAY FOUNDATION
2000 M Street, N.W.
Suite 400
Washington, DC 20036

Arthur H. Bryant
Victoria W. Ni
TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C.
555 Twelfth Street
Suite 1620
Oakland, CA 94607-3693

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BRIEF OF THE AMERICAN JEWISH COMMITTEE, PEOPLE FOR THE AMERICAN WAY FOUNDATION, THE RUTHERFORD INSTITUTE, AND TRIAL LAWYERS FOR PUBLIC JUSTICE AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

The American Jewish Committee ("AJC"), a national human relations organization with over 150,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews. It is AJC's conviction that those rights will be secure only when the rights of all are equally secure.

People For the American Way Foundation ("People For") is a non-partisan citizens' organization established in 1980 by civic, religious, and educational leaders to promote and protect civil and constitutional rights. People For has over 750,000 members and supporters nationwide.

The Rutherford Institute is a non-profit civil liberties organization founded in 1982 by its President, John W. Whitehead. The Institute educates and litigates on behalf of constitutional and civil liberties, and Institute attorneys currently handle several hundred civil rights cases nationally at all levels of federal and state courts.

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm dedicated to using trial lawyers' skills and approaches in precedent-setting litigation to create a more just society. TLPJ seeks to ensure that the United States continues to provide—and stand throughout the world as a beacon for—access to justice.[1]

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[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The United States' letter

SUMMARY OF ARGUMENT

The military commissions as currently conceived are improperly constituted and lack jurisdiction to try Petitioner. In particular, the commissions deny Petitioner the most time-honored fundamental of an adversarial process: the right to be present and to confront the witnesses against him. This Court should not allow such a proceeding to be conducted in the name of the United States of America.

I. Barring intervention from this Court, the government will put Mr. Hamdan on trial on the basis of exactly the sort of "evidence" that in 2003 led government officials to the conclusion that Iraq had weapons of mass destruction: secret summaries, prepared by persons with unidentified preconceptions and biases, of statements given *ex parte*, under unknown conditions, by persons with undisclosed motivations and inducements, and translated by persons of uncertified expertise. If the government determines that disclosure of such "evidence" to Petitioner might jeopardize "intelligence and law enforcement sources, methods, or activities" or "other national security interests," then Mr. Hamdan may not even be allowed to know the "evidence" against him. The government has already indicated its intention to exclude Mr. Hamdan from his own trial for at least two days and proceed against him *in absentia* during that period.

II. The use in criminal trials of secret evidence given by faceless accusers is inherently incompatible with a fair trial as that concept has been understood for centuries in Anglo-American jurisprudence, and before that, in Roman law. The right of a defendant to hear and confront witnesses against him is "[o]ne of the fundamental guaranties of life and liberty." *Kirby v. United States*, 174 U.S. 47, 55 (1899). Without

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consenting to the filing of this brief has been filed with the Clerk's office. Petitioner's letter providing blanket consent to the filing of *amicus* briefs has also been filed with the Clerk's office.

knowing the evidence against him, an accused cannot help his attorney make his defense or challenge the evidence's relevance or reliability. That is why the Framers enshrined this centuries-old right to confrontation as a "bedrock procedural guarantee," *Crawford v. Washington*, 541 U.S. 36, 42 (2004), of our Constitution.

III. Faced with the government's intention to ignore this procedural right of unsurpassed pedigree, the Court of Appeals shrugged. It asserted that the law imposes "only minimal restrictions upon the form and function of military commissions" and that ensuring the right to confrontation, even in its most rudimentary form, is not one of those restrictions. *Hamdan v. Rumsfeld*, 415 F.3d 33, 43 (D.C. Cir. 2005). The Court of Appeals was deeply mistaken, as a matter of both statutory construction and constitutional law.

A. The Uniform Code of Military Justice ("UCMJ"), which cabins the President's discretion to establish procedures for military commissions, prohibits the executive branch from trying prisoners *in absentia.* Article 36 of the UCMJ, 10 U.S.C. § 836, directs the President to establish rules of procedure for courts-martial and other military tribunals that apply customary federal criminal procedure and evidence rules "so far as he considers practicable." While this language permits some flexibility, it does not sanction the wholesale abandonment of basic due process protections such as the right to be present and to confront adverse witnesses.

To the contrary, reading the UCMJ to authorize the President to dispense entirely with the right of the accused to be present and to confront his accusers face to face violates the principle of statutory interpretation that requires the most explicit authorization from Congress to depart from rudimentary procedural safeguards required by the Constitution. It also flies in the face of specific assurances that military officials gave to Congress as to the limited extent to which exceptions to

customary procedures would be permitted. Finally, the Court of Appeals' crabbed reading of the UCMJ also contradicts the long-standing practice of military commissions, which reinforces that providing for confrontation is the historic norm.

B. The military commissions' procedures for trying Petitioner *in absentia* also raise grave constitutional concerns. Although the provisions of the Fifth and Sixth Amendments do not fully apply outside the borders of the United States, certain fundamental protections cannot be dispensed with. Central among them is the right to a fair trial, including the right to be present and to confront and cross-examine one's accusers. When examined closely, this Court's past wartime decisions are not inconsistent with this principle. To the extent that their results suggest that the federal judiciary is powerless under these circumstances, they should be viewed as unfortunate episodes in the Court's history, the results of wartime pressures and outdated views of habeas corpus jurisdiction and procedure. Faced with somewhat similar circumstances and pressures today, the Court should not repeat its mistakes.

ARGUMENT

I. The Military Commissions' Procedures Permit the Trial of the Accused in Absentia, on the Basis of Secret, Unsworn Statements Given in the Course of Ex Parte Interrogations.

The military commission that is to decide whether Petitioner shall live or potentially die in a Guantanamo Bay prison fails to provide the most basic of procedural safeguards. Its procedures would permit his conviction on the basis of secret, unsworn statements taken outside his presence and introduced into evidence without his ever knowing their content.

It is important to remember that the case at bar does not involve the power of the military to detain enemy aliens captured in foreign countries. *See Hamdi v. Rumsfeld*, 524 U.S.

507 (2004). The issue currently before the Court is whether the military can be given the *further* power to put such detainees on trial—possibly for their lives—*in absentia*, and to rely on secret evidence from faceless accusers in such cases, with no right of meaningful cross-examination.

The President's Order authorizing trial by military commission provided few specifics as to how the commissions should operate; it stated simply that they should provide a "full and fair trial." Military Order of Nov. 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism* ¶ 4(c)(2), 66 Fed. Reg. 57,833 (Nov. 16, 2001) ("President's Order"). The President found that using the rules of evidence and procedure ordinarily applied in federal criminal cases was "not practicable," *id.* ¶ 1(f), and he left it to the Secretary of Defense to establish the commissions' actual procedures, *id.* ¶ 6(a). The Secretary responded with Military Commission Order No. 1, *Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism*, the most recent version of which was published on August 31, 2005 ("Secretary's Order").[2] While problematic on many levels, several provisions of the Secretary's Order eviscerate core components of an adversarial process.

1. First, the regulations allow the military commission to consider in secret proceedings, outside the accused's presence, any evidence containing "Protected Information." *Id.* ¶ 6(D)(5)(a). Information is "Protected" if, among other things, it concerns "intelligence and law enforcement sources, methods, or activities" or "other national security interests."[3]

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[2] Citations to the Secretary's Order are to the August 2005 revision.

[3] Paragraph 6(D)(5)(a) of the Secretary's Order provides that "Protected Information" includes (but apparently is not limited to): (1) "information classified or classifiable"; (2) information "protected by law or rule from

It is difficult to imagine any probative evidence, other than generally known facts of which the commission could take "conclusive notice," *id.* ¶ 6(D)(4), that would not arguably fall into one of these broad and malleable categories. Though the accused has no access to this evidence and no right to be present when it is considered, the evidence nonetheless becomes part of the trial record via a secret annex not available to the defense. *Id.* ¶ 6(D)(5)(d).

The regulations provide illusory protection by permitting an accused's appointed military counsel to be present when "Protected Information" is received. *Id.* ¶¶ 5(K), 6(B)(3). However, because military counsel is not permitted to share or discuss that information with the accused or even with the accused's civilian lawyer, *id.* ¶ 6(B)(3)—who *also* may be excluded from the presentation of sensitive evidence despite a security clearance of "secret or higher," *id.* ¶ 4(C)(3)(b)—upon closer inspection, the value of having military counsel present to hear any Protected Information evaporates. Without the ability to discuss with the accused the substance of the allegations and the identity of the person making them, it is difficult to see what practical use military counsel can make of his or her access to the Protected Information.

To be sure, the commissions' revised procedures prohibit the use of evidence containing "Protected Information" if no "adequate substitute" for disclosure is available for use by the defense and if, *in the judgment of the Presiding Officer*, its admission would deprive the accused of a full and fair trial. *Id.* ¶ 4(B)(5)(b). The regulations suggest that any of the following may be an "adequate substitute" for the accused's right to know the evidence against him: the "deletion of specified items

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unauthorized disclosure"; (3) "information the disclosure of which may endanger the physical safety of participants in Commission proceedings, including prospective witnesses"; (4) "information concerning intelligence and law enforcement sources, methods, or activities"; and (5) "information concerning other national security interests."

of Protected Information from documents to be made available to the Accused, Detailed Defense Counsel, or Civilian Defense Counsel"; "the substitution of a portion or summary of the information for such Protected Information"; or even "the substitution of a statement of the relevant facts that the Protected Information would tend to prove." *Ibid.* As one commentator noted, however, "[a]n exclusionary rule with such a high bar still leaves ample room to convict someone on the basis of evidence that he and his lawyers can never examine or rebut." Owen Bonheimer, *Fair Trials for Salim Hamdan Here and Saddam Hussein in Iraq Can't Be Based on Secret Evidence*, LEGAL TIMES, Oct. 24, 2005, at 50. More fundamentally, the very act of granting a judge in a criminal case discretionary authority to determine whether a defendant may know the evidence against him is inconsistent with adversarial justice.

The possibility of these procedures coming to pass is more than just theoretical. The government has already indicated its intention to take advantage of these lop-sided rules by excluding Petitioner from at least two days of his trial. *See* Hearing on Pet. for Writ of Habeas Corpus, 10/25/04 Tr. 132 (Petitioner's counsel noting, without refutation by respondent, that "the government [has] already indicated that for two days of his trial, [the defendant] won't be there. And they'll put on the evidence at that point."); *see also Testimony Before Senate Armed Services Comm. on Military Commissions*, Dec. 13, 2001 (Stmt. of Paul Wolfowitz, Deputy Sec'y of Defense), *available at* http://www.dod.gov/speeches/2001/s20011212-depsecdef1.html (extolling, as an advantage of military commissions, ability to obtain convictions without disclosing intelligence information on which they are based).

2. In disregard for another central ingredient of the adversarial process, the commission may accept evidence in the form of out-of-court statements from witnesses whom the defense has had no opportunity to cross-examine. Secretary's

Order ¶¶ 6(D)(2)(c), 6(D)(3). The regulations expressly permit the use of unsworn out-of-court statements and testimony from prior proceedings to which the accused was not a party, *id.* ¶ 6(D)(3), so long as the evidence would have "probative value to a reasonable person," *id.* ¶ 6(D)(1). Even worse, the government has moved to admit its agents' *summaries* of interrogations of other detainees. *See* Prosecution Mot. to Pre-Admit Evid., Oct. 1, 2004. These summaries are from interrogations conducted under unknown conditions outside the presence of both the accused and his counsel and without ever providing an opportunity for cross-examination. The government conducted many of these interrogations through unnamed translators of unknown capability.[4]

It was just such summaries that intelligence analysts relied on in 2003 for their conclusion that Iraq possessed weapons of mass destruction. *See, e.g.*, Douglas Jehl & David E. Sanger, *Powell's Case, a Year Later: Gaps in Picture of Iraq Arms*, N.Y. TIMES, Feb. 1, 2004, at A1. This recent history reinforces the Court's warning in *Crawford v. Washington*, 541 U.S. 36, 57 (2004) that "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout history . . . ."

Under commission procedures, even as revised in August 2005, the reality remains that an accused may be prevented from knowing even the general nature of the evidence used against him and, thus, will be "forced to prove [his] innocence in the face of the anonymous 'slurs of unseen and unsworn

[4] Translating Arabic to English is an exacting task, even on such basic and critical issues as who is speaking and about whom. *See, e.g.*, U.S. STATE DEP'T, 9 FOREIGN AFFAIRS MANUAL APPX. F § 602(a) (2005), *available at* http://foia.state.gov/masterdocs/09FAM/09F0600.pdf ("Arabic name identification is difficult. The variations in transliteration from Arabic script, and the complex and varying name structure, often make it tricky to divide the name into surname and given name fields . . . .").

informers.'" Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962, 1980 (2005) (quoting *Jay v. Boyd*, 351 U.S. 345, 365 (1956) (Black, J., dissenting)).

II. A Criminal Defendant's Right to Be Present, to Know the Evidence Against Him, and to Confront and Cross-Examine His Accusers is Fundamental.

The President's military commissions purport to provide "full and fair trials," yet they trample "[o]ne of the fundamental guaranties of life and liberty": the right of the accused to confront his accusers. *Kirby v. United States*, 174 U.S. 47, 55 (1899). This basic building block of a fair trial is "founded on natural justice," *Crawford*, 541 U.S. at 49, and grounded "deep in human nature" itself, *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988).

The right of confrontation is a basic tenet of fair play with "a lineage that traces back to the beginnings of Western legal culture." *Id.* at 1015. It existed under Roman law. *Ibid.* Around 100 A.D. the Emperor Trajan wrote Pliny the Younger: "'Anonymous informations ought not to be received in any sort of prosecution. It is introducing a very dangerous precedent, and is quite foreign to the spirit of our age.'" *Carlson v. Landon*, 342 U.S. 524, 552 n.7 (1952) (Black, J., dissenting) (quoting The Harvard Classics, Vol. IX, Part 4).[5]

Given its ancient pedigree, it is no surprise that the right of confrontation was at the forefront of the genesis of our own legal system. The Framers incorporated it into the Sixth Amendment. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."). Chief Justice

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[5] *See also* Book of Acts 25:16 ("It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges."), *quoted in Coy*, 487 U.S. at 1015-16.

Marshall, shortly thereafter, opined that: "'I know [no right], by undermining which, life, liberty and property, might be more endangered.'" *United States v. Burr*, 25 F. Cas. 187, 193 (C.C. Va. 1807) (No. 14,694). Perhaps the most essential attributes of the right of confrontation are (1) the right to be present when adverse testimony is offered, and (2) the right to challenge such testimony by cross-examination.

1. "One of the most basic of the rights guaranteed by the [right of confrontation] is the accused's right to be present in the courtroom at every stage of his trial." *Illinois v. Allen*, 397 U.S. 337, 338 (1970); *accord United States v. Gagnon*, 470 U.S. 522, 526 (1985). Without the defendant's presence during adverse testimony, defense counsel cannot properly function; an accused's "life or liberty may depend upon the aid which, by his personal presence, he may give to counsel . . . . The necessities of the defense may not be met by the presence of his counsel only." *Lewis v. United States*, 146 U.S. 370, 373-74 (1892). "The personal presence of the accused from the beginning to the end of a trial for felony . . . may be, and must be assumed to be, vital to the proper conduct of his defense, and cannot be dispensed with." *Schwab v. Berggren*, 143 U.S. 442, 447 (1892); *accord Allen*, 397 U.S. at 344 ("one of the defendant's primary advantages of being present at the trial [is] his ability to communicate with his counsel"); *Hopt v. Utah*, 110 U.S. 574, 578 (1884) (defendant's right to be present is "vital to the proper conduct of his defense").

Accordingly, the right of the accused to be present is "scarcely less important to the accused than the right of trial itself." *Diaz v. United States*, 223 U.S. 442, 455 (1912). "A leading principle that pervades the entire law of criminal procedure is that, after indictment is found, nothing shall be done in the absence of the prisoner." *Lewis*, 146 U.S. at 372. Military courts recognize this principle as well—"[t]he integrity of the military justice system is jeopardized where a hearing is held and witnesses questioned without all parties to

the trial being present." *United States v. Dean*, 13 M.J. 676, 678 (A.F.C.M.R. 1982).

2. Also central to the right of confrontation is the ability of the accused to test the veracity of his accusers' allegations. "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in the expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405 (1965). This Court recently reaffirmed that the right to confront and to cross-examine witnesses is a "bedrock procedural guarantee." *Crawford*, 541 U.S. at 42.

Even in civil matters:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the *evidence used to prove the Government's case must be disclosed to the individual* so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is *even more important* where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.

Greene v. McElroy, 360 U.S. 474, 496 (1959) (emphasis added); *accord Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 103-04 (1963).

"The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the

misinformed, the meddlesome, and the corrupt to play the role of the informer undetected and uncorrected." *United States ex rel. Knauff v. Shaughnessy*, 339 U.S. 537, 551 (1950) (Jackson, J., dissenting).

III. The Failure to Safeguard the Accused's Right to Confrontation Renders the Military Commissions Fatally Flawed.

The District Court held that the procedures of the military commissions, particularly in their failure to respect the right of the accused to confront his accusers, were "fatally contrary to or inconsistent with" those of the Uniform Code of Military Justice ("UCMJ"). *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 168 (D.D.C. 2004). The Court of Appeals rejected this holding, concluding that "[t]he UCMJ . . . imposes only minimal restrictions upon the form and function of military commissions . . . ." 415 F.3d at 43. The Court of Appeals' decision is wrong as a matter of statutory construction. Its holding also unnecessarily raises grave constitutional concerns.

A. The Uniform Code of Military Justice Prohibits Gross Departures From Recognized Standards for a Fair Trial.

The UCMJ makes clear that military trials—including military commissions—must provide a fundamentally fair process. Article 36 of the UCMJ cabins the President's discretion to establish such procedures accordingly:

> [P]rocedures, 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. § 836 (emphasis added).

The government reads this provision as authorizing the President to dispense wholesale with "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts," simply on the basis of his *ipse dixit* that they are "not practicable" under current conditions. President's Order ¶ 1(f).[6] For three reasons, such a reading distorts Article 36's intended limit on executive discretion. First, accepted principles of statutory construction teach that, absent an explicit statement from Congress, statutes must be construed to provide a fair hearing. Second, the military gave specific assurances to Congress when the Articles of War and the UCMJ were under consideration that any departure of military commission procedure from court-martial procedure—which explicitly safeguards an accused's right of confrontation—would be minor. Finally, the historical practice of military commissions generally has been to respect basic rights of the accused and to follow the procedures of general courts-martial in all essential respects.

1. Statutes Must Be Construed to Require a Fair Hearing, Consistent with Due Process.

Absent the most explicit indication from Congress, its laws—including the UCMJ—must be construed to provide a hearing consistent with due process.

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[6] "Practicable" is defined as "capable of being done, effected, or put into practice with the available means; feasible." RANDOM HOUSE UNABRIDGED DICTIONARY 1517 (2d ed. 1987). It is distinct from "practical." *See* FOWLER'S MODERN ENGLISH USAGE 469 (2d ed. 1965) ("*practicable* means capable of being effected or accomplished, and *practical* means adapted to actual conditions").

"From a great mass of cases, running the full gamut of control over property and liberty, there emerges the principle that statutes should be interpreted, if explicit language does not preclude, so as to observe due process in its basic meaning." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 165 (1951) (Frankfurter, J., concurring). "[T]raditional forms of fair procedure [will] not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no such inhibition." *Greene*, 360 U.S. at 496. *Cf. Clark v. Martinez*, 543 U.S. 371, 125 S. Ct. 716, 722-23 (2005), *and Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) (construing statute to authorize detention of aliens for only a reasonable period, in order to avoid serious constitutional questions that would be raised by indefinite and potentially permanent detention).

"The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49 (1950). "When the Constitution requires a hearing, it requires a fair one . . . ." *Id.* at 50. For this reason, the Court has construed many rules and statutes that are otherwise silent on the point to require a hearing consistent with due process of law. *See, e.g., Burns v. United States*, 501 U.S. 129, 138 (1991) (collecting cases).

These principles do not permit the government's reading of the UCMJ to authorize trials *in absentia*, on the basis of secret evidence and *ex parte* statements given with no meaningful opportunity for cross-examination. Such procedures contravene the basic essentials of due process, and Congress has not explicitly authorized such procedures in the UCMJ or anywhere else.

2. The Government's Reading of Article 36 Violates the UCMJ's Express Limitation on Executive Discretion.

Congress created the UCMJ in 1950 in response to calls for a system of "maximum justice," *Hearings on H.R. 2498 Before a Subcommittee of the Committee on Armed Services*, 81st Cong. 597 (1949) (Stmt. of James Forrestal, Sec'y of Defense) ("*House Hearings*"), and in order to "insure a fair trial" for defendants accused of crimes in military proceedings, H.R. REP. NO. 81-491, at 4 (1949) (listing provisions designed to "insure a fair trial"); S. REP. NO. 81-486, at 2 (1949) (same). The Committee charged with drafting the UCMJ contemplated a "complete repudiation of a prior system of military justice conceived of as *only an instrumentality* of [the President's] command." Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169, 174 (1952-53) (emphasis added). In short, the UCMJ "reflect[s] [Congress's] effort to reform and modernize the system—from top to bottom." *Burns v. Wilson*, 346 U.S. 137, 141 (1953).

At the time, it was unclear whether military courts were bound to respect constitutional rights—including the Sixth Amendment right to confront witnesses. *See, e.g.*, *United States v. Zimmerman*, 2 U.S.C.M.A. 12, 17 (1952) ("The courts have been divided on the question whether [the Constitution] applies of its own force to personnel of the military establishment."). Congress responded to that uncertainty by incorporating into the UCMJ nearly every significant constitutional safeguard ensuring fairness in criminal trials. The legislative history makes clear that Congress knew that ensuring a fair trial in the military courts necessitated this statutory fortification of basic rights. As one member of the Armed Services Committee noted, the UCMJ "seeks to shield the accused substantially just as he is shielded by our Constitution and laws in civil courts . . . ." CONG. REC., 81st Cong., 1st Sess., at 5726 (1949) (Stmt. of Rep. Philbin).

Accordingly, the Court of Military Appeals has held that courts must look to the UCMJ to determine whether "there are fundamental rights inherent in the trial of military offenses which must be accorded to an accused before it can be said that he has been fairly convicted." *United States v. Clay*, 1 U.S.C.M.A. 74, 77 (1951). One of those "fundamental" rights is the right of the accused to be present, found in Article 39, 10 U.S.C. § 839(b). *See United States v. Daulton*, 45 M.J. 212, 219 (C.M.A. 1996) (UCMJ does not "authorize expelling an accused from the courtroom"); MANUAL FOR COURTS-MARTIAL UNITED STATES A21-45 (2002 ed.) ("Article 39 establishes the right of the accused to be present at all trial proceedings" and "is grounded in the due process clause of the Fifth Amendment and the right to confrontation clause of the Sixth Amendment").

While Congress contemplated that the President would have some discretion and, therefore, did not occupy the entire field of procedural regulations for military commissions, it did establish a fair-trial floor. The delegation directs the President to apply the procedural and evidentiary rules generally applicable in federal criminal cases, "so far as he considers practicable." 10 U.S.C. § 836. As this Court said recently in another context, "while [the statutory language at issue] suggests discretion, it does not necessarily suggest unlimited discretion." *Zadvydas*, 533 U.S. at 697. On the contrary, when reading this language in the Articles of War—the predecessor to the UCMJ—Justice Rutledge stated that it was "a clear mandate that Congress intended all military trials to conform as closely as possible to our customary and procedural and evidentiary protections, constitutional and statutory, for accused persons." *In re Yamashita*, 327 U.S. 1, 63 (1946) (Rutledge, J., dissenting)

The UCMJ's legislative history reinforces the conclusion that Congress understood itself to be delegating only limited leeway to the President. While it was considering the UCMJ, members

of Congress initially considered the "to the extent practicable" language in the Articles of War to be "rather dangerous" since a President might take the position from it that he could "just waive [protections available to civilians] by mere regulation." *House Hearings* at 1017; *see also id.* at 1015-19, 1061-64. The Armed Services Subcommittee contemplated removing that language and pressed the Department of Defense Assistant General Counsel and Executive Secretary of the UCMJ drafting committee, Felix Larkin, to provide specific examples when such discretion would be exercised.

Larkin answered that any deviations from federal-court rules would be minor, and provided specific examples:

- judicial notice could be broader in the military justice system given the "multitude of records that are kept by the military and the great number of official documents";

- foreign documents in the military system should not require authentication by consul because "[t]here is a lot of documentary evidence and printed material that would come before the military courts-martial in an occupied area, or in a battle zone or close to one which you could not get authenticated by consul [because] [h]e is just not anywhere near where this court is held";

- warrant requirements should be loosened "on camps, stations and posts" because "[f]requently you could not find anybody to issue a warrant."

Id. at 1017. Larkin never suggested that the President might have the power, under any circumstances, to dispense with basic procedural safeguards.

Reassured by the executive branch's on-the-record explanation that deviations from ordinary procedural rules

would be quite limited, the Subcommittee preserved the "to the extent practicable" language in Article 36. *Id.* at 1062-63. To now uphold the wholesale disregard of basic procedural rights in the military commission regulations at issue here would flout Congress' express understanding of the Act it created.

3. Historical Practice Confirms that Persons Accused Before Military Commissions Cannot Be Tried *in Absentia* on the Basis of Secret Evidence.

The practices of military commissions throughout history demonstrate officials' concern that the procedures for ascertaining guilt comport with rudimentary fairness. Military commissions are "our common law war courts" borne out of the necessity to "meet[] many urgent governmental responsibilities related to war." *Madsen v. Kinsella*, 343 U.S. 341, 346-47 (1952). Although our leaders have adapted the military commission "in each instance to the need that called it forth," *id.* at 347, "[p]roperly employed military commissions have *never* been a forum of choice that the government could select in order to sidestep constitutional judicial safeguards." David Glazier, Note, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2010 (2003) (emphasis added).

Military commissions, at least in some form, have historically played a role in our Nation's times of conflict, providing defendants various degrees of procedural protections along the way. However, even from their earliest days, military commissions have—except in the most egregious and shameful of cases[7]—endeavored to honor core guarantees necessary to

[7] Perhaps the darkest days of military commissions occurred in 1862, when, over the span of 37 days, military commissions in Minnesota tried almost 400 members of the Dakota tribe for "'various murders and outrages committed . . . on the Minnesota Frontier.'" Carol Chomsky, *The U.S.-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 27 (1990). Of those 400 men, 303 were sentenced to death; only 69 were

ensure a fair process. The right of the accused to be present before the tribunal that will decide his fate has been one of those ever-present rights.

1. Because "the Framers harbored a deep distrust of executive military power and military tribunals," *Loving v. United States*, 517 U.S. 748, 760 (1996), historical examples of attention to the fairness of military commissions abound. General Washington himself exercised review over military commissions and "made a practice of approving, disapproving, or mitigating sentences." Maj. Willard B. Cowles, JAGD, *Trial of War Criminals by Military Tribunals*, 30 AM. BAR. J. 330, 332 (June 1944).

Similarly, many of the military commissions held during the Civil War "were disapproved due to procedural irregularities"—sentences were invalidated because the judge advocate was not sworn, "because [the] record did not show sufficient procedural protections for the accused [or] that the order convening the commission was read to the prisoner, [or because] the prisoner did not have [the] opportunity to challenge members" of the commission. Maj. Michael A. Newton, *Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1, 17 n.67 (1996) (citing assorted JAG Opinions from 1862-63); *accord* Maj. Cowles, *supra*, at 332-33 ("'In a proceeding involving life, such irregularities'"—like not providing the charge against the accused in writing or not permitting objection to commission members—"'are wholly inexcusable, and make the execution of the death sentence legally impossible.'") (quoting *United States v. Sailor*, 2 JAG Record Book 83 (1863)).

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acquitted. *Id.* at 28. The commissions were so cursory that on one day, 42 men were tried. *Id.* at 27. Disturbed by the proceedings, President Lincoln eventually commuted all but 38 of the death sentences. *Id.* at 33-34. The 38 condemned men were executed on December 26, 1862—the largest mass execution in American history. *Id.* at 13, 36-37.

One of the "basic rights of the accused" at a military commission not only contemplates that he will be present during the proceedings, but also that he will have the "right to be confronted with the witnesses against him." Cowles, *supra*, at 333. In the Civil War, military commission convictions were invalidated by the Judge Advocate General for denying the right to be present or to cross-examination:

> [General Holt] repeatedly overturned the decisions of trials by military commissions . . . Holt reviewed the sentence of Mary Clemmens . . . [stating]: "Further, it is stated that the Commission was duly sworn—*but does not add 'in the presence of the accused.' Nor does the Record show that the accused had any opportunity of challenge afforded her.* These are particulars, in which it has always been held that the proceedings of a Military Commission should be assimilated to those of a Court-martial. And as these defects would be fatal in the latter case, they must be held to be so in the present instance."

MARK E. NEELY, THE FATE OF LIBERTY 162-63 (1991) (quoting opinion of General Holt) (emphasis added). *See also* Carol Chomsky, *The U.S.-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 60 n.297 (1990) (citing opinion of General Holt invalidating military commission sentence because, *inter alia*, record did not contain cross-examination of witnesses (Dec. 16, 1862)).

Later military commissions arising from the Philippine Insurrection at the turn of the century continued to recognize this right. In one telling example, the officer reviewing the conviction of members of the local population for murdering five U.S. soldiers, chastised the commission because

> the surprising error occur[ed] of admitting as evidence the report of a board of officers, which had investigated the cause of disappearance of the soldiers. . . . *Every officer, even of a year's service should be presumed to know that mere written* ex parte *statements are wholly inadmissible as evidence*, and grossly irregular in a capital case.

General Orders, No. 36, Hdqrs. Div. of the Philippines (Feb. 19, 1902) (emphasis added), *quoted in* David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5 (forthcoming Fall 2005), *available at* http://www.ssrn.com/lsn/index.html.

Military commissions of the 20th century also safeguarded the accused's right of confrontation. The commissions in occupied Germany after World War II protected procedural fairness rights through an extensive criminal code that provided for robust confrontation rights, including the right "'[t]o be present at . . . trial [and] to give evidence and to examine or cross-examine any witness.'" *Madsen*, 343 U.S. at 358 n.24 (quoting U.S. Military Gov't Ord. No. 2 (1946)). And, a Department of Defense study regarding the formation of a military commission to try ex-service members for alleged war crimes in the Vietnam War advised that "the right to confront witnesses is clearly fundamental to a fair trial . . . and thus required in a trial by military commission irrespective of whether it is regarded as a practical rule by the President." Military Commissions, Dep't of Defense, Office of the General Counsel and Dep't of the Army, at 27 (1970), attached as Appendix to Brief of *Amici Curiae* Int'l Law Professors.

2. Consistent with military commissions' use of procedures to ensure that the accused has a fair trial, such procedures have historically paralleled those of courts-martial. Even before the UCMJ existed, officials understood that military commissions would employ procedures similar to those in courts-martial in

all essential respects, including the right of the accused to be present and the right of confrontation. "With but a few exceptions, the procedure of military commissions, for the following century, has followed that of general courts martial." Maj. Cowles, *supra*, at 332; *accord* Note, *Secret Evidence in the War on Terror*, *supra*, at 1972 n.79 ("Historically, the procedural protections afforded to the accused in military commissions have tracked those provided to military personnel in courts-martial proceedings."); Kevin J. Barry, *Military Commissions: Trying American Justice*, 2003-NOV ARMY LAW. 1, 2 (2003) ("the rules and procedures applicable to military commissions have always been closely allied to those rules and procedures applicable to courts-martial at that point in time"). In fact, the variations between the two procedures were "principally as regards [to] the number required for a quorum and voting," Cowels, *supra*, at 332, *not* variations in procedures safeguarding core due process rights.

This history is relevant here because the extent to which military commission procedures have shadowed court-martial procedures indicates the level of due process safeguards basic to military commissions. *See* Eugene R. Fidell et al., *Military Commission Law*, 2005-DEC ARMY LAW. 47, 48 (2005) (describing Manual for Courts-Martial "as the baseline against which . . . departures must be judged").

In the Civil War, commanders made frequent use of military commissions, which, they noted, "should be ordered by the same authority, be constituted in a similar manner, and their proceedings be conducted according to the same general rules as courts-martial, in order to prevent abuses which might otherwise arise." General Orders, No. 1, Hdqrs. Dep't of the Missouri (Jan. 1, 1862), *available at* Cornell University Library, *Making of America*, http://cdl.library.cornell.edu/moa/

index.html.[8] *Accord* General Orders, No. 2, Hdqrs. Army of the Potomac (April 7, 1862) (proposal from General McClellan to Secretary of War that military commissions "be appointed, governed, and conducted, their proceedings reviewed, and their sentences executed as nearly as practicable in accordance with courts-martial"); General Orders, No. 12, Hdqrs. Dep't of the Rappahannock (May 16, 1862) (military commission proceedings "shall be the same as that of court-martial"). A Field Manual of Courts-Martial from 1863 outlined the mechanics of military trials, stating that military commissions "are constituted in a manner similar to [courts-martial], and their proceedings are conducted in exactly the same way, as to form, examination of witnesses, etc." CAPT. HENRY COPPEE, FIELD MANUAL OF COURTS-MARTIAL, at iii-iv (1863), *quoted in* Glazier, Note, *supra*, at 2038.

The Articles of War, the predecessor to the UCMJ, also recognized the parallels between the two fora. At congressional hearings regarding changes to the Articles of War, Major General Enoch H. Crowder, the Judge Advocate General of the Army from 1911-1923 and drafter of the revisions, testified that "[b]oth classes of courts have the *same procedure*." *Subcommittee on Military Affairs of the Senate, Hearing S.3191*, 64th Cong., 1st Sess. (1916) (emphasis added); *see also Yamashita*, 327 U.S. at 68 (Rutledge, J., dissenting) ("it is clear that General Crowder at all times regarded all military commissions as being governed by the identical procedure" as courts-martial).[9]

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[8] Citations to the *Making of America* reference Cornell University's online digital library of primary sources in American social history from the antebellum period through reconstruction.

[9] General Crowder had been the senior military lawyer and legal advisor to the U.S. commanders in the Philippines from 1898 to 1901, which is notable because the Philippine Insurrection military commissions provided "due process [protections] fully equivalent to the courts-martial even when

Commentators in the years leading up to the UCMJ's enactment observed that "[t]he procedure in military commissions, although not so clearly worked out in the past as that of courts-martial, is now sufficiently well established," and while military commissions are "'in general even less technical than a court-martial, [they] will ordinarily and properly be governed, upon all important questions, by the established rules and principles of law and evidence.'" Sheldon Glueck, *By What Tribunal Shall War Offenders Be Tried?*, 24 NEB. L. REV. 143, 154-55 (1945) (quoting WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 842 (2d ed. 1920)).

Not surprisingly then, the Preamble of the Manual for Courts-Martial makes clear that UCMJ procedures should generally apply to military commissions, as well: "Subject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions and provost courts shall be guided by the appropriate principles of law and rules and procedures and evidence prescribed for courts-martial." Preamble, MANUAL FOR COURTS-MARTIAL ¶ 2(b)(2).

When it enacted the UCMJ, Congress must have been aware not only of the well-established procedural overlap between courts-martial and military commissions, but also of military commissions' historical practice of affording defendants rudimentary due process rights. Article 36 thus must be construed as ensuring that both military commissions and courts-martial will observe the procedural safeguards necessary to afford defendants a fair-trial floor.

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conducted under the most adverse of circumstances." Glazier, *supra*, forthcoming article in 46 VA. J. INT'L L 5.

B. The Constitution Entitles Petitioner to a Trial Consistent with the Fundamentals of Due Process.

If the Court were to construe the UCMJ to authorize the extraordinary procedures proposed by the government, then it would confront the issue whether such procedures infringe any restrictions imposed by the Constitution. Decades-old decisions of the Court, grouped together as the *Insular Cases*, recognize that certain fundamental constitutional rights apply to non-citizens outside our borders. The Court of Appeals, without any mention of the *Insular Cases*, relied on later World War II war-crimes decisions of the Court to reach its holding. 415 F.3d at 37-38, 39-40. Properly read, however, these cases neither require nor justify the result below.

1. In the *Insular Cases*, the Court Correctly Held that Basic Constitutional Norms Apply Extraterritorially.

Following the Spanish-American War, the issue arose whether and to what extent constitutional protections applied in newly-acquired territories, such as the Philippines and Puerto Rico. The issue was particularly acute with regard to such rights as trial by jury and presentment by grand jury, which were not part of the legal tradition of these territories. Some contended that the Constitution applied in full force wherever the United States government acted. Others contended that the Constitution applied only within the States of the Union, and perhaps within territories "destined to become States."

The Court ultimately resolved these issues in what came to be known as the *Insular Cases*: *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); and *Downes v. Bidwell*, 182 U.S. 244 (1901).[10] The

[10] *Hawaii v. Mankichi*, 190 U.S. 197 (1903), is sometimes included in this grouping, as well.

Court held: "[T]he Constitution of the United States is in force . . . wherever and whenever the sovereign power of that government is exerted," but "[t]he Constitution . . . contains grants of power, and limitations which in the nature of things are not always and everywhere applicable . . . ." *Balzac,* 258 U.S. at 312. In any such case, the issue is which constitutional restrictions are "applicable to the situation." *Dorr*, 195 U.S. at 143. The answer depends on whether the rights in issue are "'restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution.'" *Id.* at 147 (quoting *Downes*, 182 U.S. at 291 (White, J., concurring)). This resolution has been accepted ever since. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990); *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976).

Under the *Insular Cases*, trial by jury and presentment by grand jury are not required in unincorporated territories, but a fundamentally fair trial *is* required. Similarly here, the Court need not decide whether the Sixth Amendment right of confrontation applies to all military commissions in all respects, but rather, whether aliens detained at Guantanamo Bay who are criminally prosecuted before an American military tribunal may insist that they be tried under procedures historically regarded in this country as essential to a fair trial.

Matthews v. Diaz, 426 U.S. 67 (1976), answered that question affirmatively:

> There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects *every one* of these persons from deprivation of life, liberty, or property without due process of law. . . . Even one whose presence in this country is unlawful, *involuntary*, or transitory is entitled to that constitutional protection.

Id. at 77 (emphasis added). Petitioner and others detained at Guantanamo are certainly "within the jurisdiction of the United States," although not within the territorial borders of the fifty States. *See Rasul v. Bush*, 452 U.S. 466, 471 (2004). Their position and their rights are similar to those of persons charged with crimes in unincorporated territories: the Fifth and Sixth Amendments may not apply in all respects, but there are some protections "of so fundamental a nature that they may not be transgressed," *Dorr*, 195 U.S. at 143, such as the right to confrontation.

2. The Court's Subsequent Decisions Did Not Overrule the *Insular Cases*.

Later wartime decisions of this Court should not be read to undermine the *Insular Cases*' holdings. *In re Yamashita*, 327 U.S. 1 (1946), denied habeas corpus relief to a Japanese commander who was sentenced to death following trial under procedures that permitted free use of hearsay and other evidence given *ex parte*, but did not, so far as the opinion reflects, permit trial *in absentia* or the use of undisclosed secret evidence. The Court recognized that

> [Congress] has not foreclosed [enemy aliens'] right to contend that the Constitution or laws of the United States withhold authority to proceed with the trial. It has not withdrawn, and the Executive branch of the government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.

Id. at 9. Nevertheless, the Court rejected on the merits the contention that the use of testimonial hearsay evidence and the other circumstances of trial "violate[d] any military, statutory or constitutional command." *Id.* at 25.

Justice Rutledge filed a powerful, and timeless, dissent:

> It is outside our basic scheme . . . in capital or other serious crimes to convict . . . on hearsay once, twice or thrice removed, more particularly when the documentary evidence or some of it is prepared *ex parte* by the prosecuting authority and includes not only opinion but conclusions of guilt. Nor in such cases do we deny the rights of confrontation of witnesses and cross-examination.
>
> . . . .
>
> The matter is not one merely of the character and admissibility of evidence. It goes to the very competency of the tribunal to try and punish consistently with the Constitution, the laws of the United States made in pursuance thereof, and treaties made under the nation's authority.

Id. at 44-45 (Rutledge, J., dissenting) (footnotes omitted).

The free use of hearsay in criminal trials before multi-national tribunals, such as the war-crimes tribunals that followed World War II, has been defended as part of a necessary compromise between common-law and civil-law systems, to be applied by judges from both traditions. *See*, *e.g.*, Evan J. Wallach, *The Procedural and Evidentiary Rules of the Post World War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure?*, 37 COLUM. J. TRANSNAT'L L. 851, 854-55 (1999).[11] Whatever the merits of that attempted justification, it can have no relevance to a purely American military commission sitting in territory over which

[11] This historical fact recalls Mark Twain's gibe about similar procedure: "To my mind, this is irregular. It is un-English; it is un-American; it is French." MARK TWAIN, THE MAN THAT CORRUPTED HADLEYBURG AND OTHER ESSAYS AND STORIES 262 (Cyntha Fisher Fishkin ed. 1996).

the United States has exclusive jurisdiction. And nothing in *Yamashita* can justify the use of secret evidence and exclusion of the accused from his own trial.

Yamashita and its companion case, *In re Homma*, 327 U.S. 759 (1946), are best understood as further illustrations of the war-era Court's willingness to tolerate what Justice Murphy described in *Korematsu v. United States*, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting), as conduct that "goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism." Today the Court again faces the choice described by Justice Murphy in his dissent in *Homma*:

> Either we conduct such a trial as this in the noble spirit and atmosphere of our Constitution or we abandon all pretense to justice, let the ages slip away and descend to the level of revengeful blood purges.

327 U.S. at 760 (Murphy, J., dissenting). From the perspective of history, the dissents in *Yamashita* and *Homma*, like the dissent in *Korematsu*, are truer to the Nation's constitutional principles and to Anglo-American traditions of justice than the results of those cases.

Nor does *Johnson v. Eisentrager*, 339 U.S. 763 (1950), require a different result. There, the Court held that the writ of habeas corpus was unavailable to certain German war criminals convicted before military commissions and imprisoned in Germany. The Court expressly limited its holding to cases involving "an alien enemy who, at no relevant time and in no stage of his captivity, has been within [the court's] territorial jurisdiction." *Id.* at 768. *Eisentrager* was based on a view of habeas jurisdiction, *see id.* at 790-91, that was later rejected. *See Rasul*, 542 U.S. at 476-77; *see also id.* at 483 n.15 (allegations of detainees held at Guantanamo "unquestionably

describe custody in violation of the Constitution or laws or treaties of the United States.") (quotation marks omitted).

Beyond this, *Eisentrager* did not involve any allegation that the trial by which the prisoners were convicted was unfair in any fundamental sense. Rather, as described by the Court's opinion, the prisoners' argument was that for technical reasons they were not subject to trial before a military commission. 339 U.S. at 785. The Court noted that the prisoners' contention that they were entitled to claim the full protection of the Fifth and Sixth Amendments would "amount[] to a right not to be tried at all" for the war crimes with which they were charged *Id.* at 782. The Court's rejection of this sweeping proposition did not establish the government's right to try such persons, or any persons, under fundamentally unfair procedures. No such question was presented in *Eisentrager*.[12]

* * * * *

Threats to our Nation's security have come in various forms throughout its existence. In those uncertain times, this Court has often served as the final barricade between the rule of law and the rule of men. Again thrust into that role today, the Court should not shy away from exercising its authority to ensure the continued balance between security and liberty.

CONCLUSION

For all the reasons stated above, the judgment of the Court of Appeals should be reversed and the case remanded to the District Court with directions to issue the writ.

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[12] A statement in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990), reading *Eisentrager* as "reject[ing] the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States," is both imprecise and inconsistent with the *Insular Cases*.

Respectfully submitted,

Jeffrey P. Sinensky
Kara H. Stein
THE AMERICAN JEWISH COMMITTEE
165 East 56th Street
New York, NY 10022

John W. Whitehead
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville,VA 22901

Arthur H. Bryant
Victoria W. Ni
TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C.
555 Twelfth Street
Suite 1620
Oakland, CA 94607-3693

Marvin L. Gray, Jr.
Jeffrey L. Fisher
Counsel of Record
Kristina Silja Bennard
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

Elliot M. Mincberg
Deborah Liu
PEOPLE FOR THE AMERICAN WAY FOUNDATION
2000 M Street, N.W.
Suite 400
Washington, DC 20036

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Attorneys for *Amici Curiae*