

No. 04-5393

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

**SALIM AHMED HAMDAN,
Plaintiff-Appellee,**

vs.

**DONALD H. RUMSFELD, United States Secretary of Defense, et al.,
Defendants-Appellants.**

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

**BRIEF OF AMICI CURIAE
PEOPLE FOR THE AMERICAN WAY FOUNDATION,
THE RUTHERFORD INSTITUTE AND
EUGENE R. FIDELL
ADVOCATING AFFIRMANCE
IN SUPPORT OF PLAINTIFF-APPELLEE HAMDAN**

Mary Hahn
ALLARD K. LOWENSTEIN INTERNATIONAL
HUMAN RIGHTS CLINIC
127 Wall Street
New Haven, CT 06511
(203) 432-8368

Jonathan M. Freiman (Bar # 49758)
Counsel of Record
WIGGIN AND DANA LLP
One Century Tower
P.O. Box 1832
New Haven, CT 06508-1832
(203) 498-4400

Attorneys for Amici Curiae

SCHEDULED FOR ORAL ARGUMENT
MARCH 8, 2005

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES
AND CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rules 28(a) and 29(d), *amici curiae* state the following:

(A) PARTIES AND AMICI

Except for the *amici*, People For the American Way Foundation, The Rutherford Institute and Eugene R. Fidell, all parties, intervenors, and *amici* appearing before the district court and in this court are listed in the Brief for Appellants.

(B) RULINGS UNDER REVIEW

The ruling at issue in this appeal is the district court's November 8, 2004 Order, in *Hamdan v. Rumsfeld, et al.*, No. 04-CV-1519, 2004 WL 2504508 (D.D.C. Nov. 8, 2004) (Robertson, J.) in which Judge James Robertson granted in part the petition of Salim Ahmed Hamdan for Habeas Corpus and denied Donald H. Rumsfeld's cross-motion to dismiss.

(C) RELATED CASES

All related cases brought by detainees at the Guantanamo Naval Base pending in the district court in this Circuit are listed in the Brief for Appellants. Counsel for *Amici* are not aware at this time of any other related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1(a), *amici curiae* state the following:

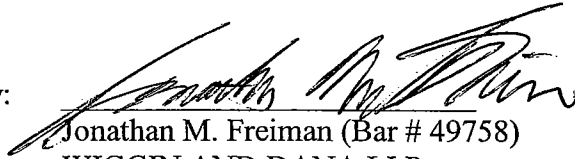
1. People for the American Way Foundation is organized as a corporation. There is no parent corporation and no publicly held corporation owns 10% or more of its stock.
2. The Rutherford Institute is organized as a corporation. There is no parent corporation and no publicly held corporation owns 10% or more of its stock.

Pursuant to D.C. Circuit Rule 26.1(b), *amici* state that their general nature and purpose is the following: *Amici Curiae* are organizations established to promote and protect constitutional rights. Its members have no ownership interest and no members have issued shares or debt securities to the public.

Respectfully submitted,

Dated: December 29, 2004

By:



Jonathan M. Freiman (Bar # 49758)

WIGGIN AND DANA LLP

One Century Tower

P.O. Box 1832

New Haven, CT 06508-1832

(203) 498-4400

Attorneys for Amici Curiae

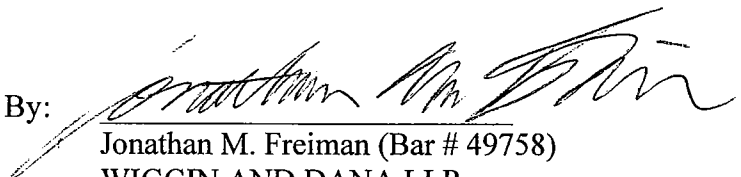
CERTIFICATE OF COUNSEL FOR SEPARATE AMICUS BRIEF:

Pursuant to D.C. Circuit Rule 29(d), Counsel for *Amici Curiae* certifies that a separate amicus brief in support of plaintiff-appellee is necessary because *amici* represented herein are of the opinion that the primary statutory sources for confrontation rights due to defendants in military commissions are Articles 49 and 50 of the Uniform Code of Military Justice. To the undersigned's knowledge, no other *amicus* brief takes this position. This brief addresses no other topic than the federal statutory derivation of confrontation rights due to defendants in military commissions.

Respectfully submitted,

Dated: December 29, 2004

By:



Jonathan M. Freiman (Bar # 49758)

WIGGIN AND DANA LLP

One Century Tower

P.O. Box 1832

New Haven, CT 06508-1832

(203) 498-4400

Attorneys for Amici Curiae

TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES.....	i
CORPORATE DISCLOSURE STATEMENT	ii
CERTIFICATE OF COUNSEL FOR SEPARATE AMICUS BRIEF	iv
TABLE OF AUTHORITIES	vi
GLOSSARY	ix
STATEMENT OF <i>AMICI</i>	1
INTRODUCTION	1
ARGUMENT.....	2
I. Congress Passed the UCMJ to Ensure Fair Trials to Military Defendants	2
II. Confrontation Is At the Core of the Fairness Required by the UCMJ	5
A. <i>The UCMJ Explicitly Provides Confrontation Rights to Commission</i> <i>Defendants</i>	5
B. <i>Respondent’s Historical Citations Do Not Alter the Clear Meaning of the</i> <i>UCMJ</i>	10
III. Commission Procedures Unlawfully Deny Hamdan Confrontation Rights Central to a Fundamentally Fair Trial	12
IV. The President Cannot Violate UCMJ Guarantees of Confrontation Rights in Military Commissions	17
CONCLUSION.....	20
CERTIFICATE OF COMPLIANCE	
APPENDIX	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

CASES

<i>Christensen v. Harris County</i> , 529 U.S. 576 (2000).....	10
* <i>Crawford v. Washington</i> , 124 S. Ct. 1354 (2004)	2, 6, 7, 15
<i>Diaz v. U.S.</i> , 223 U.S. 442 (1912).....	16
<i>Hamdi v. Rumsfeld</i> , 124 S.Ct. 2633 (2004)	2
<i>Hopt v. Utah</i> , 110 U.S. 574 (1884).....	16
<i>Illinois v. Allen</i> , 397 U.S. 337 (1970)	16
<i>Lewis v. U.S.</i> , 146 U.S. 370 (1892).....	16
<i>Madsen v. Kinsella</i> , 343 U.S. 341 (1952).....	11
<i>Malloy v. Hogan</i> , 379 U.S. 1 (1965).....	6
<i>Maryland v. Craig</i> , 497 U.S. 836 (1990).....	17
<i>Mattox v. U.S.</i> , 156 U.S. 237 (1895).....	6
<i>Middendorf v. Henry</i> , 425 U.S. 25 (1976)	3
<i>Pointer v. Texas</i> , 380 U.S. 400 (1965).....	6
<i>Ex parte Quirin</i> , 317 U.S. 1 (1942)	11
<i>Smith v. Illinois</i> , 390 U.S. 129 (1968).....	15
<i>United States v. Anderson</i> , 51 M.J. 145 (C.A.A.F. 1999).....	6
<i>United States v. Baker</i> , 32 M.J. 290 (C.M.A. 1991).....	19
<i>United States v. Clay</i> , 1 U.S.C.M.A. 74 (1951).....	4, 5
<i>United States v. Cokeley</i> , 22 M.J. 225 (C.M.A. 1986).....	7
<i>United States v. Daulton</i> , 45 M.J. 212 (C.M.A. 1996)	10, 17
* <i>United States v. Davis</i> , 19 U.S.C.M.A. 217 (1970).....	1, 8, 14

* Authorities upon which we chiefly rely are marked with asterisks.

<i>United States v. Dean</i> , 13 M.J. 676 (A.F.C.M.R. 1982).....	17
<i>United States v. Donati</i> , 14 U.S.C.M.A. 235 (1963)	13
<i>United States v. Drain</i> , 4 U.S.C.M.A. 646 (1954).....	9, 13
* <i>United States v. Jacoby</i> , 11 U.S.C.M.A. 428 (1960).....	8, 13, 16
<i>United States v. Kossman</i> , 38 M.J. 258 (C.M.A. 1993).....	4
<i>United States v. Lopez</i> , 35 M.J. 35 (1992).....	19
<i>United States v. Obligacion</i> , 17 U.S.C.M.A. 36 (1967)	9
* <i>United States v. Sippel</i> , 4 U.S.C.M.A. 50 (1954)	1, 9
<i>United States v. Vanderwier</i> , 25 M.J. 263 (1987).....	8
<i>United States v. Zimmerman</i> , 2 U.S.C.M.A. 12 (1952).....	3
<i>In re Yamashita</i> , 327 U.S. 1 (1946)	10
<i>Youngstown Sheet & Tube Co. v. Sawyer</i> , 343 U.S. 579 (1952)	20

STATUTES AND CONSTITUTION

10 U.S.C. § 802.....	10
10 U.S.C. § 821.....	5, 17
10 U.S.C. § 827.....	4
10 U.S.C. § 831.....	3, 4, 5
10 U.S.C. §832	4
10 U.S.C. § 836.....	18, 19
10 U.S.C. § 837.....	4, 5
10 U.S.C. § 839.....	1, 10
10 U.S.C. § 844.....	4, 5
10 U.S.C. § 846.....	4
10 U.S.C. § 849.....	<i>passim</i>

10 U.S.C. § 850.....	<i>passim</i>
10 U.S.C. § 855.....	5
U.S. Const., Art. 1, Sect. 8.....	20

LEGISLATIVE AND REGULATORY AUTHORITIES

<i>Hearings on H.R. 2498 Before a Subcommittee of the Committee on Armed Services</i> , 81st Cong. 597 (1949).....	<i>passim</i>
H.R. REP. NO. 491 (“H. REP.”) (1949).....	3
S. REP. NO. 486 (“S. REP.”) (1949).....	3, 4
CONG. REC., 81st Cong., 1st Sess. (1949) (statement of Rep. Philbin) (“CONG. REC.”).....	3, 5

EXECUTIVE MATERIALS

Dept. of Def. Military Comm’n Order No. 1 (“MCO1”), March 21, 2002, ¶6(D).....	12, 15
Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).....	19

MISCELLANEOUS

Carol Chomsky, <i>The United States-Dakota War Trials: A Study in Military Injustice</i> , 43 Stan. L. Rev. 13 (1990).....	11
2 Debates on the Federal Constitution (J. Elliot 2d ed. 1863).....	7
Manual for Courts-Martial (2002 ed).....	10
1 B. Schwartz, <i>The Bill of Rights: A Documentary History</i> (1971).....	6, 7

GLOSSARY

C.A.A.F.....	United States Court of Appeals for the Armed Forces
C.M.A.	The Court of Military Appeals
CONG. REC.	CONG. REC., 81st Cong., 1st Sess. (1949)
H. REP.	H.R. REP. NO. 491 (1949)
House Hearings.....	<i>Hearings on H.R. 2498 Before a Subcommittee of the Committee on Armed Services, 81st Cong. 597 (1949)</i>
Institute	The Rutherford Institute
J.A.G.	Judge Advocate General
MCO1	Dept. of Def. Military Comm'n Order No. 1 March 21, 2002
People For	People For the American Way Foundation
S. REP.	S. REP. NO. 486 (1949)
UCMJ	Uniform Code of Military Justice

STATEMENT OF *AMICI*

Amici believe Congress ensured that defendants in the military justice system would have the basic fair-trial right to confront any witnesses and evidence against them. Appellant and appellee consented to this brief.

Statements of organizational and individual identification are included at Appendix A1.

INTRODUCTION

More than half a century ago, Congress passed the Uniform Code of Military Justice (UCMJ) in order to ensure fairness and openness in military trials. In the words of the then-Secretary of Defense, the nation needed a system of “maximum justice,” and Congress passed the UCMJ to establish that system.¹

The right to confront one’s accusers has always been at the heart of American justice, not just as a part of “maximum justice,” but as one of the minimum safeguards of basic fairness. The UCMJ guarantees that right. While the District Court focused on UCMJ Article 39, the applicability of confrontation rights in military commissions is unequivocally guaranteed elsewhere, in Articles 49 and 50. The plain text of Articles 49 and 50 applies not just to defendants in courts-martial, but also to defendants before military commissions. 10 U.S.C. § 849(d) (explicitly covering “any military court or commission”); 10 U.S.C. § 850(a) (explicitly referring to “a court-martial or military commission”).

As the nation’s highest military court has long noted, those provisions flatly forbid violations of “the right of confrontation.” *U.S. v. Davis*, 19 U.S.C.M.A. 217, 224 (1970) (Art. 49); *U.S. v. Sippel*, 4 U.S.C.M.A. 50, 56 (1954) (Art. 50) (“[I]f a party seeks to establish a fact by a substitute method [other than by direct testimony], the party against whom the testimony is

¹ *Hearings on H.R. 2498 Before a Subcommittee of the Committee on Armed Services*, 81st Cong. (“*House Hearings*”) 597 (1949) 597 (Statement of James Forrestal, Secretary of Defense).

offered must have been afforded an opportunity to confront the witness.”). That guarantee of fundamental fairness echoes the Supreme Court’s decision in *Crawford v. Washington*, 124 S. Ct. 1354 (2004). *Crawford* explained that the use of “*ex parte* examinations as evidence against the accused” was precisely the “evil” that the “right to confrontation was meant to prohibit; and that the founding-era rhetoric decried.” *Id.* at 1364. Congress provided a statutory bulwark for those rights through its passage of the UCMJ. Yet the regulations governing the military commission flatly deny petitioner the right to confront the witnesses against him. Moreover, the government has acknowledged that it intends to use that unfair and unlawful advantage: it plans to introduce written reports of secret interrogations of third parties and to bar petitioner from the courtroom when introducing witnesses.

Though battles unquestionably present the need to detain enemies, *see Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004), punishment is different than detention. When it passed the UCMJ, Congress made a choice to continue on the path of openness and fairness that Justice Jackson blazed as a prosecutor at the Nuremburg trials. The regulations governing the commissions flout key fair-trial safeguards that were provided by Congress in the UCMJ, that military courts have consistently protected, and that the Framers viewed as fundamental. The commission as currently constituted cannot lawfully try petitioner.

ARGUMENT

I. Congress Passed the UCMJ to Ensure Fair Trials to Military Defendants

Congress created the Uniform Code of Military Justice (“UCMJ”) in order to ensure that defendants accused of crimes in military courts received fair trials. In the years after World War II and the military commissions that tried Quirin and Yamashita, Congress viewed military justice as fundamentally unfair – a system that provided a handful of fair-trial protections in no

more than a “coincidental” manner.² Congress sought to replace the “coincidental” connection between fairness and military justice with a new system of military justice “designed to *insure* a fair trial.”³ *Id.* (emphasis added). Congress enacted that system – the UCMJ – in 1950.

At the time, it was unclear whether constitutional rights, including the Sixth Amendment right to confront adverse witnesses, applied in military courts.⁴ Congress responded to that uncertainty by incorporating by statute nearly every significant constitutional safeguard ensuring fairness in criminal trials. The legislative history makes clear that Congress knew that “insur[ing] a fair trial” in the military courts necessitated this statutory fortification of constitutional 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”⁵

This statutory fortification of constitutional fair-trial protections pervades the UCMJ; indeed, a few UCMJ provisions arguably provide greater fair-trial protections than the civilian justice system. Among the many fair-trial protections are Article 31, which guarantees the right not to be compelled to incriminate oneself “to all persons [subject to the Code] under all circumstances” – and makes the act of compelling self-incrimination an independent criminal

² *House Hearings* at 634 (statement of Richard Wels, Chairman, Special Committee on Military Justice of N.Y. Cty. Lawyers’ Assoc.); H.R. REP. NO. 491 (“H. REP.”), at 4 (1949) (listing provisions designed to ensure fair trial); S. REP. NO. 486 (“S. REP.”), at 2 (1949) (same).

³ H. REP. at 4 (listing provisions designed to ensure fair trial); S. REP. at 2 (1949) (same).

⁴ *See, e.g., U.S. 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.”). Because the UCMJ guarantees defendants nearly all rights that the Constitution guarantees, the question may remain unanswered. *See Middendorf v. Henry*, 425 U.S. 25, 33 (1976).

⁵ CONG. REC., 81st Cong., 1st Sess., at 5726 (1949) (statement of Rep. Philbin) (“CONG. REC.”).

offense;⁶ Article 44, which extends the Fifth Amendment’s double jeopardy provision to military justice;⁷ Article 10, which “imposes a more stringent speedy-trial standard than that of the Sixth Amendment”;⁸ Article 46, which ensures equal processes for obtaining witnesses;⁹ Article 37, which criminalizes any effort to coerce the action of “any . . . military tribunal”;¹⁰ and Article 27, which guarantees the right to counsel.¹¹

Our nation’s highest military court has long understood the UCMJ to provide for fundamental fairness in military courts. Just one year after the UCMJ’s passage, the Court of Military Appeals¹² noted 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.” *U.S. v. Clay*, 1 U.S.C.M.A. 74, 77 (1951). The answer is plain: the UCMJ ensures that defendants in military courts “be given a

⁶ 10 U.S.C. §831 (establishing right, requiring that individuals be warned of right before interrogation, and making compulsion of self-incriminating statement an offense under UCMJ); *see also House Hearings* at 988 (“So not only do we retain the constitutional protections against self-incrimination . . . but it goes further and provides that if anybody tries to force you to incriminate yourself then he has committed an offense.”) (statement of UCMJ drafter, Ass’t Gen’l Couns. Felix Larkin, Dept. of Def.).

⁷ 10 U.S.C. §844; *see also House Hearing* at 616 (“You see, the commanding officer can do anything in favor of the accused. He cannot do anything against the accused.”) (statement of UCMJ drafter, Prof. Morgan); S. REP. at 20 (provision “continu[ed] . . . the highly desirable features and safeguards of the automatic review system” while “represent[ing] a substantial strengthening of the rights of an accused.” Further, Article 32 provides safeguards beyond the civilian system by extending confrontation rights to pretrial investigation hearing. 10 U.S.C. §832; *see also House Hearings* at 997 (“This I should say goes further than you usually find in a proceeding in a civil court”) (Felix Larkin).

⁸ *U.S. v. Kossman*, 38 M.J. 258, 259 (C.M.A. 1993).

⁹ 10 U.S.C. §846.

¹⁰ 10 U.S.C. §837.

¹¹ 10 U.S.C. §827.

¹² The Court of Military Appeals (C.M.A.) was renamed in 1995 the “U.S. Court of Appeals for the Armed Forces” (C.A.A.F.).

fair trial and it commands us to see that the proceedings in the courts below reach that standard.”

Id.

The UCMJ applies to the entire military justice system, not just courts-martial. By its explicit terms, its provisions apply to courts-martial, provost courts, military commissions and “other military tribunals.” *See* 10 U.S.C. § 821. To be sure, some provisions were motivated primarily by problems that Congress perceived in courts-martial. But many provisions were not. These provisions, which embody Congress’s intention to ensure fair trials in *all* military fora, explicitly apply in military commissions, in all military tribunals (a category that includes commissions),¹³ or to all persons subject to the Code.¹⁴

As the next section makes clear, two of the most significant fair-trial protections establish classic confrontation rights that apply – explicitly – to military commissions.

II. Confrontation Is At the Core of the Fairness Required by the UCMJ

A. The UCMJ Explicitly Provides Confrontation Rights to Commission Defendants

In enacting the UCMJ, “Congress granted to an accused the [right] . . . to be confronted by witnesses testifying against him.” *Clay*, 1 U.S.C.M.A. at 77; *see also* CONG. REC. at 5726 (noting that UCMJ “has provided . . . for confrontation of witnesses by the accused”) (statement of Rep. Philbin). The right to confront one’s accusers is central to a fair trial in any system, civilian or military: “There are few subjects, perhaps, upon which this Court and other courts

¹³ *E.g.*, 10 U.S.C. §837 (eliminating military command’s control over military justice and establishing criminal penalties for any person who coerces “any . . . military tribunal”).

¹⁴ *E.g.*, 10 U.S.C. §844 (“No person may, without his consent, be tried a second time for the same offense”); 10 U.S.C. §831(a) (“No person subject to this chapter may compel any person to incriminate himself or to answer any questions the answer to which may tend to incriminate him”); 10 U.S.C. §831(c) (“No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence in not material to the issue and may tend to degrade him”); 10 U.S.C. §855 (prohibiting cruel and unusual punishment “inflicted upon any person subject to” the UCMJ).

