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UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

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) **DEFENSE NOTICE OF  
MOTION**

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) **(MOTION TO  
DISMISS FOR  
DENIAL OF A  
SPEEDY TRIAL IN  
VIOLATION OF  
ARTICLE 10 OF  
THE UCMJ)**

19 August 2004

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The Defense in the case of the *Salim Ahmed Hamdan* provides the following notice of motion:

1. This Notice is filed in accordance with the Presiding Officer's Order made via Email on 31 July 2004.
2. Relief Requested: The Defense seeks dismissal of charges based on denial of speedy trial.
3. Synopsis of Legal Theory: The President's Military Order pursuant to which Mr. Hamdan has been detained for purpose of trial by Military Commission purports to be based, in part, on congressional authorization embodied in selected provisions of the UCMJ. In promulgating the Military Order, President Bush relied, in part, on his authority under 10 U.S.C. § 836, which allows the Executive Branch to prescribe rules for military commissions, so long as they are not inconsistent with the UCMJ. Article 10 of the UCMJ, 10 U.S.C. § 810, provides that any arrest or confinement of an accused must be terminated unless charges promptly are brought and made known to the accused, and speedy trial afforded for a determination of guilt on such charges:

When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or dismiss the charges and release him.

10 U.S.C. § 810.

Mr. Hamdan is protected by the Article 10 by virtue of the President's reliance on the UCMJ for rule making authority; as well as by virtue of Article 2 of the UCMJ, 10 U.S.C. § 802(a)(12), which provides that "persons within an area leased by or otherwise reserved or acquired for the use of the United States" and under the control of any of the various branches of the military are subject to the UCMJ.

The governments delay of more than a year from the time Mr. Hamdan was made eligible for this Commission and approximately seven months since Mr. Hamdan was placed in pre-commission segregation constitutes a denial of speedy trial in violation of Article 10, of the UCMJ in the absence of extraordinary or compelling circumstances mandates that this Commission dismiss the charges against Mr. Hamdan for violation of Article 10.

4. Witnesses and Evidence: The Defense intends to enter evidence and call facts witnesses concerning Mr. Hamdan's pre-commissions confinement and the impact of the government's delay on Mr. Hamdan. Additionally in the event that abeyance of hearing this motion below is not granted, the Defense intends t to call expert witnesses concerning the applicability of the Uniform Code of Military Justice to Commission proceedings in support of this motion.

5. Oral Argument: Because the full facts will not be known until such time as a conclusion of evidentiary hearing, the Defense requests oral argument for this motion.

6. Request for an Extension of Time: Defense moves to incorporate the decisions of the federal courts into this tribunal process and to hold hearing of this motion in abeyance pending the resolution of the application of Article 10 to these proceedings in Federal Court. Detailed Defense Counsel has already challenged in federal court on Mr. Hamdan's behalf as "next friend," the right of the government to hold Mr. Hamdan without charges in-pretrial segregation in violation of Article 10 of the UCMJ. In order for the Court to resolve the merits of Detailed Defense Counsel's petition, the Federal Court must determine the applicability of Article 10 to these proceedings prior the proposed trial date of 11 December 2004. Likewise in order to resolve whether the government is barred from trying Mr. Hamdan by Military Commission; the Military Commission must determine the applicability of Article 10 to these proceedings.

The proper course for this Commission to proceed is to allow for the federal court to decide these matters and for the commission to follow the federal court's guidance. As stated by Attorney General Biddle in the Nazi Saboteur case; in his response to the defense's claim that "the order of the President creating this court is invalid and unconstitutional," Biddle said in part that:

*In the second place, let me say that the question of the law involved is a question, of course, to be determined by the civil courts should it be presented to the civil courts.*

Transcript available at [http://www.soc.umn.edu/~sama/ha/nazi\\_saboteurs/nazi01.htm](http://www.soc.umn.edu/~sama/ha/nazi_saboteurs/nazi01.htm) ("Saboteur Tr.") (emphasis added). See also Rehnquist, All The Laws But One 137 (1998); Saboteur Tr., at 2765 (adjourning commission for a number of days so that defendants could proceed in Supreme Court); id., at 2935 (remarks of the lead prosecutor, the Judge Advocate General defending commission's jurisdiction: "the defense counsel have attempted to show that Long Island and Florida were not in the theater of operations. I will admit that that contention was made before the decision of the Supreme Court yesterday on the habeas corpus matter. It seems to me that that

probably will straighten out the question as to whether this is a theater of operation.”; id., at 2963 (remarks of Judge Advocate General, “I do not see how counsel can plead surprise when counsel was arguing that very thing to the Supreme Court)

In the present case the question of the application of Article 10 is now before a civil court and as conceded by the government in it’s statements and practice in the Nazi saboteurs the Federal District Court’s finding of law, will be determinative on this Commission and judicial economy dictates that of this motion be held in abeyance pending the civil court’s resolution.

## **VI. CLAIMS FOR RELIEF**

### **COUNT ONE**

#### **DENIAL OF A SPEEDY TRIAL IN VIOLATION OF ARTICLE 10 OF THE UNIFORM CODE OF MILITARY JUSTICE**

1. Lieutenant Commander Swift re-alleges and incorporates by reference paragraphs 1 through 31 above.
- 2.

### **COUNT TWO**

#### **VIOLATION OF ARTICLE 103 OF THE THIRD GENEVA CONVENTION AND UNITED STATES GOVERNMENT REGULATIONS**

3. Lieutenant Commander Swift re-alleges and incorporates by reference paragraphs 1 through 35 above.
4. The lengthy pre-trial confinement of Mr. Hamdan violates Article 103 of the 1949 Geneva Convention, as well as United States Government regulations. Article 103 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3394, 75 U.N.T.S. 135, provides that

[j]udicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. *In no circumstances shall this confinement exceed three months.*

(Emphasis added.) Additionally, Article 5 of the Geneva Convention states:

[S]hould any doubt arise as to whether persons . . . belong to any of the categories [entitled to protection as a POW under the Convention], such persons shall enjoy the protection of the present

Convention until such time as their status has been determined by a competent tribunal.

5. Likewise, Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-6(a) (1997), at 70, attached as Exhibit K to the Swift Decl, requires that United States military forces abide by the provisions of Article 5 of the Geneva Convention. Finally, Department of the Navy, NWP 1-14M: The Commander's Handbook on the Law of Naval Operations 11.7 (1995), at 77, attached as Exhibit L to the Swift Decl., states that "individuals captured as spies or as illegal combatants have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and to have the question adjudicated."

6. Again, defendants have a clear nondiscretionary duty to release Mr. Hamdan under the Geneva Convention and under the United States Government's own regulations because he has been detained in pre-commission segregation for more than three months.

### **COUNT THREE**

#### **VIOLATION OF COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS**

7. Lieutenant Commander Swift re-alleges and incorporates by reference paragraphs 1 through 39 above.

8. Even the few individuals who lack Article 5 and Article 103 protections of the Third Geneva Convention are entitled to the protection of Common Article 3 of that treaty. Common Article 3 prohibits the contracting parties from "the passing of sentences . . . without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people."

9. In this case, the lengthy pre-trial confinement of Mr. Hamdan without charge, and without process to contest his guilt, amounts to an arbitrary and illegally imposed sentence that is incompatible with fundamental guarantees of due process recognized by all civilized people.

### **COUNT FOUR**

#### **CONSTITUTIONAL VIOLATION: ESTABLISHMENT OF MILITARY COMMISSIONS IN VIOLATION OF SEPARATION OF POWERS**

10. Lieutenant Commander Swift re-alleges and incorporates by reference paragraphs 1 through 42 above.

11. Mr. Hamdan's detention is unlawful because he is being detained to face charges before a military commission that is itself the product of unconstitutional Executive Branch action. Respondent President Bush's Military Order providing for the establishment of military commissions is ultra vires and void, because it is an unconstitutional exercise of legislative and judicial power by the Executive Branch. The Constitution vests "All legislative Powers" in Congress, and requires, at a bare minimum, that unlawful conduct be defined in advance, either by positive legislation, or by reference to a recognized body of international law.

12. Article I of the Constitution grants Congress, not the Executive, the power "To define and punish . . . Offences against the Law of Nations" and "To constitute Tribunals

inferior to the Supreme Court." Accordingly, absent circumstances so exigent as to demonstrably rule out resort to Congress, that lawmaking body and not the Chief Executive must be the authorizing agent of the military commissions and the body that defines the offenses for which an accused will be answerable before such commissions. Neither the Use-of-Force Resolution nor any other act of Congress grants to the Executive Branch under the circumstances presented here the authority to establish military commissions, or to define the offenses that will be subject to their exclusive jurisdiction.

13. In addition to enabling the unlawful exercise of legislative powers, the Military Order also purports to suspend the Writ of Habeas Corpus and to circumscribe the jurisdiction of the federal courts in violation of Art. I § 9 and Art. III § 2 of the Constitution, by denying to persons held subject to the Military Order any access, remedy, or proceeding before "any court of the United States." Military Order at § 7, Ex. B to the Swift Decl. To allow the Chief Executive to proceed in this manner to dismantle the jurisdiction of the federal courts, redesigning the very architecture of American justice, is to succumb to an executive unilateralism decried by both our Founders and twentieth-century courts, and all who came between. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Respondents are under a clear and nondiscretionary duty to obey the Constitution and its foundational command of the separation of powers.

#### **COUNT FIVE**

#### **CONSTITUTIONAL VIOLATION: TRIAL BEFORE MILITARY COMMISSIONS IN VIOLATION OF EQUAL PROTECTION**

14. Lieutenant Commander Swift re-alleges and incorporates by reference paragraphs 1 through 46 above.

15. Mr. Hamdan is being detained under the authority of a Military Order that violates Mr. Hamdan's right to equal protection of the laws of the United States. Mr. Hamdan may only be held for trial by a military commission by dint of his noncitizenship. The Military Order, by its terms, applies only to noncitizens. The Military Order is, to the best of Petitioner's understanding, the first of its kind to make this citizen/alien distinction. It runs afoul of the very purpose of the Equal Protection Clause of the United States Constitution. The Framers of the Clause understood that discrimination against aliens was pervasive and problematic and therefore intentionally extended the reach of the Clause to "persons" rather than confining it to "citizens." Foremost in their minds was the language of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 449 (1856), which had been utilized to limit due process guarantees by framing them as nothing more than the "privileges of the citizen."

16. The Military Order reverts back to an antebellum concept of fundamental rights, one in which aliens are singled out for lesser forms of justice than other citizens. While the government is given considerable latitude in areas such as immigration, under the Constitution there is little or no room for government by approximation when it puts people on one side or the other of a crude line that differentiates between individuals who are given access to the fundamental protections of civilian justice (including indictment, a jury trial presided over by a judge not answerable to the prosecutor, and access to an

appeal before a commission independent of the prosecuting authority) and those afforded only a distinctly less protective and inferior brand of adjudication.<sup>1</sup> If the Executive Branch ever may take such a step—shunting aliens into a procedure from which all U.S. citizens are spared—he may do so only upon a convincing showing of necessity that matches the claim of threat to the fact of alienage. This singling out of aliens for such fundamental disfavor might be justified in rare circumstances, but it is hard to imagine—and, absent explicit congressional action, impossible to assume that such circumstances are present today.

## COUNT SIX

### **DETENTION IN VIOLATION OF 42 U.S.C. § 1981**

17. Lieutenant Commander Swift re-alleges and incorporates by reference paragraphs 1 through 49 above.

18. Mr. Hamdan is being detained under the authority of the Military Order which contravenes 42 U.S.C. § 1981. That fundamental statutory provision guarantees equal rights for all persons to give evidence, to receive equal benefit of all laws and proceedings for the security of persons, and to receive like punishment. Mr. Hamdan is being unlawfully detained for purposes of trial by military commission because he is a noncitizen—a citizen who committed the very same acts as Mr. Hamdan could not be detained under the Military Order and held for trial before a military commission.

## COUNT SEVEN

### **CONSTITUTIONAL AND STATUTORY VIOLATION: INVESTING MILITARY COMMISSIONS WITH SUBJECT- MATTER JURISDICTION CONTRARY TO THE RECOGNIZED LAWS OF WAR**

19. Lieutenant Commander Swift re-alleges and incorporates by reference paragraphs 1 through 51 above.

20. In the Military Order, the Respondent President Bush purports to derive his authority, in part, from provisions of the UCMJ that he claims authorize the use of military commissions in accordance with the laws of war.

21. The jurisdiction of military commissions is strictly limited to (1) violations of the laws of war, or (2) other crimes occurring during or in the immediate aftermath of a declared war while United States forces occupy, and hence must adequately police, territory captured from the enemy. As a plurality of the Supreme Court held in *Reid v. Covert*, 354 U.S. 1, 21 (1957),

[t]he jurisdiction of military tribunals is a very limited and  
extraordinary jurisdiction derived from the cryptic language in

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<sup>1</sup> The Military Commission rules thus violate notions of procedural due process and Article III protections, not simply in the ways indicated above, but also in matters such as access to exculpatory evidence and the right to confront witnesses. Were a trial of Mr. Hamdan ever to take place before a military commission, Petitioner expects that those matters would become the subject of collateral attack.

Art. I, § 8 [granting Congress the power to "define and punish. . . Offences against the Law of Nations"], and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.

22. In the present case, by identifying as individuals subject to its terms anyone who "is or was a member of the organization known as al Qaida," the Military Order unlawfully invests military commissions with jurisdiction far exceeding that recognized under the customary laws of war and the UCMJ.

23. Moreover, there is no indication that Mr. Hamdan has committed any offense as to which a military commission might have jurisdiction to try him. Thus, even if Respondent President Bush is deemed to have been granted congressional authorization to establish military commissions, he has unlawfully exceeded that authorization by expanding the jurisdiction of the commissions beyond all legitimate bounds. Such conduct violates both the UCMJ and the Separation of Powers mandated by the U.S. Constitution.

### **COUNT EIGHT**

#### **THE APPOINTING AUTHORITY, AND ANY MILITARY COMMISSION THAT MAY BE ESTABLISHED, LACKS PERSONAL JURISDICTION OVER MR. HAMDAN**

24. Lieutenant Commander Swift re-alleges and incorporates by reference paragraphs 1 through 56 above.

25. Before a military commission can lawfully assert jurisdiction or detain Mr. Hamdan, the Military Order requires Respondent President Bush to have reason to believe that Mr. Hamdan:

- (i) is or was a member of the organization known as al Qaida;
- (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
- (iii) has knowingly harbored one or more individuals described [in the categories above].

Military Order at § 2(a)(1), Ex. B to the Swift Decl.

26. Mr. Hamdan meets none of the criteria set forth in the Military Order to identify individuals subject to its terms. Respondents have come forward with no evidence to justify detention of Mr. Hamdan pursuant to the Military Order, and have adopted a process and procedure whereby they never will be required to do so and, absent relief from this Court, whereby Mr. Hamdan never can compel them to do so.

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Detailed Defense Counsel