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COURT URGED TO PERMIT TERRORISTS TO BE TRIED BY MILITARY COMMISSIONS

(Swift v. Rumsfeld)

The Washington Legal Foundation (WLF) this week urged a federal judge in Washington, D.C. to uphold the Bush Administration's plan to convene military commissions to conduct trials of al Qaeda leaders accused of war crimes.

In a brief filed in *Swift v. Rumsfeld*, WLF argued that Congress has explicitly endorsed the creation of such commissions; and that even if Congress had not done so, the Constitution authorizes the President, as Commander in Chief of American military forces, to order military trials for enemy combatants. WLF argued that military commissions have been utilized throughout American history.

"Military commissions are an effective and constitutional means of bringing to justice enemy combatants, and there are at least some instances in which the federal courts' criminal justice system is not up to the task," said WLF Chief Counsel Richard Samp after filing WLF's brief. "Because of the requirement that proceedings in federal court be totally open, recent criminal proceedings against international terrorists have set back our fight against terrorism by requiring disclosure of U.S. intelligence sources; using military commissions would lessen that problem," Samp said.

The Bush Administration in November 2001 issued an order authorizing the establishment of military commissions to hear war crimes charges brought against those captured during the war against al Qaeda. The pending federal court challenge to that order was filed by Charles Swift, the lawyer for Salim Ahmed Hamdan, a citizen of Yemen who was captured during fighting in Afghanistan and is being detained at Guantanamo Bay, Cuba. Hamdan is one of a handful of al Qaeda operatives against whom war crimes charges have been filed.

Swift admits that his client served as a driver and close aide to Osama bin Laden for several years. He nonetheless insists that his client is a civilian and was not part of the al Qaeda conspiracy to murder Americans. He contends that as a civilian, Hamdan is not subject to trial before a military commission. He also contends that the entire system of military commissions violates separation-of-power principles established by

the Constitution because, he argues, only Congress is authorized to establish military commissions, and it has not done so.

In its brief, WLF argued that Swift's challenge is premature. WLF argued that any federal court review must await exhaustion of the military commission proceedings. WLF argued that, although civilians are not subject to trial before military commissions, it is up to the commission hearing Hamdan's case to make the initial determination regarding whether he is, in fact, a civilian.

WLF also disputed Swift's separation-of-powers argument. WLF argued that Congress authorized use of military commissions both in 1950, when it adopted the Uniform Code of Military Justice, and in September 2001, when it adopted the Authorization for Use of Military Force (which authorizes the President to use "all necessary and appropriate force" against al Qaeda). WLF also argued that the President has authority to establish military commissions even without Congress's blessing, noting that Executive Branch officials have used commissions to hear charges against enemy combatants for 230 years, often without seeking congressional authorization, and Congress has never objected to the practice.

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 states. It devotes a considerable portion of its resources to promoting America's national security.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site.