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March 27, 2006

Hon. William K. Suter
Clerk
United States Supreme Court
One First Street, NE,
Washington, D.C. 20543

Re: *Hamdan v. Rumsfeld, et al.*, No. 05-184

Dear General Suter:

The letter is submitted on behalf of five retired generals and admirals who have previously filed amicus briefs in the above-named case – Brigadier General David M. Brahms, Brigadier General James P. Cullen, Vice Admiral Lee F. Gunn, Rear Admiral John D. Hutson, and Rear Admiral Donald J. Guter. These amici argue, among other things, that Hamdan is entitled to the protections of the Geneva Conventions and that this Court can and should order the President to afford Hamdam those protections.

The purpose of the letter is to suggest, most respectfully, that Justice Scalia recuse himself from further participation in this case. Amici would greatly appreciate your providing Justice Scalia with a copy of this letter.

Whether to recuse is a matter committed to the sound discretion of the Justice. Amici believe that Justice Scalia should recuse himself from further participation of this case in light of remarks that the Justice made earlier this month at the University of Freiburg in Switzerland. Those remarks, since widely publicized, give rise to the unfortunate appearance that, even before the briefing in this case was complete, the Justice had made up his mind about the merits. The Justice's remarks also give rise to the unfortunate appearance that the Justice may bring to this case a personal animus toward Petitioner and those similarly situated arising from the military service of the Justice's son in Iraq. In a case that is fundamentally about fair process, it is especially important that this Court's own process be perceived to be fair.

The second Question Presented in the Petition reads as follows:

Whether Petitioner and others similarly situated can obtain judicial enforcement from an Article III court of rights protected under the 1949 Geneva Convention in an action for a writ of habeas corpus challenging the legality of their detention by the Executive branch?

Yesterday the following story was posted online. The story, by Michael Isikoff, is due to appear in the April 3, 2006 issue of *Newsweek*. This letter rests on the account provided by *Newsweek* based on its review of a tape of the remarks. The most pertinent portions of the story are italicized:

April 3, 2006 issue – The Supreme Court this week will hear arguments in a big case: whether to allow the Bush administration to try Guantánamo detainees in special military tribunals with limited rights for the accused. But Justice Antonin Scalia has already spoken his mind about some of the issues in the matter. *During an unpublicized March 8 talk at the University of Freiburg in Switzerland, Scalia dismissed the idea that the detainees have rights under the U.S. Constitution or international conventions, adding he was “astounded” at the “hypocritical” reaction in Europe to Gitmo. “War is war, and it has never been the case that when you captured a combatant you have to give them a jury trial in your civil courts,” he says on a tape of the talk reviewed by NEWSWEEK. “Give me a break.” Challenged by one audience member about whether the Gitmo detainees don’t have protections under the Geneva or human-rights conventions, Scalia shot back: “If he was captured by my army on a battlefield, that is where he belongs. I had a son on that battlefield and they were shooting at my son and I’m not about to give this man who was captured in a war a full jury trial. I mean it’s crazy.” Scalia was apparently referring to his son Matthew, who served with the U.S. Army in Iraq. Scalia did say, though, that he was concerned “there may be no end to this war.”*

The comments provoked “quite an uproar,” said Samantha Besson, a member of the Freiburg law faculty who had invited Scalia to give his talk, which was mostly about his “originalist” interpretation of the Constitution. *This isn’t the first time Scalia has commented on matters before the court: two years ago he recused himself from a Pledge of Allegiance case after making public comments*

about the matter. “This is clearly grounds for recusal,” said Michael Ratner of the Center for Constitutional Rights, a human-rights group that has filed a brief in behalf of the Gitmo detainees. “I can’t recall an instance where I’ve heard a judge speak so openly about a case that’s in front of him—without hearing the arguments.” Other experts said it was a closer call. *Scalia didn’t refer directly to this week’s case, Hamdan v. Rumsfeld, though issues at stake hinge in part on whether the detainees deserve legal protections that make the military tribunals unfair.* “As these things mount, a legitimate question could be asked about whether he is compromising the credibility of the court,” said Stephen Gillers, a legal-ethics expert. A Scalia recusal (it’s entirely up to him) would create problems; Chief Justice John Roberts has already done so in Hamdan because he ruled on it as an appellate judge. A Supreme Courtspokeswoman said Scalia has no comment.

The Judicial Code provides that a Justice “shall” disqualify himself “in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). Similarly, Canon 3(A)(6) of the Code of Conduct for United States Judges provides, in pertinent part: “A judge should avoid public comment on the merits of a pending or impending action.” As the Court has stated, “what matters is not the reality of bias or prejudice but its appearance. Quite simply and quite universally, recusal [i]s required whenever ‘impartiality might reasonably be questioned.’” *Liteky v. United States*, 510 U.S. 540, 548 (1994) (per Scalia, J.). Section 455(a) “covers all aspects of partiality.” *Id.* at 553 n.2. See *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860-61 (1988).

Amici respectfully submit that, at the very least, Justice Scalia’s impartiality “might reasonably be questioned” in this case based on his remarks at the University of Freiburg and that the Justice’s remarks may violate Canon 3(A)(6). First, the Justice’s remarks create the appearance that, even before briefing was complete, he had already made up his mind about the second Question Presented (whether Petitioner has judicially enforceable rights under the Geneva Conventions). Second, the Justice’s remarks create the appearance of personal bias arising from his son’s military service in Iraq. Finally, as noted, this case is about fairness, and, in light of his remarks at Freiburg, the appearance of fairness suggests.

For this and the other reasons stated, amici respectfully urge the Justice to recuse himself from further consideration of this matter.

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Respectfully,

/s/

David H. Remes
Counsel for Amici

cc: Mr. Neal Katyal
The Solicitor General