No. 05-184

In the Supreme Court of the United States

SALIM AHMED HAMDAN, PETITIONER

v.

DONALD H. RUMSFELD, ET AL.,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMICUS CURIAE BRIEF OF RETIRED GENERALS AND ADMIRALS AND MILT BEARDEN IN SUPPORT OF PETITIONER (Geneva Conventions – Judicial Deference)

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QUESTION PRESENTED

Amici will address the following question:

Whether the federal courts may require the President to afford a Guantanamo detainee the protections of the Geneva Conventions.

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INTEREST OF AMICI [1]

Amici include five retired senior military officials with extensive experience in issues relating to legal policy, the laws of war, and armed conflict, who have spent their careers commanding troops at home and overseas and protecting the nation from attack; and a retired intelligence officer who ran the CIA's covert operations in Afghanistan during the Soviet occupation. Amici, combined, represent nearly 200 years of learning and experience.

General Merrill A. McPeak served in the United States Air Force from 1957 to 1994. From 1990 to 1994, he was Chief of Staff for the Air Force and the senior officer responsible for a combined active-duty, National Guard, Reserve, civilian workforce of more than 850,000 people serving at 1,300 locations in the United States and abroad.

Milt Bearden, SIS Level 5, retired from the Central Intelligence Agency in 1994 after 30 years of service as an intelligence officer. Mr. Bearden ran the CIA's covert operations in Afghanistan during the Soviet invasion, and helped train Afghan freedom fighters. During his career, Mr. Bearden was station chief in Pakistan, Nigeria, Germany, and the Sudan, and served as chief of the CIA's Soviet-East European Division during the last days of the Soviet Union. Mr. Bearden received the CIA's highest honor, the Distinguished Intelligence Medal, and is the author of *The Main Enemy*, a book about the CIA-KGB spy wars.

Vice Admiral Lee F. Gunn served in the United States Navy for 35 years. From 1997 to 2000, he served as Inspector General of the Department of the Navy. Admiral Gunn commanded the USS Barbey, Destroyer Squadron Thirty-One, and Amphibious Group Three, comprising the 21 ships, 12 shore commands, and 15,000 sailors and

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[1] Letters of consent have been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made a monetary contribution to the preparation or submission of this brief. For purposes of this brief, amici adopt Petitioner's statement of facts.

marines of the Pacific Amphibious Forces. Admiral Gunn served under General Anthony Zinni as Deputy Combined Forces Commander and Naval Forces Commander for Operation United Shield, the final withdrawal of United Nations peacekeeping forces from Somalia in 1995.

Rear Admiral Donald J. Guter was a line officer in the United States Navy from 1970 through 1974. After attending law school, he served in the Navy from 1977 until he retired in 2002. From June 2000 through June 2002, Admiral Guter served as the Navy's Judge Advocate General. Admiral Guter now serves as the Dean of Duquesne University School of Law in Pittsburg, Pennsylvania. Admiral Guter was inside the Pentagon when it was attacked on September 11, 2001.

Rear Admiral John D. Hutson served in the United States Navy from 1973 to 2000. He was the Navy's Judge Advocate General from 1997 to 2000. Admiral Hutson now serves as President and Dean of the Franklin Pierce Law Center in Concord, New Hampshire.

Brigadier General Richard O'Meara retired from the United States Army after 36 years in the active and reserve components. He is a combat veteran and former Assistant to the Judge Advocate General for Operations (IMA). General O'Meara is a professor of International Relations at Monmouth University in New Jersey, and he serves as adjunct faculty in the Defense Institute for International Legal Studies. General O'Meara has lectured on human rights and the rule of law in such diverse locales as Cambodia, Rwanda, and the Ukraine, and serves as a defense expert before the Special Court in Sierra Leone.

SUMMARY OF ARGUMENT

The decision of the court of appeals directly and immediately endangers American troops and undermines the laws of war. The United States became a party to the Geneva Conventions to protect American troops by establishing an international norm of fair and humane treatment of all individuals captured in armed conflicts. Affording the protections of the Conventions to all individuals captured by the United States in armed conflicts is vital to the well-being of Americans captured in such conflicts. The Judiciary has the final say as to the meaning of treaties of the United States. It has the power and duty to enforce them and has done so for nearly 200 years. Judi-

cial enforcement of the Conventions does not require new action by Congress. The Court should rule that Petitioner is entitled to the protections of the Conventions and direct the President to afford him those protections forthwith.

ARGUMENT

I. THE SAFETY OF AMERICAN SOLDIERS CAPTURED ABROAD DEPENDS ON APPLYING THE GENEVA CONVENTIONS TO ALL INDIVIDUALS CAPTURED BY THE UNITED STATES

A. The United States Adopted the Geneva Conventions to Protect Americans Captured in Armed Conflict.

The Geneva Conventions establish norms for the treatment of citizens of signatory nations captured during war. The United States became a party to the Conventions to protect the safety and welfare of its own citizens. As Secretary of State Dulles said during Senate consideration of the Conventions, America's "participation [in the Conventions] is needed to * * * enable us to invoke them for the protection of our nationals." *Geneva Conventions for the Protection of War Victims: Hearing Before the Senate Comm. on Foreign Relations*, 84th Cong., 1st Sess. 3-4 (1955). Senator Mansfield similarly urged that "it is to the interest of the United States that the principles of these conventions be accepted universally by all nations," because "[t]he conventions point the way to other governments." He stated:

> Without any real cost to us, acceptance of the standards provided for prisoners of war, civilians, and wounded and sick will insure improvement of the condition of our own people as compared with what had been their previous treatment.

101 Cong. Rec. 9960 (1955). Senator Alexander Smith voiced the same view:

> I cannot emphasize too strongly that the one nation which stands to benefit the most from these four conventions is the United States * * * To the extent that we can obtain a world-wide acceptance of the high standards in the conventions, to that extent will we have assured our own people of greater protection and more civilized treatment.

Id. at 9962. More recently, Senator Biden made the same point:

> There's a reason why we sign these treaties: to protect my son in the military. That's why we have these treaties. So when Americans are captured, they are not tortured.

See Interview with Joseph R. Biden, Jr., United States Senator, Fox News Sunday (June 13, 2004), available at http://biden.senate.gov /newsroom/details.cfm?id=222640.

As the Legal Adviser to the Department of State has observed:

> Any small benefit from reducing further [the application of the Geneva Conventions] will be purchased at the expense of the men and women in our armed forces that we send into combat. A decision that the Conventions do not apply to the conflict in Afghanistan in which our armed forces are engaged deprives our troops there of any claim to the protection of the Convention in the event they are captured and weakens the protections afforded by the Conventions to our troops in future conflicts.

Memorandum from William H. Taft IV, Legal Adviser, Dep't of State, to Counsel to the President (Feb. 2, 2002), available at http://www.fas.org/sgp/othergov/taft.pdf ("Taft Memo").

B. Steadfast Application of the Geneva Conventions by the United States Has Saved American Lives.

The United States has been steadfast in applying the Conventions – even as to soldiers of governments that insisted the Conventions did not bind them, and even where the Conventions technically did not apply. Time and again the United States' adherence to the Conventions and its precursors has saved American lives.

In World War II, for example, it has been noted that "[t]he American Red Cross attributed the fact of the survival of 99 percent of the American prisoners of war held by Germany * * * to compliance with the [1929] Convention." Howard S. Levie, *Prisoners of War in International Armed Conflict* 10 n.44 (1977). And the fact that millions of POWs from all camps returned home was "due exclusively to the observance of the Geneva Prisoners of War Convention." Josef L. Kunz, *The Chaotic Status of the Laws of War and the Urgent Need for Their Revision*, 45 Am. J. Int'l L. 37, 45 (1951). The significantly higher mortality rate suffered by Soviet soldiers held by Germany

can be explained by the fact that the 1929 Convention was not "technically applicable" and was not applied to those prisoners. Levie, *supra*, at 10 n.44.

Thousands of American soldiers taken prisoner during the Vietnam War also benefited from the United States' commitment to the Geneva Conventions. Although North Vietnam insisted that the Geneva Conventions did not apply to American prisoners, whom it labeled "war criminals," the United States afforded all enemy POWs the protections of the Conventions to secure "reciprocal benefits for American captives." Maj. Gen. George S. Prugh, *Vietnam Studies, Law at War: Vietnam 1964-73*, at 63 (1975). The United States afforded those protections not only to North Vietnamese soldiers but also to the Viet-Cong, who did not follow the "laws of war." *Id.*; *see also* Dep't of State Bull. 10 (Jan. 4, 1971) (White House statement announcing President Nixon's demand that the North Vietnamese apply the Geneva Conventions to ease "the plight of American prisoners of war in North Viet-Nam").

These efforts paid off. Former American POWs and commentators have recognized that the United States' application of the Conventions to North Vietnamese soldiers and Viet-Cong saved American soldiers from abuses when they were imprisoned in Vietnam. Speaking on the fiftieth anniversary of the Geneva Conventions, Senator McCain stated:

> The Geneva Conventions and the Red Cross were created in response to the stark recognition of the true horrors of unbounded war. And I thank God for that. I am thankful for those of us whose dignity, health and lives have been protected by the Conventions * * * I am certain we all would have been a lot worse off if there had not been the Geneva Conventions around which an international consensus formed about some very basic standards of decency that should apply even amid the cruel excesses of war.

Senator John McCain, Speech to the American Red Cross Promise of Humanity Conference (May 6, 1999), available at http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content_id=820. Senator McCain stated that he and other POWs are grateful to have been "spare[d] * * * the indignity of [being] put on trial in violation of the conventions." *Id.*

Since the Vietnam War, the United States has continued to insist on broad adherence to the Geneva Conventions. The emergent features of modern conflict – including peacekeeping operations and police actions against warlords and terrorist networks – have not diminished the importance to the United States of adhering to the Geneva Conventions.

For example, in the covert operations against the Soviet Union in Afghanistan, the policy of the United States throughout the three successive administrations that prosecuted the war – Carter, Reagan, and Bush – was to insist that both allied Afghan Mujahedeen insurgents and Soviet soldiers receive the protections of the Geneva Conventions. According to Milt Bearden, who ran the war in Afghanistan for the CIA:

> Early in the conflict, the Afghans were brutal to their prisoners, using them as beasts of burden and objects of amusement in traditional knife play; the Soviets responded in kind. But as American involvement deepened, the Afghans were persuaded to change that behavior; at the same time, the Soviet troops, too, began treating their prisoners in accordance with international protocols.
>
> One incident in particular drives home the wisdom of this policy. In early August 1988, a Soviet pilot captured under those new conditions resisted our offer of resettlement in the West, eventually to return to the Soviet Union as a national hero. Part of his exchange, though, was the extraction of certain guarantees from the Soviet commanders that their treatment of Afghan prisoners would reach "symmetry" of a sort with the treatment of the pilot * * * The next time I saw that pilot, he was on TV, helping beat back the 1991 coup against Mikhail Gorbachev * * * His name is Aleksandr Rutskoi, and he remains a voice for democracy and one of Vladimir Putin's leading critics.

See Milt Bearden, *When the CIA Played by the Rules*, N.Y. Times, Nov. 4, 2005, at A27.

And in 1993, following the capture of U.S. Warrant Officer Michael Durant by forces loyal to Somali warlord Mohamed Farah Aideed, the United States demanded assurances that Durant's treatment would be consistent with the protections afforded by the Con-

ventions. The United States made this demand even though, "[u]nder a strict interpretation of the Third Geneva Convention's applicability, Durant's captors would not be bound to follow the convention because they were not a 'state.'" Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror"*, 44 Harv. Int'l L.J. 301, 310 (2003).

As part of its negotiations on behalf of Durant, the United States stressed that Somali fighters captured by the United States would be treated as prisoners of war under the Geneva Conventions, even though Somalia had no functioning government and thus was not a "state" within the meaning of the Geneva Conventions. *See* Paul Lewis, *U.N., Urged by U.S., Refuses to Exchange Somalis*, N.Y. Times, Oct. 8, 1993, at A16. The approach bore fruit: "Following these declarations by the United States, heavy-handed interrogations of Durant appeared to cease, the Red Cross was allowed to visit him and observe his treatment, and he was subsequently released." *McDonald & Sullivan*, *supra*, 44 Harv. Int'l L.J. at 310.

Denying Guantanamo detainees the protections of the Geneva Conventions weakens the United States' ability to demand that the Conventions be applied to Americans captured during armed conflicts abroad. That Respondents believe they can justify denying the detainees those protections is cold comfort:

> Interpolating unrecognized exceptions into the contours of prisoner of war status * * * undermines the Geneva Conventions as a whole, [and could easily] boomerang to haunt U.S. or allied forces: enemy forces that might detain U.S. or allied troops would undoubtedly follow the U.S. lead and devise equally creative reasons for denying prisoner of war status. By [flouting] international law at home, the United States risks undermining its own authority to demand implementation of international law abroad.

Manooher Mofidi & Amy E. Eckert, *"Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels*, 36 Cornell Int'l L.J. 59, 90 (2003).[2]

Just such erosion, however, is already occurring. Alarmingly but predictably, other governments have begun citing United States policy to justify their repressive policies:

Egypt. President Mubarak stated that United States policies following September 11 justified the use of "all means" to combat terrorism, and that "the events of September 11 created a new concept of democracy that differs from the concept that Western states defended before these events, especially in regard to the freedom of the individual."

Liberia. President Taylor imprisoned and tortured a respected journalist, labeling him an "unlawful combatant."

Zimbabwe. A spokesman for President Mugabe called for full investigation and prosecution of "media terrorism."

Eritrea. The government suspended independent newspapers and jailed 21 journalists and opposition politicians, citing links with Osama Bin Laden.

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[2] *See also* Steven W. Becker, "*Mirror, Mirror on the Wall. . .": Assessing the Aftermath of September 11th*, 37 Val. U. L. Rev. 563, 572 (2003) (arguing that American failure to grant POW status under the Geneva Convention "is placing U.S. military personnel abroad in danger, as we have troops in many parts of the world, and it is reasonable to assume that at some time some of them may be captured. If the same treatment is applied to them, we would be hard put to argue otherwise."); Harold Hongju Koh, *The Case Against Military Commissions*, 96 Am. J. Int'l L. 337, 340 (2002) (arguing that it "seriously disserves the long-term interests of the United States – whose non-uniformed intelligence and military personnel will conduct extensive armed activities abroad in the months ahead" to fail to follow the Geneva Conventions); John Cloud, *What's Fair in War?*, Time, Apr. 7, 2003, at 66 (arguing that the United States should apply the Geneva Conventions because "it is that very document that could help those young American captives get home safe.").

China. The government applied a new terrorism charge against a U.S. permanent resident and democracy activist.

Russia. The government linked its brutal tactics in Chechnya to September 11.

Lawyer's Committee for Human Rights, *Assessing the New Normal: Liberty and Security for the Post-September 11 United States*, at 77-79 (Fiona Doherty & Deborah Pearlstein eds., 2003).

II. THE COURT CAN AND SHOULD REQUIRE THE PRESIDENT TO AFFORD HAMDAN THE PROTECTIONS OF THE GENEVA CONVENTIONS.

It has long been the province and duty of Article III courts to interpret and apply treaties to which the United States is a party. The power to do so is conferred by Article III, cl. 2, ¶ 1, which provides that "the judicial Power" extends to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." This power is also embedded in the Supremacy Clause, which specifies that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const., Art. VI, cl. 2. As Alexander Hamilton explained in The Federalist No. 22:

> Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations.

The Federalist Papers, at 150 (Clinton Rossiter ed., 1961).

The Supreme Court recognized the power of Article III courts to interpret treaties in *Owings v. Norwood's Lessee*, 9 U.S. 344 (1809). Writing for the Court, Chief Justice Marshall stated: "The reason for inserting that clause [Art. VI, cl. 2] in the constitution was, that all persons who have real claims under a treaty should have their causes decided by the national tribunals." *Id*. at 348. Although Hamilton and Marshall were focused on the need to reserve treaty interpretation to

federal rather than state courts, case law has since made clear that this reservation also applies against the other Branches.

In *Jones v. Meehan*, 175 U.S. 1 (1899), the Court held – in the teeth of a contrary interpretation by Congress and the Executive Branch – that a treaty between the United States and a Chippewa tribe had granted a tribal chief fee simple title to certain land. The Court broadly affirmed that "[t]he construction of treaties is the peculiar province of the judiciary." *Id*. at 3. Since then, the Court has often confirmed the ultimate role of the Judicial Branch in treaty interpretation. *See*, *e.g.*, *Perkins v. Elg*, 307 U.S. 325 (1939) (overruling a State Department interpretation of a citizenship treaty); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("the courts have the authority to construe treaties and executive agreements").

A core function of the Judicial Branch is to define not only the limits of its own powers, *see Marbury*, but also the limits of powers granted by the Constitution to the Political Branches. As the Supreme Court explained in *Baker v. Carr*, 369 U.S. 186 (1962):

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

Id. at 211. Although the construction of a treaty by the Executive Branch is "of weight," it is "not conclusive upon courts called upon to construe" the treaty. *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933).

Accordingly, federal courts have frequently overruled Executive Branch treaty interpretations and ordered the Executive Branch to conform its actions to those treaties as judicially construed. In *British Caledonian Airways Ltd. v. Bond*, 665 F.2d 1153 (D.C. Cir. 1981), the Circuit invalidated an FAA regulation as contrary to the Convention on International Civil Aviation, and in *Rainbow Navigation, Inc. v. Dep't of the Navy*, 686 F. Supp. 354 (D.D.C. 1988), the Court overruled the Navy's interpretation of an agreement between United States and Iceland regulating bidding for military shipping contracts.

Judicial willingness to overturn Executive Branch interpretations of treaties is especially marked when individual liberty is implicated. *See*, *e.g.*, *Johnson v. Browne*, 205 U.S. 309 (1907) (interpreting an extradition treaty to prohibit imprisonment of a defendant for one crime when extradition from Canada had been sought for another); *United States v. Decker*, 600 F.2d 733, 738 (9th Cir. 1979) (liberty interest of accused weighed against holding dispute over a fishing treaty non-justiciable).

Indeed, courts have overturned Executive Branch interpretations of treaties in areas where deference is traditionally due. In *Perkins*, for example, this Court overturned the Secretary of State's interpretation of a naturalization treaty with Sweden. Under the Secretary's interpretation, an American-born woman whose father had taken her to Sweden as a child lost her U.S. citizenship while abroad. The Court declared the woman a citizen, barred the government from deporting her, and ordered the Secretary to issue her a passport. 307 U.S. 325.

III. JUDICIAL ENFORCEMENT OF THE GENEVA CONVENTIONS DOES NOT DEPEND ON FURTHER ACTION BY CONGRESS

A. The Geneva Conventions Are "Self-Executing"

A self-executing treaty is one that "operates of itself without the aid of any legislative provision." *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), *overruled in part on other grounds*, *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833). To determine whether a treaty is self-executing, a court typically looks to "the intent of the signatory parties as manifested by the language of the instrument, and, if the language is uncertain, it must then look to the circumstances surrounding its execution." *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976).

Evidence that the drafters intended the Conventions to be self-executing is provided by article 129 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Geneva III" or "Third Convention"). Article 129 is the only provision that speaks to domestic legislation. It states that signatories should enact any legislation necessary to provide any *additional* penal sanctions for persons guilty of specified

"grave breaches" of the Convention. The Convention, however, does not require legislation implementing the underlying prohibitions or sanctions. It would be anomalous to require legislation to implement *additional* sanctions but not the underlying prohibitions or sanctions. Consistent with the requirement of article 129, Congress enacted the War Crimes Act, 18 U.S.C. § 2441, imposing criminal liability on any U.S. national committing a "grave breach" of the Conventions. Like the drafters, Congress saw no need to enact legislation providing for enforcement of the underlying prohibitions or sanctions.

The ratification history establishes that the Senate understood the Conventions to be enforceable in domestic courts without implementing legislation. The Foreign Relations Committee stated that the four Conventions are almost entirely self-executing:

> 15. Extent of Implementing Legislation Required: From information furnished to the committee it appears that very little in the way of new legislative enactments will be required to give effect to the provisions contained in the four conventions.

Geneva Conventions for the Protection of War Victims: Report of the Senate Comm. on Foreign Relations, S. Rep. No. 9, 84th Cong. 1st Sess. 30 (1955). The Committee identified only four provisions that required implementing legislation, none pertaining to the protections of individuals at issue here. *Id*. at 30-31.[3]

For 50 years, the Executive Branch has implemented the Geneva Conventions without questioning the lack of Congressional execution. Regulations jointly promulgated by the Army, Navy, Air Force, and Marine Corps have consistently treated the Conventions as binding. *See* Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* § 1-5 (a)(2) (1997) ("AR 190-8"); Dep't of the Army, Field Manual No. 27-10,

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[3] The four provisions concerned (1) a restriction on commercial use of the Red Cross emblem; (2) the provision of workers' compensation rights to injured civilian detainees; (3) exemption of relief shipments from customs; and (4) a requirement that POW camps be identified with the letters PW, PG, or IC.

The Law of Land Warfare, ch. 3, § I ¶ 71 (1956) ("FM27-10") (adopting article 5 verbatim).

Finally, and most important, the Conventions were written "first and foremost to protect individuals, and not to serve state interests." Oscar M. Uhler *et. al.*, *Commentary IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 20 (Jean S. Pictet ed., 1958). For example, in Geneva III:

- Article 5 provides that "persons shall enjoy the protection of [the Third Convention]" whenever their status as a POW is in doubt.
- Article 7 provides that "[p]risoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention."
- Article 106 provides that "[e]very prisoner of war shall have * * * the right of appeal."
- Article 129 provides that "[i]n all circumstances, the accused persons shall benefit by safeguards of proper trial and defense").

The panel majority erred in concluding that the Geneva Conventions are not self-executing. *Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005). The majority based its conclusion nearly entirely on the "alternative holding" of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), concerning the earlier 1929 version of the Geneva Conventions. In an unsupported footnote to this opinion, Justice Jackson there stated that the "responsibility for observance and enforcement of [the 1929 Conventions] is upon political and military authorities." *Id*. at 789 n.14.

The 1949 Geneva Conventions, however, diverge substantially from their predecessors and, in fact, were written to correct the "clearly demonstrated * * * deficiencies which existed in the 1929 Geneva Conventions" with respect to the scope of their application and enforceability. 59 *International Law Studies: Prisoners of war in International Armed Conflict* 1, 9-10 (Naval War College Press, 1978).

Under the interpretation of the court below, individuals from nations with scant bargaining power (such as Yemen), individuals captured fighting on behalf of a regime that no longer exists (such as the former government of Afghanistan), and citizens of the detaining na-

tion (*see*, *e.g.*, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004)) would be left without a remedy. Indeed, this interpretation would render certain provisions nonsensical. For example, Geneva III, art. 7 states that "[p]risoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention." It is unclear why the drafters of the Conventions would bother considering the waiver of personal rights that a detainee may not personally enforce.

B. AR 190-8 Executed the Geneva Conventions

To the extent the Geneva Conventions require any further authorization to be enforceable in courts, such implementation was provided by AR 190-8. It is well established that treaty terms may be executed by properly issued regulations. *See Restatement (Third) of the Foreign Relations Law of the United States*. § 111, cmt. h (describing implementation "by legislation or appropriate executive or administrative action"); Gary B. Born, *International Civil Litigation in the United States Courts* 19 (3d ed. 1996) (stating that implementation may be by "legislation or regulations"). AR 190-8 constitutes the law of the United States. *See Gratiot v. United States*, 45 U.S. (4 How. 80), 117 (1845) ("As to army regulations, this court has too repeatedly said, that they have the force of law * * *"). As such, it both evidences the United States' understanding of its obligations under the Geneva Conventions and executes those conventions.

C. The UCMJ Requires Compliance with the Geneva Conventions.

The Government seeks to try Hamdan before a military tribunal under 10 U.S.C. § 821. But that statute limits military tribunals to "offenders * * * triable under the law of war." Because the Geneva Conventions are foundational to the laws of war, *see Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2641 (2004) (plurality opinion) (citing the Geneva Conventions as law of war), the military commission must comply with the Geneva Conventions.

In addition, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.); *accord McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10, 21-22 (1963). "This rule of construction reflects principles of customary international law – law that [a court

must assume] Congress ordinarily seeks to follow." *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004). Thus, the federal statutes providing for military commissions, and allowing the President to set their procedures, must be interpreted to authorize only commissions that conform to the Geneva Conventions.

The Uniform Code of Military Justice ("UCMJ") authorizes the President to write procedures for military commissions and states that, if practical, these procedures "shall * * * apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district court." 10 U.S.C. § 836. The statute permits the President to suspend certain district court procedures, but does not authorize him to waive the fundamental guarantees of the Geneva Conventions. Under the *Charming Betsy* canon, a court must construe the authority granted by this statute to preclude any violation of customary international law, including the Geneva Conventions.

IV. THE PRESIDENT MAY NOT DENY HAMDAN THE PROTECTIONS OF THE GENEVA CONVENTION

A. The Geneva Conventions Apply to Hamdan Because He Was Captured During an International Armed Conflict.

The Geneva Conventions provide humanitarian protections to all involved in international armed conflicts. They use expansive language in order to "deprive belligerents, in advance, of the pretexts they might in theory put forward for evading their obligations." *Commentary IV*, at 20.

Article 2 ("Common Article 2"), common to the Third and Fourth Conventions, provides that the Conventions are applicable in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." Geneva III, art. 2. Afghanistan is a party to the Conventions. *See* International Committee of the Red Cross, *States Party to the Geneva Conventions and their Additional Protocols*, Feb. 6, 2004. Because Hamdan was captured in the course of the conflict between the United States and Afghanistan, the Geneva Conventions apply to Hamdan.

Respondents argue that Hamdan was captured not during the United States' armed conflict with Afghanistan but during a "sepa-

rate" conflict with al Qaeda – a conflict that the United States happened to be fighting at the same time, on the same soil, using the same troops, and with the same objectives.[4] The conflict with al Qaeda is inseparable from the conflict with Afghanistan, however, just as the World War II conflict between Germany and the French Resistance was inseparable from the conflict between Germany and France. That a detainee may have been part of an irregular military organization instead of a country's recognized armed forces may provide a detainee with a *different* set of substantive rights under the Conventions (contrast Article 3 of Geneva III, setting out minimum protections available to all detainees, with Article 4, defining the sets of detainees eligible for prisoner-of-war protections), but the Conventions are clear that whether they apply depends simply upon the existence of an armed conflict, and not on the status of the detainee in question.

Moreover, even if one could digest the fiction that there were two parallel conflicts in Afghanistan, Hamdan was captured by Afghan paramilitary forces allied with the United States and fighting the Taliban.

Secretary of State Powell was therefore correct when he stated, soon after the United States invaded Afghanistan, that the Geneva Conventions apply to both al Qaeda and Taliban fighters. Rowan Scarborough, *Powell Wants Detainees to the Declared POWs*, Wash. Times, Jan. 26, 2002. As his Legal Adviser stated (Taft Mem. at ¶ 3):

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[4] *See* Presidential Mem. and Order to the Vice President, *et al.*, dated Feb. 7, 2002, at ¶ 2, *available at* http://www.library.law.pace.edu/research/020207_bushmemo.pdf (last visited Jan. 5, 2006) (accepting conclusion of DOJ and determining that provisions of Geneva do not apply to conflict with al-Qaeda in Afghanistan or elsewhere because, among other reasons, al Qaeda is not a High Contracting Party to Geneva; also accepting legal conclusion of the Attorney General and DOJ that Constitution authorizes President to suspend Geneva Conventions as between the United States and Afghanistan, but declining to exercise that authority and determining instead that Geneva Conventions will apply to present conflict with the Taliban).

> [The suggestion that there is a] * * * distinction between our conflict with al Qaeda and our conflict with the Taliban does not conform to the structure of the Conventions. The Conventions call for a decision whether they apply to the conflict in Afghanistan. If they do, their provisions are applicable to all persons involved in the conflict – al Qaeda, Taliban, Northern Alliance, U.S. troops, civilians, etc. If the Conventions do not apply to the conflict, no one involved in it will enjoy the benefit of their protections as a matter of law.[5]

Respondents' interpretation of Common Article 2 bears a deeply disturbing resemblance to the interpretation of predecessor conventions adopted by Nazi Germany in World War II. Exploiting "technicalities" and "ambiguities" in the 1929 Conventions, the Nazis refused to afford POW status to members of the armed forces of countries the Nazis occupied, arguing that prisoners were no longer soldiers of any government or state in existence. *See* Levie, *supra*, at 12. Responding to this brazen evasion of the conventions, Common Article 2 was written "as a catchall, to include every type of hostility which might occur without being 'declared war,'" *Commentary IV,* at 14-15, thus ensuring that "nobody in enemy hands can be outside the law," *id.* at 51.[6]

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[5] *See also* Lawrence Azubuike, *Status of Taliban and Al Qaeda Soldiers: Another Viewpoint*, 19 Conn. J. Int'l L. 127, 153-54 (2003) (arguing that the Third Convention should be applied to the conflict with al Qaeda because al Qaeda was an "enemy" of the U.S. in an armed conflict and its forces were so intertwined with the Taliban as to make them indistinguishable); Joan Fitzpatrick, *Agora: Military Commissions: Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 Am. J. Int'l L. 345, 349 (2002) (noting that the conflict in Afghanistan was an international armed conflict in which the Taliban and Al Qaeda joined forces against the U.S. and its Afghan allies).

[6] *See also* Norman G. Printer, Jr., *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. Int'l L. & For. Aff. 331, 371 (2003) (arguing that "the U.S. treatment of individual al-Qaeda members must comport with the stric-

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As one scholar has commented, Respondents' position "repudiates the very concept of a 'law' of war," substituting "a new form of international armed conflict that is subject to no identifiable norms of international humanitarian law" and "an international armed conflict in which all of the 'combatants' as defined by the Third Geneva Convention are on one side – that of the United States and its allies." Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 Hastings Int'l & Comp. L. Rev. 303, 317-18 (2002).

B. Hamdan Is Entitled to POW Treatment Until a Competent Tribunal Determines Otherwise.

Geneva III has been interpreted to create a presumption that a prisoner who is captured in a war zone is a POW. *See* Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 847 Int'l Rev. Red Cross 571, 571 (2002). Moreover, article 5 of Geneva III and United States military regulations require prisoners to be afforded full POW status as long as there is any doubt about their status. Article 5 provides:

> Should *any doubt* arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

(Emphasis added.) *See also* AR 190-8; FM27-10.[7] To overcome the presumption and deny Hamdan POW status, therefore, Respondents must establish either that it is beyond doubt that Hamdan is not entitled to POW status, or that a competent tribunal has determined that he is not. Respondents cannot make either showing.

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tures of the conventions because the conventions apply in all instances of international conflict.").

[7] The military regulations cited in this brief express the interpretation of the Geneva Conventions by the United States. *See* FM 27-10, ch. 3, § I ¶ 71(b) (explaining that AR 190-8 is the military's interpretation of Article 5).

Doubt as to Hamdan's status starts with his capture by bounty-hunting Afghan paramilitary forces who had every incentive to manufacturer information to justify their reward. "Pakistani intelligence sources said Northern Alliance commanders could receive $5,000 for each Taliban prisoner and $20,000 for a Qaeda fighter. As a result, bounty hunters rounded up any men who came near the battlegrounds and forced them to confess." Jan McGirk, *Pakistani Writes of His US Ordeal*, Boston Globe, Nov. 17, 2002, at A30.

In addition, Army regulations provide that a detainee's status is "in doubt" under Article 5 whenever the detainee *claims* that he is entitled to POW status, as Hamdan has done. Military regulations provide:

> A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and *who asserts that he or she is entitled to treatment as a prisoner of war*, or concerning whom any doubt of a like nature exists.

See AR 190-8, § 1-6(b) (emphasis added). Navy regulations provide that even "individuals captured as spies or 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." NWP 1-14M: The Commander's Handbook on the Law of Naval Operations § 11-7 (1995).[8]

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[8] *See also* George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 Am. J. Int'l L. 891, 893 (2003) (the military regulation's "interpretation [of Article 5] clearly indicates that doubt arises and a tribunal is required whenever a captive who has participated in hostilities asserts the right to be a POW"). The United States has regularly conducted adjudications in the midst of conflicts to determine if detainees asserting the right to POW status are entitled to such protections. *See*, *e.g.*, Judge Advocate General's School, *Operational Law Handbook* 22 n.2 (O'Brien ed., 2003) (discussing hearings to determine whether detainees were entitled to POW status conducted during the first Gulf War); *Contemporary Practice of the United States Relating to International Law*, 62 Am.

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Because Hamdan claims POW status, he is entitled under Article 5 and military regulations to POW protections until a competent tribunal determines otherwise. For the reasons stated by Petitioner and amicus National Institute of Military Justice, the military commission established by the President is not a competent tribunal for purposes of Article V or AR 190-8. *See* Pet'r Br. at 47 n.38 and NIMJ Amicus Br. 16 n.6, 19-30. *See also*, *e.g.*, *Hamdi*, 124 S. Ct. at 2658 (Souter, J., concurring in part, dissenting in part, and concurring in judgment); *Gherebi v. Bush*, 352 F.3d 1278, 1283 n.7 (9th Cir. 2003) (suggesting that the failure to make status determinations by tribunals violates Article 5 and the military regulations that codify it), *as amended by* 374 F.3d 727 (9th Cir. 2004); *European Commission for Democracy Through Law (Venice Commission), Council of Europe*, *Opinion on the Possible Need for Further Development of the Geneva Conventions*, at 9-10 (2003), *available at* http://venice.coe.int/docs/2003/CDL-AD(2003)018-e.asp ("Venice Commission Opinion") (last visited Jan. 5, 2006).[9]

J. Int'l L. 754, 768-75 (1968) (discussing hearings conducted during the Vietnam War); Note, *Safeguarding the Enemy Within*, 71 Fordham L. Rev. 2565, 2574 (2003) (noting U.S. Army's establishment of widespread Article 5 tribunals in Vietnam to adjudicate POW status of enemy detainees).

[9] Article 45(1) of the first Protocol Additional to the Geneva Conventions provides that

> [a] person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war * * * until such time as his status has been determined by a competent tribunal.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3. Although the United States is not a party to Protocol I, commentators have suggested that the rule established in Article 45(1) is now customary international law and that the United States regards Article 45(1) as customary international law. *See* Naqvi, supra, at 591-93 (U.S. regards this rule as customary international law); Aldrich, 96 Am. J. Int'l L. at 892 (Article 45(1) is "now a part of customary international law"). By vio-

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Respondents assert that no doubt exists as to his status because the President has "determined" that Hamdan is a member of al Qaeda and is subject to the Military Order. But the President cannot decide Hamdan's status because "the president is not a tribunal and cannot substitute for a tribunal under Article 5." Aldrich, 96 Am. J. Int'l L. at 897. Nor can the President justify departing from the requirements of Article 5 on the ground that the President has labeled Hamdan an "enemy combatant." Such a justification assumes its conclusion. Neither Article 5 nor the military regulations purport to withhold from so-called "enemy combatants" the right to have their status determined by a tribunal.

The President's categorical refusal to provide POW protections to any of the detainees also violates Article 5's requirement that the prisoners receive individualized status determinations. This requirement is implicit in the rule that doubt as to a prisoner's status exists when the prisoner claims POW status. *See* Naqvi, *supra*, at 585-87.

The individualized assessment required by Article 5 recognizes the realities of war: when large numbers of people are rounded up, civilians, soldiers, and even "enemy combatants" are easily mistaken. After the Gulf War, the United States, as it had done following every conflict since the ratification of the Geneva Conventions, convened tribunals for detainees with unclear status. Of 1,196 tribunals convened, almost three quarters (886) resulted in a finding that the detainee was not a combatant at all, but a displaced civilian. Dep't of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* (1992), *available at* www.ndu.edu/library/epubs/cpgw.pdf (last visited Jan. 5, 2006). Respondent Rumsfeld has acknowledged that some of the detainees at Guantanamo may be unlawfully detained: "Sometimes when you capture a big, large group there will be someone who just happened to be in there that didn't belong in there." Dep't of Defense, Secretary Rumsfeld Media Availability en route to

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lating Article 45(1), the United States therefore also violates Common Article 3. *See Kadic v. Karadzic*, 70 F.3d 232, 242-43 (2d Cir. 1995); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1351 (N.D. Ga. 2002).

Camp X-Ray (Jan. 27, 2002), *available at* www.defenselink.mil /news/Jan2002/ t01282002_ t0127sd2.html (last visited Jan. 5, 2006).

If Article 5 were construed to allow the President to "determine" categorically that a designated class of prisoners is not entitled to POW status – especially a group as large and diverse as the Guantanamo detainees – the protections of Article 5 would be illusory. Such a construction "would give the detaining power an easy means to circumvent its obligation under Article 5 by simply declaring that it has no doubts that the conditions of Article 5 * * * are not satisfied." Venice Comm'n Opinion at 9.

C. Hamdan Is Protected by Common Article 3 Regardless of Whether He Is Deemed a POW

"If any person detained during an armed conflict is not a POW, such person nevertheless benefits from protections under Common Article 3 of the Geneva Conventions, which applies today in all armed conflicts and which incorporates customary human rights to due process into the conventions." Paust, *supra*, at 514 & n.37. Common Article 3 requires humane treatment of prisoners and forbids "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Geneva III, art. 3.

Common Article 3 is applicable in the case of "armed conflict not of an international character," but it is not limited to non-international conflicts: Because international armed conflicts trigger "protections equal to, and in most areas greater than, those accorded by Common Article 3," Derek Jinks, *September 11 and the Laws of War*, 28 Yale J. Int'l L. 1, 41 (2003), "[the] minimum requirement [of Common Article III] in the case of a non-international conflict is *a fortiori* applicable in international conflicts," *Commentary IV*, at 14.

Thus, the International Court of Justice has stated that "[t]here is no doubt that, in the event of international armed conflicts * * * [the rules articulated in Common Article 3] * * * constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity.'" *Nicaragua v. United States*, 1986 I.C.J. 14, 113-14 (1986) (citation omitted). The ICJ stated that

> [b]ecause the minimum rules applicable to international and non-international conflicts are identical, there is no need to address the question whether * * * [the actions alleged to be violative of Common Article 3] must be looked at in the context of the rules which operate for one or for the other category of conflict.

Id.

Similarly the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia found that Common Article 3 was applicable to the conflict in the former Yugoslavia whether or not that conflict was characterized as international or internal. *Prosecutor v. Tadic*, Case No. IT-94-1-A, ICTY, Trial Chamber, Decision on Defense Motion on Jurisdiction, Aug. 10, 1995, ¶¶ 65-74, *available at* http://www.un.org/icty/tadic/trialc2/decision-e/100895.htm (last visited Jan. 5, 2006); *see also Kadic*, 70 F.3d at 242-43 (stating in its discussion of customary international law that Common Article 3 sets forth the "most fundamental requirements of the law of war"); *Mehinovic*, 198 F. Supp. 2d at 1351 (recognizing "the customary international humanitarian norms embodied in [Common Article 3]").[10]

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[10] Hamdan should also be understood to qualify for the protections due civilians under the Geneva IV. Although Article 4 of Geneva IV states that these protections are not available to "[n]ationals of a neutral state who find themselves in the territory of a belligerent state" (on the theory that those individuals are to be protected through diplomatic means) some commentary suggests that the protections of Geneva IV are to be provided to anyone who finds himself "in the hands of a Party to the [armed] conflict." Art. 4. *See*, *e.g.*, *Commentary IV* at 51 ("Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law."); *accord* FM 27-10, ch. 3 § II ¶ 73 (Army Field Manual, taking a similar position). Such a reading of Geneva IV is particularly appropriate in Hamdan's case because the Yemeni government's diplomatic efforts on Hamdan's behalf have so far been unavailing.

CONCLUSION

Two centuries ago, Justice Story wrote that, whatever the President's discretion, "he cannot lawfully transcend the rules of warfare established among civilized nations. He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims." *Brown v. United States*, 12 U.S. (8 Cranch) 110, 153 (1814). Here, the President's repudiation of the Geneva Conventions has endangered the men and women of our armed forces and other Americans detained abroad.

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