No. 05-184

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

AMICUS BRIEF OF LAW PROFESSORS LOUIS HENKIN, RICHARD B. BILDER, JOHN BARTON, JOHN B. QUIGLEY, JOHN E. NOYES, DAVID D. CARON, RUTI G. TEITEL, MARTIN FLAHERTY, MARY ELLEN O'CONNELL, DAVID D. COLE, ANDREW STRAUSS, CARLOS M. VÁZQUEZ, CONNIE DE LA VEGA, WILLIAM S. DODGE, JULIE R. O'SULLIVAN, BETH STEPHENS, SEAN MURPHY, SARAH H. CLEVELAND, LAURENCE R. HELFER, WILLIAM J. ACEVES, MARK A. DRUMBL, GREGORY H. FOX, DAVID SLOSS, LAURA DICKINSON, OONA A. HATHAWAY, ROSA EHRENREICH BROOKS AND MARIANO-FLORENTINO CUELLAR SUPPORTING PETITIONER (GENEVA – ENFORCEABILITY)

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INTEREST OF *AMICI CURIAE*

Amici curiae respectfully submit this brief to address the question whether the treaty rights petitioner asserts are enforceable in our courts. *Amici* are law professors with expertise in international law and U.S. foreign relations law. They file this brief to provide the Court with an historical perspective on the enforcement of treaties in U.S. courts. *Amici* are listed in the appendix to this brief.[1]

SUMMARY OF ARGUMENT

Congress has empowered federal courts to grant habeas corpus relief to individuals who are in custody in violation of a treaty of the United States. Petitioner alleges that he is in custody in violation of the Geneva Convention [No. III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"). The GPW is a treaty of the United States, valid and in force. Under Article VI of the Constitution, it is the "supreme Law of the Land" and the judges in every state are required to give it effect. Petitioner is thus entitled to the relief he seeks if, in fact, he is in custody in violation of the GPW.

The Court of Appeals held that the GPW is not enforceable in the courts by the individuals on whom it confers rights. Its holding was based on a fundamental misunderstanding of the Founders' design, as reflected in

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[1] The parties' letters of consent to the filing of *amici* briefs have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of the Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution for preparing or submitting this brief. This brief was prepared with the *pro bono* assistance of Brandy L. Anderson and Kristin M. Leavy, associate attorneys in private practice in Washington, D.C.

applicable constitutional texts, as well as two centuries of consistent Supreme Court jurisprudence.

The Court of Appeals relied on a supposed "general" rule that treaties, as compacts between nations, are to be enforced through state-to-state negotiations and reclamations, not through litigation in domestic courts. The Constitution, however, clearly contemplates judicial application of treaties. The Founders understood that, as a matter of international law, enforcement of treaties depended on state-to-state negotiation and reclamation and even military force. However, they feared the consequences of treaty violations and resolved to adopt a mechanism that would avoid or remedy treaty violations by the United States before they triggered international disputes. The mechanism they adopted was the Supremacy Clause, which declared treaties to be the "supreme Law of the Land" and instructed the *judges* in every state to give them effect.

This Court's decisions confirm that it is the role of the courts to protect the treaty-based rights of individuals. In cases where this Court has found that a treaty protects individual rights, and that an individual's treaty rights have been violated, this Court has consistently granted judicial remedies to the victims. It has consistently applied treaties as the rule of decision when they have been invoked as a defense to civil or criminal proceedings, even when the treaties have not specified that they are judicially enforceable. This Court has also consistently enforced treaty-based rights at the behest of individuals seeking affirmative relief, even when the treaties have not expressly required judicial enforcement or created a private right of action. In the absence of an express right of action in the treaty, this Court has provided judicial remedies pursuant to rights of action found in other sources of law. Only where Congress enacted a statute that superseded the treaty under the later-in-time rule has this Court denied a judicial remedy

to an individual whose treaty rights were violated. Because the GPW has not been superseded by a later inconsistent statute, petitioner is entitled to a judicial remedy if trial by military commission would violate his treaty rights.

The writ of habeas corpus has historically been available to individuals detained in violation of treaty rights. As the Court of Appeals appears to have recognized, the federal habeas statute, which authorizes the issuance of the writ to persons "in custody in violation of . . . . treaties of the United States," supplies petitioner's right of action. Cases suggesting that the GPW is not a self-executing treaty in the sense that *it* does not provide a private right of action are therefore inapposite. The ratification history of the GPW and the post-ratification practice of the U.S. military confirm that the relevant provisions of the GPW are self-executing in every relevant respect. Petitioner is thus entitled to habeas relief if he is in custody in violation of the GPW.

The Court of Appeals' contrary conclusion relied on a single footnote in *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950), *overruled on other grounds by Rasul v. Bush*, 542 U.S. 466 (2004), addressing an issue that was never argued before the Supreme Court and that the Court, according to its own holding (now reversed), lacked jurisdiction to decide. Because the *Eisentrager* dictum is in deep conflict with the Founding design and clear holdings of this Court, it should not be followed. Because there is no language in the GPW that suggests that it bars domestic judicial enforcement of its terms, petitioner is entitled to habeas relief if trial by military commission would violate the GPW.

This brief assumes that Hamdan's trial by military commission would contravene the GPW. We solely address

the Court of Appeals' holding that the GPW is not a judicially enforceable treaty.[2]

ARGUMENT

I. THE COURT OF APPEALS' HOLDING FUNDAMENTALLY MISUNDERSTANDS THE FOUNDERS' DESIGN WITH RESPECT TO TREATIES

In concluding that the rights conferred on Hamdan by the GPW are not enforceable in our courts, the Court of Appeals relied on the notion that, "[a]s a general matter, a 'treaty is primarily a compact between independent nations,' and 'depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it.'" *Hamdan v. Rumsfeld*, 415 F.3d 33, 38 (D.C. Cir. 2005) (citation omitted). "If a treaty is violated," the court wrote, "this 'becomes the subject of international negotiations and reclamation,' not the subject of a lawsuit." *Id.* at 38-39. The

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[2] The question of the conformity of the military commissions with the GPW would arise in this case even if the Court agreed with the lower court that the GPW is not directly enforceable in the courts by individuals. Hamdan argues that the President lacks the authority to authorize his criminal trial by the military commissions he created, and that no statute confers on the President the necessary authority. One of the statutes the President has cited as authority, section 821, authorizes the use of such commissions, if at all, only in accordance with the laws of war. 10 U.S.C. § 821. Because the GPW is part of the laws of war, the Court must consider whether the commissions comport with the GPW (as well as other treaties and customary international law principles that fall within the rubric of the laws of war) in determining whether the President's action was authorized by that statute, regardless of whether the GPW would be directly enforceable in the courts by Hamdan.

court's reliance on this idea reflects a fundamental misunderstanding of the constitutional design with respect to treaties and misreads the very decisions of this Court on which it relied.

The text of the Constitution clearly contemplates the judicial enforcement of treaties. Article VI declares that "all Treaties" are the "supreme Law of the Land," and it specifically instructs the "judges in every State" to give them effect. U.S. Const. art. VI. Article III extends the federal judicial power to "all Cases . . . arising under" treaties. U.S. Const. art. III, § 2, cl. 1. The debates at the Constitutional Convention disclose that treaty violations attributable to the United States during the period of the Articles of Confederation were a key animating cause of the Founders' decision to write a new Constitution. The Founders were concerned that treaty violations would give rise to international friction, deter other nations from concluding potentially beneficial treaties with us, and reflect poorly on the nation's honor. Although they considered other mechanisms for securing compliance with treaties, in the end the Founders adopted a mechanism that relied on judicial enforcement. *See generally* Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals,* 92 Colum. L. Rev. 1082, 1102-07 (1992); Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 Colum. L. Rev. 2095, 2118-26 (1999).

The Convention and ratification debates also show that the Founders were fully aware that, *as a matter of international law*, treaties were compacts between nations that depended for their efficacy on the good faith of the parties or political or military action at a state-to-state level. *See, e.g., The Federalist No. 15* (Alexander Hamilton) ("Compacts of this kind exist among all civilized nations, subject to the usual vicissitudes of peace and war, of

observance and nonobservance, as the interests or passions of the contracting powers dictate."). The very point of the Supremacy Clause was to establish that, *as a matter of U.S. domestic law*, treaties were to be enforceable in the courts by individuals whose rights they governed. As Hamilton wrote in Federalist No. 22, "[t]he 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." Similarly, Brutus affirmed that, "as treaties will be the law of the land, every person who has rights or privileges secured by treaty, will have the aid of the courts of law, in recovering them." Brutus, *Anti-Federalist No. XIII*, New York Journal, Feb. 1, 1788, *reprinted in* 16 The Documentary History of the Ratification of the Constitution 172 (John P. Kaminski & Gaspare J. Saladino eds., 1984).[3]

Far from contradicting the Founders' design, the decisions of this Court cited by the Court of Appeals are fully in accord with it. For example, in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), Chief Justice Marshall's opinion for the Court stated:

> A treaty is in its nature a contract between two nations, not a Legislative Act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infraterritorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

Id.

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[3] For additional authorities supporting the propositions in this paragraph, see Vázquez, *Treaty-Based Rights, supra*, at 1097-99, 1109-10.

Like some other lower courts and scholars,[4] the Court of Appeals took this statement out of context, overlooking the fact that Marshall here was speaking of the operation of treaties in legal systems that do not have a Supremacy Clause. As Marshall went on to say:

> In the United States *a different principle is established.* Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an Act of the Legislature, whenever it operates of itself without the aid of any legislative provision.

Id. (emphasis added). Chief Justice Marshall's point was that, by virtue of the Supremacy Clause, treaties generally are enforceable in our domestic courts. The effect of the Supremacy Clause was to make treaties generally cognizable "in courts of justice as equivalent to an Act of the Legislature."[5] *Id.*

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[4] *E.g., Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968-69 (4th Cir. 1992); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring); *see also* John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 Colum. L. Rev. 1955, 2087 (1999) (misreading *Foster* in this way). *Compare* David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. Davis L. Rev. 1 (2002), at 19-24 (analyzing *Foster*) and at 61-63 (criticizing Yoo), *with* Carlos Manuel Vázquez, *Laughing at Treaties*, 99 Colum. L. Rev. 2154, 2193 (1999) (explaining Yoo's error).

[5] The Court extended this "different principle" only to treaties that operate of themselves, without the aid of any legislative provision. The latter qualification has given rise to the idea that some treaties are judicially unenforceable because they are non-self-executing. The Court of Appeals did not invoke this doctrine in holding that

The Court of Appeals also relied on the *Head Money Cases*, 112 U.S. 580 (1884), to contend that treaties are not generally enforceable in U.S. courts. *Hamdan*, 415 F.3d at 38-39. But the Court of Appeals overlooked the passage that immediately followed the one it quoted. That passage makes it clear that, where a treaty "contain[s] provisions which confer certain rights upon the citizens or subjects of one of the Nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country," the U.S. Constitution "places such provisions as these in the same category as other laws of Congress." *Head Money Cases*, 112 U.S. at 598.

As with *Foster*, this Court's opinion in the *Head Money Cases* cuts decidedly against the Court of Appeals' holding. This Court made it clear that treaties that "prescribe a rule by which the rights of the private citizen or subject may be determined" are to be regarded as equivalent to an act of the legislature, and hence to be "enforced in a court of justice." *Id.* at 598-99. As the Court of Appeals recognized, the GPW prescribes rules by which the rights of private individuals may be determined. *See Hamdan*, 415 F.3d at 40 (stating that the GPW "protect[s] individual rights"). Therefore, in accordance with this Court's decision in *Head Money Cases*, this Court should "resort to the treaty for a rule of decision for the case before it." 112 U.S. at 599.[6]

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the GPW was not judicially enforceable. As discussed in Part III, the district court correctly found the GPW to be self-executing in all relevant respects. Our point here is that the Court of Appeals overlooked the language in *Foster* that shows that, in the United States, the "general" rule is the opposite of the one it stated.

[6] *Charlton v. Kelly*, 229 U.S. 447 (1913), also cited by the Court of Appeals, is wholly inapposite. The issue there was whether the U.S. courts should regard the United States' obligations under a

That *Foster* and *Head Money Cases* stand for the opposite of what the Court of Appeals believed is confirmed by *United States v. Rauscher*, 119 U.S. 407 (1886), where this Court made clear that the passages cited by the Court of Appeals address the "difference between the judicial powers of the courts of Great Britain [where treaties are *not* part of the law of the land] and of this country in regard to treaties." *Id.* at 417. *Head Money Cases*, in particular, addressed "the effect of a treaty as a part of the law of the land, as distinguished from its aspect as a mere contract between independent nations." *Id.* at 418. Because treaties are declared by the Constitution to be the supreme law of the land, this Court emphasized in *Rauscher*, "the courts are bound to take judicial notice [of them], and to enforce in any appropriate proceeding the rights of persons growing out of [them]." *Id.* at 419.

II. THIS COURT'S PRECEDENTS ESTABLISH A STRONG PRESUMPTION THAT INDIVIDUALS ARE ENTITLED TO JUDICIAL REMEDIES FOR VIOLATIONS OF TREATY RIGHTS

Consistent with the Founding design, this Court's decisions from the start have enforced treaties at the behest of individuals challenging violations of their treaty-based rights.[7] In many cases, the treaties were enforced even

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treaty as extinguished because of an asserted breach by the other party. The Court held that such a breach at best renders the treaty voidable, not void.

[7] Here and elsewhere in the brief, we use the term "rights" in the sense of "primary right." An individual has a "primary right" under a treaty if a state party to the treaty has a legal duty under the treaty to behave in a particular way, or to refrain from behaving in a particular way, with respect to that individual. *See generally* Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William

though they did not expressly confer any right to judicial enforcement. Except where Congress has enacted a later-in-time statute that superseded the treaty as a matter of domestic law, individuals harmed by violations of their treaty rights have consistently been afforded a judicial remedy in accordance with the principle endorsed by this Court in *Marbury v. Madison* "that where there is a legal right, there is also a legal remedy . . . whenever that right is invaded." 5 U.S. (1 Cranch) 137, 163 (1803) (quoting William Blackstone, 3 *Commentaries* *23). The *Marbury* principle establishes a strong presumption that individuals who are harmed by a violation of their treaty-based rights are entitled to domestic judicial remedies. *See Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 348 (1809) (Marshall, C.J.) ("Each treaty stipulates something respecting the citizens of the two nations, and gives them rights. Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected.").

The Court of Appeals concluded that the GPW was not judicially enforceable even though it concededly protects individual rights and even though the rights established by its most relevant provisions are specifically applicable in the

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Eskridge & Philip P. Frickey eds., 1994), at 130-31 (defining primary duties), and at 136-37 (noting that a "primary right" is "the mere obverse" of a duty). This brief addresses the availability of secondary or remedial rights (*i.e.*, the right to enforce the treaty in domestic courts); it would be tautological to address that question by reference to the concept of a right unless that term were understood to mean primary right. For the same reason, the judicial opinions and other authorities we cite that employ the term "right" in addressing the judicial enforceability of treaties are properly understood to be using the term in the same sense.

context of judicial proceedings. *See, e.g.*, GPW art. 102 ("A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power."); *id.* art. 105 ("The prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent interpreter. He shall be advised of these rights by the Detaining Power in due time before the trial."); *id.* art. 3 (prohibiting "[t]he 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").

The Court of Appeals did not indicate the circumstances in which it believed treaty-based rights could be enforced by the right-holder in our courts. Other lower courts, however, have suggested that treaties may be enforced in court only when they create a private right of action. *E.g., Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring). This suggestion is untenable. Throughout our history, this Court has enforced treaties at the behest of the right-holder, both defensively and offensively, even when the treaties have been no more explicit with respect to judicial enforcement than the GPW, and in many cases far less so.

A private right of action is obviously unnecessary if the right-holder invokes a treaty defensively. In *Rauscher*, even the dissenter recognized that, "if there is anything in [a treaty] which forbids a trial. . . . , the accused may use [the treaty] as a defense to a prosecution . . . ." 119 U.S. at 434 (Waite, C.J., dissenting on other grounds) *See also Kolovrat v. Oregon*, 366 U.S. 187 (1961) (treaty successfully invoked in answer to state's petition to take certain personal

property); *Cook v. United States*, 288 U.S. 102 (1933) (treaty successfully invoked as defense to proceeding to collect penalty). *Cf. Patsone v. Pennsylvania*, 232 U.S. 138 (1914) (treaty invoked as defense to criminal prosecution; claim rejected on the merits).

In numerous other cases, this Court has applied treaties at the behest of defendants as the rule of decision whenever they have addressed issues relevant to the case, even when the treaties were far less clearly addressed to judicial conduct than the GPW. In every case, the rationale supporting judgment for the defendant relied on the Court's assessment that a judgment for the plaintiff would have infringed upon the defendant's treaty-based rights. *See Carneal v. Banks*, 23 U.S. (10 Wheat.) 181 (1825) (where plaintiff sued to rescind contract for land swap, claiming that defendant did not have valid title to land, Court dismissed bill for rescission because defendant derived title from French citizen whose right to hold land in U.S. territory was protected under article 11 of the Treaty of Amity and Commerce, U.S.-Fr., art. 11, Feb. 6, 1778, *reprinted in* 2 Treaties and Other International Acts of the United States of America 3, 11-12 (Hunter Miller ed., 1931) ("1778 Treaty with France")); *Orr v. Hodgson*, 17 U.S. (4 Wheat.) 453 (1819) (where plaintiff sued to rescind contract for purchase of land, challenging validity of defendant's title, Court dismissed bill for rescission because defendant had valid title protected by article 6 of Definitive Treaty of Peace, U.S.-Gr. Brit., art. 6, Sept. 3, 1783, *reprinted in* 2 Treaties and Other International Acts, *supra*, 151, 155); *Moodie v. The Ship Phoebe Anne*, 3 U.S. (3 Dall.) 319 (1796) (where British consul filed libel to recover ship captured by French privateer, Court awarded judgment to French privateer because article 19 of 1778 Treaty with France protected right of French citizens to enter U.S. ports and obtain items necessary for repairs).

These consistent precedents dating back to the Framing Period provide particularly powerful evidence of the Framers' views concerning the judiciary's role in the enforcement of treaties. This Court has emphasized that the force of constitutional precedents "tends to increase in proportion to their proximity to the Convention in 1787." *Powell v. McCormack*, 395 U.S. 486, 547 (1969). In the case of treaties, the consistent precedents of this Court in the initial decades of the Constitution demonstrate with clarity the contemporaneous understanding that it is the judiciary's responsibility to provide remedies for individuals who are harmed by violations of their treaty rights.

Although petitioner Hamdan is not a defendant in this proceeding, he claims that the GPW gives him rights in connection with a criminal proceeding in which he is the defendant. At least in the absence of a specific jurisdictional limitation, a petitioner in this posture may enforce the same legal rights as in the related criminal proceedings. See *Rauscher*, 119 U.S. at 431 (In addition to invoking the treaty as a defense, "[i]f the party . . . is under arrest and desires a more speedy remedy . . . , a writ of *habeas corpus* from one of the federal judges or federal courts [may be] issued on the ground that he is restrained of his liberty in violation of . . . a treaty of the United States."). As Henry Hart wrote in his famous Dialogue, "in an advance challenge the court . . . should consider and decide any question which it thinks the plaintiff would have a right to have it decide if he were a defendant." Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1374 (1953).[8]

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[8] In the Dialogue, this statement takes the form of a question. We have quoted it here as a statement because the questioner's interlocutor assented to the questioner's formulation of the point. *See* Hart, *supra*, at 1374 (noting that, in such circumstances, "the

In any event, this Court's decisions demonstrate that plaintiffs, too, are generally entitled to remedies for the violation of their treaty-based rights, even if the treaty at issue does not specifically confer a private right of action or otherwise address judicial enforcement any more clearly than does the GPW. If the treaty does not itself create a private right of action, it may be enforced in courts pursuant to rights of action having their basis in other sources of law. In many of this Court's decisions in favor of plaintiffs relying on treaties, the plaintiff's right of action was derived from non-statutory domestic law. *See Society for Propagation of the Gospel v. Town of New Haven*, 21 U.S. (8 Wheat.) 464 (1823) (action for ejectment); *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259 (1817) (action for ejectment); *Fitzsimmons v. Newport Insurance Co.*, 8 U.S. (4 Cranch) 185 (1808) (suit for breach of contract); *Higginson v. Mein*, 8 U.S. (4 Cranch) 415 (1808) (suit to foreclose on mortgage); *Hopkirk v. Bell*, 7 U.S. (3 Cranch) 454 (1806) (suit to recover payment on bond); *Ogden v. Blackledge*, 6 U.S. (2 Cranch) 272 (1804) (suit to recover payment on bond); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) (libel in admiralty court); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (suit to recover payment on bond). In each of these cases, the Court granted a remedy because the right-holder had been harmed by a past violation of a treaty right, or was likely to be harmed by a future violation of a treaty right.

More recent cases confirm that a treaty is affirmatively enforceable in court by the right holder even when the treaty itself does not expressly confer a private right of action. In

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court ought ordinarily" to "treat the plaintiff now as if he were a defendant"). Hart suggested that a court should decide such questions "regardless of any restriction on its jurisdiction." *Id. A fortiori*, the court should do so where there has been no specific jurisdictional restriction.

Asakura v. City of Seattle, 265 U.S. 332 (1924), for example, the plaintiff was a Japanese national who operated a pawnbroker business in Seattle. *Id.* at 339. Seattle passed an ordinance that prohibited non-citizens from operating a pawnbroker business in the city. *Id.* at 339-40. Plaintiff sued to enjoin enforcement of the ordinance on the ground that it violated a bilateral treaty with Japan Treaty of Commerce and Navigation, U.S.-Japan, Feb. 21, 1911, 37 Stat. 1504, which granted Japanese citizens a right "to carry on trade" in the United States "upon the same terms as native citizens or subjects." *Asakura*, 265 U.S. at 340 (quoting Treaty of Commerce and Navigation art. I). Even though the treaty did not expressly grant Japanese citizens a right to sue for injunctive relief, the Supreme Court affirmed an injunction in favor of the plaintiff, relying on the traditional equitable action for injunctive relief as the basis of a domestic right of action to enforce the plaintiff's treaty-based rights. Similarly, in *Jordan v. Tashiro*, 278 U.S. 123 (1928), this Court affirmed a state court's grant of a mandamus petition to enforce the same treaty. In short, at least where another law confers a private right of action for the form of relief sought, treaty-based rights may be enforced in court, even if the treaty itself does not explicitly confer a private right of action.[9]

This Court's decisions denying treaty-based claims are consistent with the proposition that treaties are generally enforceable in our courts by individuals whose rights the treaties protect. Most of these cases have denied relief on the merits—that is, on the ground that the treaty invoked by one

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[9] Because the habeas statute confers petitioner's right of action, *see infra* Part III, there is no need to consider the circumstances in which it is appropriate to infer a private right of action from the treaty itself, or the circumstances in which a remedy for a treaty violation is constitutionally required.

party did not impose the claimed obligation on the other party. *See, e.g., United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (interpreting Extradition Treaty, U.S.-United Mexican States, May 4, 1978, 31 U.S.T. 5059, as not prohibiting forcible abduction); *Sale v. Haitian Centers Council Inc.*, 509 U.S. 155 (1993) (interpreting U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267, as not applicable to actions of Coast Guard on the high seas).

The sole case in which this Court has unambiguously denied relief on the ground that a treaty was not self-executing—*Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), subsequently overruled on this point in *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833)—was a decision on the merits.[10] The Court held that a treaty providing that the United States "shall ratify and confirm" certain land grants did not itself ratify or confirm the grants on which the plaintiff based his claim, but instead contemplated that the legislature would ratify and confirm the grants. *Foster*, 27 U.S. at 314. The Court thus held that the treaty did not itself confer the right plaintiff claimed.

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[10] In *Cameron Septic Tank Co. v. Knoxville*, 227 U.S. 39, 50 (1912), this Court noted but did not endorse the apparent view of Congress and "some of the other contracting nations" that the Treaty of Brussels of 1900 was not self-executing. Instead, it ruled against the plaintiff on the merits, interpreting the treaty as not applicable on the facts of the case. *See id.* It is worth noting that, because other nations have very different constitutional rules about the domestic effect of treaties, the view of other nations that implementing legislation is required for a particular treaty is not probative of whether implementing legislation is required for the United States. *See* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695, 709-10 (1995).

The only cases in which this Court has denied relief to individuals who claimed their treaty rights were violated other than on the merits or because of jurisdictional obstacles not present here[11] have involved treaties that conflicted with subsequently-enacted statutes. Two of the cases cited by the Court of Appeals hold only that the courts may not enforce a treaty in the face of a later inconsistent statute. *Whitney v. Robertson*, 124 U.S. 190 (1888), *Head Money Cases*, 112 U.S. 580 (1884). This conclusion is based on the idea that treaties and statutes are of equivalent juridical stature, and hence the later in time prevails; the later statute supersedes the earlier treaty as the "supreme Law of the Land."[12] For present purposes, however, what is important is that this Court has insisted that statutes be construed so as not to violate a treaty if at all possible. *See, e.g., Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Chew Heong v. United States*, 112 U.S. 536, 554 (1884). This Court thus applies a strong presumption that treaties remain judicially enforceable even in the face of congressional action that appears to conflict with it.

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[11] For example, in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), the Court denied relief because the defendant was entitled to foreign sovereign immunity. In addressing the plaintiff's argument that certain treaties removed Argentina's sovereign immunity, the Court wrote that, because the treaties did not specify that a private right of action could be maintained against Argentine in the United States courts, the treaties did not waive Argentina's sovereign immunity. *Id.* at 442.

[12] Even though the statute supersedes the treaty as a matter of domestic law, the treaty continues to bind the Untied States as a matter of international law. Because the individual claimants thus continue to have rights under the treaty under international law, we do not characterize these as decisions on the merits.

More recently, this Court suggested in dicta that a treaty provision that did on its face confer individual rights was not judicially enforceable because it was non-self-executing. In *Sosa v. Alvarez-Machain*, this Court stated that a provision of the International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Doc. E 95-2 (1978), 999 U.N.T.S. 171, that gave individuals a right to be free from arbitrary detention, even though binding as a matter of international law, was "not self-executing and so did not itself create obligations enforceable in the federal courts." 542 U.S. 692, 735 (2004).[13] Be that as it may,[14] the Court's analysis in *Sosa* is consistent with a strong presumption that treaty rights are judicially enforceable in the United States. The Court's conclusion that the ICCPR was not judicially enforceable was based on the proposition that "an express understanding" to that effect was incorporated by the United States into its instruments ratifying that treaty. *Id.*

In sum, far from suggesting that treaties are not generally judicially enforceable, this Court's decisions support the opposite presumption. They establish that, even if a treaty does not explicitly confer a right to judicial enforcement, the rights it creates may always be enforced defensively, and

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[13] The statement was dicta because the plaintiff had not relied on the treaty as the basis of his rights. He relied instead on customary international law. Indeed, the United States was not a party to the ICCPR at the time of the relevant events.

[14] *Cf.* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 Yale J. Int'l L. 129, 152-96 (1999) (arguing that declaration to ICCPR was intended to clarify that ICCPR does not create private rights of action); Vázquez, *Four Doctrines*, *supra*, at 719-22 (treaty that is non-self-executing in the sense that it does not confer private right of action may still be enforced in court defensively or through rights of action created by other laws).

may be enforced offensively at least by right-holders whose rights of action are conferred by other sources of law. Petitioner Hamdan may enforce his rights under the GPW because he claims that the treaty gives him rights in connection with a criminal proceeding in which he is the defendant, and, additionally, as discussed further in Part III, because his right of action is conferred by the habeas statute.

III. THE FEDERAL HABEAS STATUTE AUTHORIZES COURTS TO PROVIDE HABEAS RELIEF FOR INDIVIDUALS DETAINED IN VIOLATION OF THE GPW

The habeas statute authorizes courts to grant habeas relief for any individual who "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). Petitioner alleges that he is in custody in violation of the GPW. The United States has been a party to the GPW since 1955. *See* 84 Cong. Rec. 9958, 9972-73 (1955). As the Court of Appeals appeared to recognize, the GPW protects individual rights and the habeas statute supplies Hamdan's right of action. *Hamdan*, 415 F.3d at 40 ("The availability of habeas may obviate a petitioner's need to rely on a private right of action." (citing *Wang v. Ashcroft*, 320 F.3d 130, 140-41 & n.16 (2d Cir. 2003)). It follows that petitioner is entitled to habeas relief if his detention violates the GPW.

A. Habeas Corpus Has Historically Been Available to Individuals Detained in Violation of Their Treaty Rights

The habeas statute provides "[t]hat the several courts of the United States . . . shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Judiciary Act of

Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 Despite numerous amendments to this provision, Congress has continuously retained the statutory reference to treaties since it was added to the statute in 1867. Congress has thus manifested its intention that courts grant habeas relief to individuals detained in violation of their treaty rights.[15]

This Court has not hesitated to execute Congress' will in this respect. For example, in *Chew Heong v. United States*, 112 U.S. 536 (1884), a Chinese laborer who was detained on a ship near San Francisco filed a habeas corpus petition in federal court to obtain release from custody. *Id.* at 538. Chew Heong alleged that his detention violated Article II of an 1880 treaty between the United States and China, which stated: "Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will." *Id.* at 542 (quoting Treaty Concerning Immigration, U.S.-China, Nov. 17, 1880, 22 Stat. 826). The treaty itself did not grant Chew Heong a right of access to U.S. court, nor did it expressly grant him the power to invoke the treaty before a U.S. court. Even so, the Supreme Court granted Chew Heong's habeas petition, holding that he was "entitled to enter and remain in the United States." *Id.* at 560. The treaty was judicially enforceable because the treaty created an individual right and the federal habeas statute provided a private right of action that enabled him to enforce that right.

In *Rauscher*, appellee challenged his criminal conviction on the ground that it violated Article X of the Webster-Ashburton Treaty, U.S.-Gr. Brit., art. X, Aug. 9, 1842,

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[15] The federal courts also have the power to issue habeas corpus and other writs pursuant to other laws. *See United States v. Laverty*, 3 Mart. (o.s.) 733, 26 F. Cas. 875 (D.C. La. 1812) (granting habeas relief under the All Writs Act to claimed enemy aliens who asserted rights under treaties and statutes). The current version of this Act is at 28 U.S.C. § 1651.

reprinted in 4 Treaties and Other International Acts, *supra*, 363, 369-70. The treaty did not expressly grant Rauscher the power to invoke Article X as a defense to criminal charges. Nevertheless, the Supreme Court ruled in favor of Rauscher on the basis of his treaty defense, holding that he had "a right to be exempt from prosecution upon the charge set forth in the indictment." 119 U.S. at 409. In addition, the Court noted, if the party "is under arrest and desires a more speedy remedy . . . , a writ of *habeas corpus* from one of the federal judges or federal courts [may be] issued on the ground that he is restrained of his liberty in violation of . . . a treaty of the United States." *Id.* at 431. The Court then added, specifically rejecting an argument very similar to the one accepted by the Court of Appeals: "This is a complete answer to the proposition that the rights of persons extradited under the treaty cannot be enforced by the judicial branch of the government, and that they can only appeal to the executive branches of the treaty governments for redress." *Id.*

B. The GPW Is Self-Executing in All Relevant Respects

Several lower court opinions have asserted that the Geneva Conventions are not self-executing. *See, e.g., Al Odah v. United States*, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J., concurring), *rev'd sub nom. Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-09 (D.C. Cir. 1984) (Bork, J., concurring). However, those opinions state that the Conventions are not self-executing in the sense that they do not create private rights of action. *See Al Odah*, 321 F.3d at 1147 (Randolph, J., concurring) (stating that the Geneva Convention "is not self-executing . . . . No American citizen, therefore, has a cause of action under this treaty"); *Hamdi*, 316 F.3d at 468 (holding that the GPW is not self-executing, because "'the document, as a whole, [does not]

evidence an intent to provide a private right of action'" (quoting *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992))); *Tel-Oren*, 726 F.2d at 809 (Bork, J., concurring) (finding that the Conventions do not create a private right of action). As discussed above, a habeas petitioner need not establish that the treaty that confers his right also confers a private right of action. As the Court of Appeals appeared to recognize, the habeas statute supplies Hamdan's right of action.

In any event, the Senate record associated with ratification of the Geneva Conventions supports the proposition that the Conventions are self-executing in the sense that they have the status of supreme federal law. *See* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 Cornell L. Rev. 97, 121-29 (2004); *see also United States v. Lindh*, 212 F. Supp. 2d 541, 553-54 & n.20 (E.D. Va. 2002) (GPW, invoked defensively, found to be self-executing; relevant provisions are "a part of American law and thus binding in federal courts under the Supremacy Clause").[16] Both the Senate and the Executive Branch stated that most of the Convention's provisions would be implemented without enacting new legislation. *See* Geneva Conventions for the Protection of War Victims: Hearing on Executives D, E, F and G Before the Senate Comm. on Foreign Relations, 84th Cong. 59 (1955) (letter from Assistant Attorney General) (stating that, upon ratification of the Conventions, "the United States will be required to enact only relatively minor legislation" to implement the Conventions); Senate Comm. on Foreign Relations, Geneva Conventions for the Protection of War Victims, S. Exec. Rep. No. 84-9 (1955), *reprinted in* 84 Cong. Rec. 9958, 9971

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[16] *See generally* Vázquez, *Four Doctrines*, *supra*, at 700-22 (distinguishing four distinct senses in which a treaty might be non-self-executing).

(1955) ("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."). These statements demonstrate that, at the time of ratification, the political branches believed that the vast majority of the Conventions' provisions were self-executing, in the sense that no additional implementing legislation was required to give the Conventions the force of law in the United States. *See* Restatement (Third) of the Foreign Relations Law of the United States § 111 n.5 (1987) ("[I]f the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by the courts.")

The post-ratification practice of the U.S. military demonstrates that the executive branch has understood the Conventions to have the status of supreme federal law. On October 1, 1997, the government published Army Regulation 190-8, which establishes policies and procedures "for the administration, treatment, employment, and compensation of enemy prisoners of war, retained personnel, civilian internees and other detainees in the custody of U.S. Armed Forces." Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1.1(a) (Oct. 1, 1997). The regulation does not cite any federal statute as a basis of authority for its adoption. Rather, it cites the Geneva Conventions as the basis for the military's legal authority to promulgate the regulations. *Id.* § 1.1(b). Moreover, the regulation states: "In the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence." *Id.* § 1.1(b). In short, the U.S. military asserts that the Geneva Conventions are directly binding on U.S.

military forces as a matter of domestic law, even where the Conventions conflict with the military's own regulations.

IV. *JOHNSON V. EISENTRAGER*'S SUGGESTION THAT A TREATY'S PROVISION FOR INTERNATIONAL DISPUTE SETTLEMENT MECHANISMS PRECLUDES DOMESTIC JUDICIAL ENFORCEMENT CONTRADICTS THE FOUNDING DESIGN AND THIS COURT'S CLEAR HOLDINGS

Apart from its misconception that treaties are generally not judicially enforceable, the Court of Appeals rested its holding that the GPW is not judicially enforceable on a single footnote in *Johnson v. Eisentrager*, *overruled on other grounds*, *Rasul v. Bush*, 542 U.S. 466 (2004). *See Hamdan*, 415 F.3d at 38-40.[17] That footnote concerned the 1929 Geneva Convention, which the Court of Appeals found, and we will assume here, is indistinguishable from the GPW. *Hamdan*, 415 F.3d at 39 The Court in *Eisentrager* said that this Convention was not judicially enforceable, even though it concededly created "right[s] which the [U.S.] military authorities [were] bound to respect," because

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[17] The Court of Appeals also quoted a Comment from the Restatement (Third) of the Foreign Relations Law of the United States to the effect that "[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." *Hamdan*, 415 F.3d at 39 (quoting Restatement (Third) § 907 cmt. a). As discussed above, a treaty that does not provide for a private right of action is not for that reason necessarily unenforceable in domestic courts; such a treaty may be enforced defensively or pursuant to rights of action created by other laws. The contention that treaties generally do not create private rights is similarly irrelevant because, as the Court of Appeals correctly recognized, the GPW clearly protects individual rights.

> [i]t is . . . the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our own citizens against foreign governments are vindicated only by Presidential intervention.

Eisentrager, 339 U.S. at 789 n.14.

The Court of Appeals' reliance on this statement from *Eisentrager* was misplaced. In *Eisentrager,* this Court held that there was "no basis for invoking federal judicial power in any district." *Id.* at 790. Parts I to III of the Court's opinion provided the rationale supporting this conclusion. *See id.* at 768-85. The footnote that the Court of Appeals relied upon is in Part IV, which addressed the merits of the prisoners' habeas petition. *Id.* at 785-90. As the dissent noted, the "petition for certiorari here presented no question except that of jurisdiction; and neither party has argued, orally or in briefs, that this Court should pass on the sufficiency of the petition." *Id.* at 792 (Black, J., dissenting). Thus, the *Eisentrager* footnote addressed an issue that was never argued before the Supreme Court and that the Court, according to its own holding in the case, lacked jurisdiction to decide.

The Court's dictum in *Eisentrager*, unsupported by even a single citation, assumes that a treaty's provision for state-to-state dispute settlement mechanisms precludes domestic judicial enforcement. That assumption is in deep tension with the Founding design and a long line of holdings of this Court. It does not follow from the fact that state-to-state dispute settlement mechanisms exist that domestic judicial enforcement mechanisms are unavailable.

As discussed in Part I, the Founders recognized that "protests and intervention" by "political and military authorities" are the default dispute settlement mechanisms of international law. If the existence of these mechanisms negated the availability of domestic judicial enforcement, treaties would never be judicially enforceable. In adopting the Supremacy Clause, the Founders supplemented these international enforcement mechanisms with domestic judicial enforcement in order to empower the courts to avoid or remedy treaty violations *before* they triggered international dispute settlement mechanisms. They particularly feared triggering that most devastating of all international dispute settlement mechanisms—war. *See, e.g.*, 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 158 (Jonathan Elliott ed., 2d ed. 1881) (William R. Davie) ("It was necessary that treaties should operate as laws upon individuals. . . . . They involve in their nature not only our own rights, but those of foreigners. . . . If our courts of justice did not decide in favor of foreign citizens and subjects when they ought, it might involve the whole Union in a war."). It is therefore a fundamental mistake to infer from the existence of international dispute settlement mechanisms that domestic judicial enforcement is unavailable in the United States.[18]

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[18] The Court's assumption that international dispute mechanisms are inconsistent with domestic judicial remedies also overlooks the fact that, under international law, a state's entitlement to raise an international claim through diplomatic channels or otherwise against another state based on the other state's violation of the treaty-based rights of its nationals is subject to the doctrine of exhaustion of domestic remedies. See Restatement (Third) of the Foreign Relations Law of the United States § 902(1) & cmt i. On the relationship between the international-law doctrine of exhaustion of domestic remedies and the question of domestic

There are numerous cases in which the Supreme Court has approved domestic judicial enforcement of a treaty that provided expressly for international dispute resolution. In *Chew Heong*, for example, this Court granted habeas relief even though the treaty said nothing about domestic judicial enforcement and provided expressly for diplomatic negotiations to resolve issues related to treaty implementation. *See* Treaty Concerning Immigration art. IV; *see also Shanks v. Dupont,* 28 U.S. (3 Pet.) 242 (1830) (granting remedy for violation of article 9 of Treaty of Amity, Commerce, and Navigation, U.S.-Gr. Brit., art. 9, Nov. 19, 1794, *reprinted in* 2 Treaties and Other International Acts, *supra*, 245, 253-54 ("Jay Treaty"), even though articles 4, 5, 6, 7, 12 and 15 of treaty provide expressly for international dispute resolution); *Hughes v. Edwards*, 22 U.S. (9 Wheat.) 489 (1824) (enforcing article 9 of Jay Treaty); *Orr*, 17 U.S. (4 Wheat.) at 453 (enforcing article 9 of Jay Treaty); *Craig v. Radford*, 16 U.S. (3 Wheat.) 594 (1818) (enforcing article 9 of Jay Treaty); *Jackson v. Clarke*, 16 U.S. (3 Wheat.) 1 (1818) (enforcing article 9 of Jay Treaty); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1812) (enforcing article 9 of Jay Treaty); *Fitzsimmons*, 8 U.S. (4 Cranch) at 185 (enforcing article 18 of Jay Treaty).

Despite the presumption in favor of judicial remedies for individual victims of treaty violations, it might be appropriate for a court to deny judicial remedies for violations of a particular treaty if the treaty itself included language precluding domestic judicial remedies or if the United States' ratification was conditioned on a restriction of the availability of domestic judicial remedies. *Cf. supra* at 18 (discussing dicta from *Sosa v. Alvarez-Machain*). The GPW contains no

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remedies for treaty violations, see Vázquez, *Treaty-Based Rights*, *supra*, at 1159-61.

such language, and the United States did not adopt any such condition when it ratified the treaty. The bare fact that the GPW provides for international dispute settlement does not support an inference that the parties intended to preclude domestic judicial enforcement.

CONCLUSION

For the reasons stated above, the GPW is enforceable in the courts of this country, and petitioner is entitled to habeas relief if his trial by military commission would violate that Convention.

Respectfully submitted,

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January 6, 2006

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