IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SALIM AHMED HAMDAN, Petitioner, v. DONALD H. RUMSFELD, Secretary of Defense, *et al.*, Respondents.	Civil Action No. 1:04-CV-01519-(JR)

AMICUS BRIEF OF

GENERAL DAVID M. BRAHMS (ret.)
ADMIRAL LEE F. GUNN (ret.)
ADMIRAL JOHN D. HUTSON (ret.)
GENERAL RICHARD O'MEARA (ret.)

IN SUPPORT OF PETITIONER

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INTEREST OF AMICI

Amici are retired senior military officials with extensive experience in issues relating to legal policy, the laws of war, and armed conflict. Amici have spent their careers commanding troops at home and overseas and protecting the nation from attack. Amici believe that the United States, for the sake of its own soldiers, must afford the protections of the Geneva Conventions to all individuals seized in armed conflicts and held in its custody.

Brigadier General David M. Brahms served in the United States Marine Corps from 1963 through 1988, with a tour of duty in Vietnam. He served as principal legal advisor for POW matters at Marine Corps Headquarters in the 1970s and was directly involved in issues relating to the return of American POWs from Vietnam. From 1985 through 1988, he was the senior legal adviser for the Marine Corps. General Brahms is a member of the Board of Directors of the Judge Advocates Association.

Vice Admiral Lee F. Gunn served in the United States Navy for 35 years. From 1997 to 2000, he served as the Department of the Navy Inspector General. Admiral Gunn commanded the USS Barbey, Destroyer Squadron Thirty-One, and Amphibious Group Three, comprised of the 21 ships, 12 shore commands, and 15,000 Sailors and Marines of the Pacific Amphibious Forces. He 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 John D. Hutson served in the Navy from 1973 to 2000. He was the Navy's Judge Advocate General from 1997 to 2000. Admiral Hutson is now President and Dean of the Franklin Pierce Law Center in New Hampshire.

Brigadier General Richard O'Meara retired from the United States Army after 36 years of service in the active and reserve components. He is a combat veteran and former Assistant to the Judge Advocate General for Operations (IMA). He currently is a professor of International Relations at Monmouth University and serves as adjunct faculty in the Defense Institute for International Legal Studies. General O'Meara has lectured on human rights and rule

of law subjects in locations as diverse as Cambodia, Rwanda, Vietnam, and the Ukraine, and serves as a defense expert before the Special Court in Sierra Leone.

INTRODUCTION

Amici ask the Court to declare that the military commissions established by the President in his Military Order of November 13, 2001, by which Respondents propose to try Petitioner Salim Ahmed Hamdan as an "enemy combatant," unlawfully denies Hamdan the protections of the Geneva Conventions. Amici ask the Court to order Respondents to provide Hamdan those protections.

Amici's concern is more than theoretical: Respondents' denial of Hamdan's rights under the Geneva Conventions directly endangers American soldiers. 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"). Senator Biden has made the same point more bluntly: "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* http://biden.senate.gov/pressapp/record.cfm?id=222640 (June 13, 2004) (last visited Sept. 29, 2004).

The Geneva Conventions establish rules 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 stated 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," for "[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 worldwide 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.

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, *Prisoners of War in International Armed Conflict* 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 (last visited Sept. 29, 2004). 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, following the capture of U.S. Warrant Officer Michael Durant in 1993 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 Conventions. 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. This 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*, 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).[1]

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 Sept. 11 "created a new concept of democracy . . . 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.
- **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 Sept. 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).

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[1] *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 nonuniformed 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.").

By recognizing the rights that the Geneva Conventions afford captives like Hamdan, the United States can protect Americans captured in armed conflicts and avoid lasting damage to the rule of law abroad.

SUMMARY OF ARGUMENT

The military commission system established by the President's Military Order of November 13, 2001 violates Hamdan's rights under the Geneva Conventions, as do the particular conditions of Hamdan's internment. Among the three Branches, the federal courts have the final say as to the meaning of the Conventions, and they also have the power and the duty to enforce the Conventions as judicially construed. This Court can and should declare that the military commission system violates Hamdan's rights under the Geneva Conventions and compel Respondents to adhere to the Conventions in their treatment of him.

ARGUMENT

I. THE COURT CAN AND SHOULD REQUIRE RESPONDENTS TO AFFORD HAMDAN THE PROTECTIONS OF THE GENEVA CONVENTIONS.

Hamdan properly seeks judicial enforcement of the Geneva Conventions because the federal courts are the ultimate expositors of the meaning of treaties and may compel the Executive Branch to conform its actions to treaty requirements as judicially construed. The relevant portions of the Geneva Conventions obligate the Executive Branch without further action by Congress and therefore can be directly enforced by the courts.

A. Federal Courts Are Empowered and Obligated to Interpret Treaties.

Since the dawn of the Republic, it has been "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). It similarly 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:

> A circumstance which crowns the defects of the Confederation remains yet to be mentioned – the want of a judiciary power. 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). In that case the Court held that a 1794 peace treaty with Britain did not protect a Briton's claim to land from confiscation. 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").

B. The Court May Compel the Executive Branch to Conform Its Actions to the Requirements of the Geneva Conventions as Judicially Construed.

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 – including the D.C. Circuit and this Court – 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), this 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., 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). And courts have been prepared to overturn Executive Branch interpretations of treaties in areas where deference is traditionally due. In *Perkins*, for example, the Supreme 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.

C. Judicial Enforcement of the Geneva Conventions Does Not Depend on Further Action by Congress.

Further action by Congress is unnecessary to ensure Hamdan the protections of the Geneva Conventions. The relevant provisions of the Geneva Conventions are "self-executing," and in any event only military commissions that conform to the Geneva Conventions are authorized by existing statutory law.

1. The Geneva Conventions are "self-executing".

Courts may enforce duly ratified treaties that are "self-executing" without action by Congress. 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). Such a treaty "expressly or impliedly" permits private actions by individuals to enforce its provisions. *Head Money Cases*, 112 U.S. 580, 598-99 (1884); *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976); *Z & F Assets Realization Corp. v. Hull*, 114 F.2d 464, 470-71 (D.C. Cir. 1940). A treaty may "contain both self-executing and non-self-executing provisions." *Lidas, Inc. v. United States*, 238 F.3d 1076, 1080 (9th Cir. 2001).

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*, 555 F.2d at 851. The "critical" factor is "the purposes of the treaty and the objectives of its creators." *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279, 1283 (9th Cir. 1985).

The relevant provisions of the Geneva Conventions do not state whether they require implementing legislation. Thus, a court must look to the intent of the drafters, the intent of the Senate in ratifying the Conventions, and the purposes and objectives of the Conventions.

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, *United States v. Noriega*, 808 F. Supp. 791, 798 n.8 (S.D. Fla. 1992). 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.[2]

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[2] 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.

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

Finally, 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 Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("Geneva IV" or "Fourth Convention"). –

- Article 5 affords "individual . . . rights and privileges under the present Convention," "rights of communication," and "rights of fair and regular trial."
- Article 72 affords the "right to present evidence," the "right to be assisted by a qualified advocate or counsel of their own choice," and the "right at any time to object."
- Article 73 provides that "[a] convicted person shall have the right of appeal."
- Article 78 provides that persons interned for security reasons shall have "the right of appeal."
- Article 80 refers to "rights" of internees.
- Article 147 provides "rights of fair and regular trial."

Likewise, 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").

As one district court has stated in reference to Geneva III:

> [I]t is inconsistent with both the language and spirit of the treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of Geneva III is to ensure humane treatment of POWs – not to create some amorphous, unenforceable code of honor among the signatory nations. 'It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.' [citing 3 International Committee of the Red Cross, *Commentary on the Geneva Conventions* (J. Pictet, ed., 1960)].

Noriega, 808 F. Supp. at 799; *see also United States v. Lindh*, 212 F. Supp. 2d 541, 553-54 (E.D. Va. 2002); *Restatement (Third) of the Foreign Relations Law of the United States*. § 111, Rpt.'s Note 5 ("obligations not to act, or to act only subject to limitations . . . generally self executing").

Respondents do not acknowledge this authority. Instead, they argue that because the Foreign Relations Committee did not specifically state that violations of the 1949 treaty *could* be enforced through private actions, the legislative intent was to preclude such private actions. (Mot. 32.) As noted, however, the Committee specifically found the Conventions almost entirely self-executing.

Respondents also argue that the drafters must have intended to preclude private enforcement in domestic courts because the Conventions include provisions allowing nations to resolve their differences in interpreting the Conventions by diplomatic means. *Id.* at 31 n.20. One does not – and cannot – follow from the other. Under Respondents' logic, 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 nation (*see, e.g.*, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004)) would be left without

a remedy. Indeed, Respondents' 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 Conventions would allow individuals to waive rights they cannot enforce.

Several courts have recognized that the provisions of the Conventions relating to individual rights are self-executing and provide a private right of action. As one district court has stated, "[Geneva III,] insofar as it is pertinent here, is a self-executing treaty to which the United States is a signatory. It follows from this that the [Geneva III] provisions in issue here are a part of American law and thus binding in federal courts under the Supremacy Clause." *Lindh*, 212 F. Supp. 2d at 553-54 (footnotes omitted); *see also Noriega*, 808 F. Supp. at 797. Another district court has held that the Geneva Conventions "under the Supremacy Clause ha[ve] the force of domestic law." *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 590 (S.D.N.Y. 2002), *remanded on other grounds*, 356 F.3d 695 (2d Cir. 2003), *rev'd on other grounds*, 124 S. Ct. 2711 (2004).

Although the Fourth Circuit in *Hamdi v. Rumsfeld* stated the view that the Conventions are not self-executing, 316 F.3d 450, 468-69 (4th Cir. 2003), its decision was vacated, 124 S. Ct. 2633 (as was the decision of this Circuit in *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *see Rasul v. Bush*, 124 S. Ct. 2686 (2004)). Moreover, contrary to the law of this Circuit, the Fourth Circuit declined to consider legislative intent or acknowledge that a treaty can provide an implied private right of action. *See Diggs*, 555 F.2d at 851.[3] The

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[3] Judge Bork expressed a view similar to the Fourth Circuit's in his concurring opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring). Like the Fourth Circuit, Judge Bork failed to consider the pertinent legislative history or recognize that treaties can contain both self-executing and non-self-executing provisions. The Supreme Court rejected his reasoning in *Sosa v. Alvarez-Machain,* 124 S. Ct. 2739 (2004), in holding that the law of nations could be enforced under Alien Tort Claims Act.

Fourth Circuit's conclusion that the Geneva Conventions are not self-executing has been much criticized.[4]

2. The federal statute governing military commissions requires compliance with the Geneva Conventions.

"[A]n 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. Therefore, 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.

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[4] *See, e.g.*, Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained without Trial*, 44 Harv. Int'l L.J. 503, 515 (2003) (*Hamdi* "incorrect"); Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 Cornell L. Rev. 892, 917 (2004) (*Hamdi* "erroneous").

II. THE MILITARY COMMISSION SYSTEM VIOLATES HAMDAN'S RIGHTS UNDER THE GENEVA CONVENTIONS.

A. The Geneva Conventions Apply to Hamdan.

Hamdan is entitled to the protections of the Geneva Conventions because he was captured during an armed conflict between the United States and Afghanistan.[5] Under the Conventions, the United States is required to treat Hamdan as a POW until a "competent tribunal" determines that he is not entitled to that designation. *See* Geneva III, art. 5. If a "competent tribunal" determined that Hamdan is not a POW, the United States would be required to provide him the protections of Article 3 ("Common Article 3"), common to all of the 1949 Geneva Conventions, which sets minimum standards for the protection of detainees.

1. The Geneva Conventions apply to Hamdan because he was captured during an international armed conflict.

The Geneva Conventions were intended to be applied broadly to provide human rights protections to all involved in international armed conflicts. The Conventions were "drawn up first and foremost to protect individuals, and not to serve state interests." *Commentary IV*, at 20. They use expansive language in order to "deprive belligerents, in advance, of the pretexts they might in theory put forward for evading their obligations." *Id.*

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 (*see* Hamdan Aff. at 10, Ex. B to Schmitz Decl. filed with Hamdan's petition), the Geneva Conventions apply to Hamdan.

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[5] The factual assertions in this brief either appear in Hamdan's petition or have been reported to amici by Hamdan's counsel. For the purpose of deciding Respondents' motion to dismiss, these factual assertions must be taken as true. *Warren v. District of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004).

Respondents argue that Hamdan was captured not during the United States' armed conflict with Afghanistan but during a "separate" 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.[6] The conflict between the United States and al Qaeda can no more be separated from the conflict between the United States and Afghanistan than the conflict between Germany and the French Resistance in World War II can be separated from the conflict between Germany and France. 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. *See* Hamdan Aff. at 10.

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):

> [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.[7]

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6 *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 Sept. 29, 2004) (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).

7 *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

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Respondents' interpretation of Common Article 2 bears a 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 because those prisoners were no longer soldiers of any government or state in existence. *See* Levie, *Prisoners of War in International Armed Conflict*, 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.[8]

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).

2. Hamdan is entitled to be treated as a POW 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:

Afghanistan was an international armed conflict in which the Taliban and Al Qaeda joined forces against the U.S. and its Afghan allies).

[8] *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 strictures of the conventions because the conventions apply in all instances of international conflict.").

> 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.[9] 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.

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. Hamdan Aff. at 10. "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. *See* Hamdan Pet. ¶¶ 36-42. 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

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[9] 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).

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).[10]

Because Hamdan claims POW status, he is entitled under Article V and military regulations to POW protections until a competent tribunal determines otherwise. *See also, e.g.*, *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); *Hamdi*, 124 S. Ct. at 2658 (Souter, J., concurring in part, dissenting in part, and concurring in judgment); *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 Sept. 29, 2004).[11]

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[10] *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. 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).

[11] 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 violating Article 45(1), the

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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. (Mot. 35-36). 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 is a recognition of 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 Sept. 29, 2004). 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 Camp X-Ray (Jan. 27, 2002), available at www.defenselink.mil/news/Jan2002/ t01282002_ t0127sd2.html (last visited Sept. 29, 2004).

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).

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.

3. Hamdan is protected by Common Article 3 whether or not 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 (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 Sept. 29, 2004); *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]").[12]

B. Respondents' Treatment of Hamdan Violates the Geneva Conventions.

Whether Hamdan is deemed protected under the Third Convention as a POW or only under the basic protections of Common Article 3, Respondents have failed to provide him with the judicial process and humane treatment which he is due.

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[12] 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.

1. The military commissions violate the Third Geneva Convention and Common Article 3.

Military commissions *per se* do not violate the Geneva Conventions. Indeed, some of the amici have advocated the use of commissions – constituted with appropriate protections for defendants – in the current war against Al Qaeda. Such commissions, however, must provide at least the protections afforded by the Geneva Conventions unless Congress unmistakably provides otherwise. See *Charming Betsy*, 6 U.S. (2 Cranch) 64, and discussion at page 15, *supra*. Congress has not provided otherwise.

The military commissions established by Respondents violate the Geneva Conventions because they fail to provide Hamdan (a) the right to a speedy investigation and trial, (b) the right to present an adequate defense, (c) the right not to have coerced confessions admitted as evidence, (d) the right to have his case heard before an independent tribunal, (e) the right to appellate review of his sentence, (f) the right to be free from retroactive punishments, and (g) the right to be free from discrimination in his sentencing and punishment.

a) Right to a speedy judicial investigation and trial

Article 103 of Geneva III requires that "[j]udicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. . . . In no circumstances shall this confinement [prior to trial] exceed three months." Hamdan has been in detention for nearly three years. Since being declared subject to military commission proceedings, he has been in detention for fifteen months, the last six of which he has spent in solitary confinement. *See* Hamdan Pet. 11; Charge Sheet for *United States v. Hamdan*, Hamdan Pet. 11.

Respondents' actions also violate Common Article 3, which requires at least those minimum judicial protections "recognized as indispensable by civilized peoples." The content of these protections is defined through customary international law, which has found expression in

Article 75 of Protocol I,[13] and in the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. ("ICCPR").[14]

Respondents' treatment of Hamdan violates Common Article 3 and customary international law because, by any measure, the proceedings against him have been "unduly delayed." *See* Protocol I, art. 75(4)(a) (requiring "an accused to be informed without delay of the particulars of the offence alleged against him"); ICCPR, art. 14(3)(c) (requiring detainees to be "tried without undue delay"). Hamdan was held prisoner for more than two-and-one-half years before Respondents issued their charges against him; the offenses of which he is accused allegedly occurred before the end of 2001. Approval of Charge and Referral, *United States v. Hamdan*. This delay has inevitably impaired his ability to mount an adequate defense, inasmuch as the trail of evidence has become cold and witnesses have become unavailable.

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[13] Although the United States has not ratified Protocol I (*see supra* note 11), its stated reasons for not ratifying Protocol I did not include objections to article 75, and the President specifically recognized that some provisions of Protocol I reflect customary international law. *See Message from the President Transmitting Protocol II Additional to the 1949 Geneva Conventions*, 26 I.L.M. 561, 564 (1987). According to a JAG deskbook:

> Although the U.S. has never ratified either of these Protocols, [their] relevance continues to grow based on several factors: a. The US has stated it considers many provisions of Protocol I . . . to be binding customary international law. b. The argument that the entire body of Protocol I has attained the status of customary international law continues to gain in strength . . . d. U.S. policy is to comply with Protocol I and Protocol II whenever feasible.

Judge Advocate General's School, U.S. Army, *Legal Framework of the Law of War*, in Law of War Workshop Deskbook 25, 32 (Brian J. Bill ed., 2000), available at www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/ CLAMO-Public.nsf/0/fc6fd99c6c0745e185256a1d00467742/$FILE/LOW%20Deskbook %202000.pdf (last visited Sept. 27, 2004). *See also* Douglass Cassel, Center for International Human Rights, *Violations of International Human Rights and Humanitarian Law Arising from Proposed Trials Before United States Military Commissions*, June 17, 2004, available at www.law.northwestern.edu/depts/clinic/ihr/docs/MilComms061704.pdf at n. 85 (last visited Sept. 27, 2004).

[14] "All the rights . . . protected by the principal International Covenants [including the ICCPR] . . . are internationally recognized human rights . . . ." *Restatement* § 701 Reporter's Note no. 6, § 702, cmt. m (1987).

b) Right to present an adequate defense

The military commissions are a tilted playing field, a fateful contest with one-sided rules. The commissions severely handicap prisoners in conducting their defense.

Under article 84 of Geneva III, "[i]n no circumstances whatever shall a prisoner of war be tried by a court of any kind . . . the procedure of which does not afford the accused the rights and means of defense provided for in Article 105." Article 105 mandates respect for various rights, including the right "to assistance by one of his prisoner comrades" in mounting a defense, and the right to have legal counsel able to "confer with any witnesses for the defense, including prisoners of war." Similarly, Common Article 3, Protocol I, and the ICCPR all set out required elements for an adequate legal defense under customary international law, providing that a detainee must "have all necessary rights and means of defense," Protocol I Art. 75(4)(a), and "adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing," ICCPR at Art. 14(3).

Contrary to these requirements, Hamdan is being held in solitary confinement, *see* Hamdan Pet. at 11, and thus may not confer with others interned at the Guantanamo Bay facility. Moreover, the Secretary of Defense has issued an order that authorizes the officer presiding over a military commission to restrict the access of the defense to witnesses significantly. Restrictions can "include, but are not limited to: testimony by telephone . . . or other electronic means; [and the] introduction of prepared declassified summaries of evidence." Dep't of Def. Military Comm'n Order No. 1 at § 6(D)(2)(d) (Mar. 21, 2002) ("MCO No. 1"). This order violates Hamdan's unconditional right to an adequate defense, which permits such limitations in "no circumstances whatever" and permits his counsel free access to "any witnesses." Geneva III, arts. 84, 105; *see also* Protocol I, art. 75(4)(g) (allowing defendants to "obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him"); ICCPR art. 14(3)(e) (requiring that defendants be afforded access to witnesses "under the same conditions" as the prosecution).

Because Hamdan is a citizen of Yemen, Hamdan's counsel sought to be allowed to have Yemeni officials meet with him. That request was denied. Hamdan's ability to assist in his own defense has also been hampered by poor translation. *See, e.g.*, Neil A. Lewis, *Terror Tribunal Defendant Demands to Be Own Lawyer*, N.Y. Times, Aug. 27, 2004, *at* www.nytimes.com/2004/08/27/politics/27gitmo.html ("The day's proceedings were marred by translation difficulties, which have been a chronic problem throughout the week. Translators hired by defense lawyers in the audience provided alternate translations and criticized the choppy versions offered by the tribunal's interpreters."). Translation problems have plagued operations at Guantanamo for years. *See* 148 Cong. Rec. S5,843 (daily ed. June 20, 2002) (letter from Senators Leahy and Grassley to the Inspector General of the Department of Justice questioning incidents of faulty translation by FBI translators at Guantanamo).

The military resources available to Hamdan's defense also are insufficient:

> There is a stark and critical imbalance in the resources of the prosecution and defense attorneys. The prosecutors have an entire floor and a real staff – including researchers, clerks and paralegals. The defense attorneys – all six of them – work from one office. In the office there are just four computers and a copy machine that only periodically works. They have no administrative staff. They are, to my eye, under water. It appears difficult, if not impossible, to practice law in this type of environment. The contrast with the prosecution's resources is stark.

Deborah Pearlstein, *Military Commission Trial Observation*, Aug. 25, 2004, at http://www.humanrightsfirst.org/us_law/detainees/military_commission_diary.htm (last visited Sept. 29, 2004). There are not enough computers and telephones to allow several defense teams to work simultaneously, even though the commissions are proceeding simultaneously. The conference table in the defense teams' offices was removed prior to the start of the commissions, forcing defense counsel to work on the floor. *See* Kenneth Roth, Letter to Defense Secretary Rumsfeld on the Military Commissions at Guantanamo Bay, Sept. 16, 2004, *available at* www.hrw.org/english/docs/ 2004/09/15/usdom9350.htm (last visited Sept. 26, 2004).

c) Right to exclude coerced and unreliable confessions as evidence

Hamdan suffered physical abuse in Afghanistan when he was unable to provide answers that satisfied U.S. troops, *see* Hamdan Aff. 10, and then was subjected to almost three years of constant mental and moral coercion at Guantanamo. For example, Hamdan was told that he would be offered U.S. citizenship if he would act as a witness against others. *Id.* at 11. He has been in solitary confinement so long that he has considered pleading guilty to unspecified charges simply to be released back into the general Guantanamo population. *Id.* at 12.

The admission of confessions or tortured testimony – from or against Hamdan – would clearly violate domestic law, the UCMJ, 10 U.S.C. § 831, and judicial protections "recognized as indispensable by civilized peoples." Under Respondents' system, however, such evidence is *required* to be admitted before the military commission "if, in the opinion of the Presiding Officer [or a majority of the commission] . . . the evidence would have probative value to a reasonable person." *See* MCO No. 1 at § 6(D)(1). Moreover, Hamdan is hindered in rebutting such evidence by the fact that he is likely to have access to it only in the form of summaries or "statements of the relevant facts that the [tortured testimony or other classified information] would tend to prove." *Id.* § 6(D)(5)(b). These summaries, although hearsay and thus difficult to contest, *must* be admitted if "probative . . . to a reasonable person," even if the prejudicial value of the evidence outweighs its probative value. *Id.* at 6(D)(1).

d) Right to an independent and impartial tribunal

"In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized." Geneva III, art. 84; *see also Hamdi*, 124 S. Ct. at 2648 (detainees are entitled to "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker"). The same guarantee of an independent and impartial tribunal is implicit in Common Article 3, via customary international law, Protocol I art. 75(4), and the ICCPR art. 14(1).

The tribunal established by Respondents to judge Hamdan is not impartial. The military commission, named by an Appointing Authority who was in turn named by the

Secretary of Defense, is composed of a presiding officer and five other members (including one alternate). The presiding officer is a retired military judge; the other five members of the commission are active military officers who "continue to report to their parent commands," Dep't of Def. Military Comm'n Instruction No. 6 (Apr. 30, 2003), § 3(A)(8). Although the Military Commission Instruction promises that "the consideration or evaluation of duty as a member of a military commission is prohibited in preparing effectiveness, fitness, or evaluation reports of a commission member," it is difficult to believe that such considerations would not occur to any member of the commission with ambitions for higher military position.

That this is not an impartial tribunal is apparent not only in the structure of the commission but also in its particular composition. The presiding officer has admitted stating that he did not believe there was any "speedy trial" issue at stake for the Guantanamo detainees.[15] During preliminary proceedings, he also purported to predict the ruling of the Appointing Authority, based upon his close friendship with the Authority. *See* Roth, Letter to Defense Secretary Rumsfeld. Other commission members were involved in the capture and interrogation of enemy forces in Afghanistan, led efforts to transport captives from Afghanistan to Guantanamo, or were otherwise involved in military operations in Afghanistan.[16] One member has admitted calling the Guantanamo detainees "terrorists."[17]

The structure of the commission also casts doubt on its competence and independence. The presiding officer is the only member of the commission with legal experience. The lack of legal experience on the part of the other members of the commission became clear during *voir dire* questioning, when the alternate member admitted to not knowing

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15 *See* John Hendren, *Trials and Errors at Guantanamo*, L.A. Times, Aug. 29, 2004, at A1.

16 *See* Vanessa Blum, *Defense Lawyer Challenges Impartiality of Guantanamo Commission Members*, Legal Times, Aug. 26, 2004, *available at* www.law.com/ jsp/article.jsp?id= 1090180421066 (last visited Sept. 12. 2004).

17 *See* Toni Locy, *U.S. Tribunal Could Lose Members*, USA Today, Sept. 14, 2004, at 5A, *available at* www.usatoday.com/ printedition/news/ 20040915/a_tribunals15.art.htm (last visited Sept. 29, 2004).

what the Geneva Conventions are. Hendren, *supra* ("'Do you know what the Geneva Convention is, sir?' Swift asked. 'Not specifically. No, sir,' Lt. Col. Curt S. Cooper answered. 'And that's being honest.'"). But it is the full commission, not just the presiding officer, that has the authority to "provide a full and fair trial" and to "proceed impartially and expeditiously, strictly confining the proceedings to a full and fair trial of the charges, excluding irrelevant evidence, and preventing any unnecessary interference or delay." MCO No. 1 at § 6(B)(1)-(2). For Hamdan, it is a no win situation: The members of the commission either may disregard the presiding officer on matters that require legal experience, for example, the admissibility of evidence[18]; or they may defer to him indiscriminately *because* of his legal experience.

In addition, the tribunal process facing Hamdan ends with a decision by the President or by the Secretary of Defense. MCO No. 1 at § 6(H)(2), (5)-(6). The President and Secretary are not impartial: their political reputations are at stake in these highly visible commission hearings. The members of the military commission, and the Appointing Authority and the review panel, *id.* at § 6(H)(3)-(4), who have intermediate appellate authority, similarly cannot be impartial because they are members of an organization whose reputation is at stake. And they are not independent because they report indirectly to the President and the Secretary of Defense – as do the prosecution and defense staff.

It is difficult indeed to believe that the commission members could remain impartial following the President's public statement, "I know for certain that these are bad people", Guy Dinmore & Cathy Newman, *Iraq Controversies Mar Ovations for Blair*, Fin. Times, July 18, 2003, at 3, and the statement of Secretary Rumsfeld that the Guantanamo detainees are "among the most dangerous, best-trained, vicious killers on the face of the Earth," Jess Bravin, Jackie Calmes & Carla Anne Robbins, *Status of Guantanamo Bay Detainees Is Focus of Bush Security Team's Meeting*, Wall St. J., Jan. 28, 2002, at A16.

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[18] Interlocutory questions, "the disposition of which would effect a termination of proceedings with respect to a charge," are to be referred to the Appointing Authority. MCO No. 1 at § 4(A)(5)(d).

e) Right to appeal to a civilian court

Under article 106 of the Third Convention, "[e]very prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial." For U.S. military personnel, referral to a Court of Criminal Appeals of court-martial cases is mandatory for any member of the U.S. military who receives a sentence of confinement for one year unless this appeal has been waived. 10 U.S.C. § 866(b). Thereupon, discretionary review by the Court of Appeals for the Armed Forces and the Supreme Court of the United States is available. *Id.* § 867(a)-a(a). The Court of Appeals for the Armed Forces is composed of five civilian judges, appointed by the president with the advice and consent of the senate for a term of 15 years, and removable only for cause. 10 U.S.C. § 942.

Hamdan, however, is due only an administrative review by the Appointing Authority, further review of the trial record by a panel of military officers, and final review by the Secretary of Defense or the President. MCO No. 1 at § 6(H). There is no provision for review by a true judicial body:

> [M]ilitary tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and . . . the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

The White House, President Issues Military Order (Nov. 13, 2001), § 7(b), *available at* http://www.whitehouse.gov/news/releases/2001/11/ print/20011113-27.html (last visited September 29, 2004).

f) Right to be free from retroactive punishments

Common Article 3 incorporates the customary international due process rights of Protocol I, art. 75(4)(c), which states that "[n]o one shall be accused or convicted of a criminal

offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed . . . ."

Among other acts, Hamdan has been accused of conspiracy to commit two offences: (i) destruction of property by an unprivileged belligerent, and (ii) terrorism. According to the International Committee of the Red Cross, as to each offense, "[i]t is doubtful that this crime, as defined [within Dep't of Def. Military Comm'n Instruction No. 2 (Apr. 30, 2003), § 6(B)], exists under the law of armed conflict . . . . Violation of the prohibition against retroactivity is of concern." International Committee of the Red Cross, *Analysis of Proposed Military Commissions*, Nov. 24, 2003, on file with the authors.

g) Right to nondiscriminatory treatment

Under Common Article 3, persons not taking active part in the conflict "shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria." However, the government has agreed to stronger procedural protections for military commission defendants from Australia and Great Britain: These defendants are permitted the involvement of foreign lawyers as consultants, confidential communications with their lawyers, and increased family contacts. David Hicks, a detainee from Australia, will be permitted to serve any sentence in an Australian prison.[19] Despite requests from the government of Yemen, Hamdan has received no such assurances.

The very fact that Hamdan is subject to the military commissions violates the nondiscrimination protections of Common Article 3 because U.S. citizens are beyond their jurisdiction. Military Order of Nov. 13, 2001, at § 2 ("The term 'individual subject to this order' shall mean any individual who is not a United States citizen . . .").

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[19] *See* B. Graham & T. Branigan, *Two Britons at Guantanamo Will Not Face the Death Penalty*, Washington Post, July 23, 2003, at A18; Dep't of Def. News Release No. 892-03, *U.S. and Australia Announce Agreements on Guantanamo Detainees* (Nov. 25, 2003).

2. Hamdan's conditions of internment violate the Geneva Conventions.

For over two-and-a-half years, Hamdan has been subject to (a) arbitrary detention, (b) questioning under unlawful coercion, (c) solitary confinement with limited access to sunlight and exercise, (d) infrequent medical treatment, and (e) barriers to the free exercise of his religion. This treatment violates the Geneva Conventions.

a) Prolonged arbitrary detention

The Supreme Court has recently recognized a customary international legal prohibition against prolonged arbitrary detention. *See Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2768 (2004). The Court cited the Restatement (Third) of Foreign Relations Law, which declares that a state violates customary international law "if, as a matter of state policy, it practices, encourages, or condones . . . (e) prolonged arbitrary detention . . . ." Restatement § 702. "Detention is arbitrary if it is supported only by a general warrant, or is not accompanied by notice of charges; if the person detained is not given early opportunity to communicate with family or to consult counsel, or is not brought to trial within a reasonable time." Restatement § 702, cmt. h. The Court also noted that the International Court of Justice, in addressing the hostage crisis in Iran, might properly have labeled the hostage situation as "arbitrary detention" in part because the crisis "lasted 'many months.'" *Sosa*, 124 S. Ct. at 2768 n.27 (citing *United States v. Iran*, 1980 I.C.J. 3, 42).

Hamdan did not receive notice of the charges against him for eighteen months – assuming that he was indeed informed that he is subject to the military commission when the President made that determination in July 2003. Charge Sheet for *United States v. Hamdan*. Hamdan has been detained for almost three years, during which time he had very limited contact with family and counsel. Hamdan's detention exceeded the roughly fourteen months of the hostages' confinement in Iran.[20] That Hamdan's detention has been prolonged and arbitrary by any reasonable standard is obvious.

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[20] *See* BBC, *1981: Tehran frees US hostages after 444 days* (n.d.), *available at* http://news.bbc.co.uk/onthisday/hi/dates/stories/january/21/newsid2506000/ 2506807.stm.

b) Questioning under coercion

Hamdan was told that he would "remain in custody until such time as he wishe[d] to plead guilty to some unspecified crime against the United States . . . and that his appointed defense counsel [was] . . . available only to assist Hamdan in pleading guilty to some unspecified offense." Hamdan Pet. 13. Because he has refused to plead guilty, he has been kept from his family and home for nearly three years. *See id.* at 11, 13. This treatment violates article 99 of the Third Convention, which states that "[n]o moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused." "[P]risoners of war must at all times be protected, particularly against acts of . . . intimidation." *Id.* art. 13. "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind." *Id.* art. 17. Finally, this treatment violates Article 75 of Protocol I, which forbids "torture of all kinds, whether physical or mental."

c) Solitary confinement without access to sunlight

Article 21 of the Third Convention requires that, except for confinement resulting from disciplinary sanctions, POWs "may not be held in close confinement except where necessary to safeguard their health . . . ." In fact, "[p]risoners of war shall be quartered under conditions as favorable as those for the forces of the Detaining Power who are billeted in the same area" – conditions that "shall in no case be prejudicial to their health." Art. 25. Moreover, POWs "shall not be separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture, except with their consent." Art. 22. Article 75(1) of Protocol I, incorporated in Common Article 3, requires detainees "to be treated humanely in all circumstances".

The years of confinement away from his family – and now his solitary confinement without access to sunlight or fellow internees – have endangered Hamdan's

psychological well-being, and put him, in the words of an examining psychiatrist, at risk of "serious mental injury." Hamdan Pet. 11, 13.

d) Inadequate medical treatment

The Third Convention provides that POWs are to receive without charge "the medical attention required by their state of health," Art. 15, and that "[m]edical inspections of prisoners of war shall be held at least once a month," Art. 31. Such medical care is also implicit in article 75(1) of Protocol I, incorporated in Common Article 3, which requires detainees "to be treated humanely in all circumstances." Hamdan, however, receives medical care infrequently – he is seen by a physician once every four to five months. Hamdan's health is such that more critical, timely intervention is regularly required. The years of confinement away from his family – and now his solitary confinement at Camp Echo at Guantanamo – have put him at risk of "serious mental injury." He has lost 50 pounds and is on a hunger strike against his condition. Respondents have thus violated their legal duty under the Geneva Conventions to provide Hamdan the basic medical assistance he requires.

e) Restrictions on free exercise of religion

Hamdan has been denied access to important religious texts other than the Koran, and he has not had access to a Muslim chaplain, except for a brief period, in the time he has been interned at Guantanamo. The Third Convention mandates that detainees "shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities." Geneva III, art. 34.

The seriousness of these treaty violations is magnified by the religious context of the armed conflict in which Hamdan was sold to the United States. The United States effectively is at war with radical Islam. Violating the religious liberties of Muslim captives in that war can only heighten the likelihood of grisly retribution against Americans.

III. The Court Should Order Respondents to Treat Hamdan in Accordance with the Geneva Conventions.

Hamdan has languished in Respondents' custody for nearly three years. He has spent much of that time in solitary confinement – deprived of sunlight, exercise, medical care and other basic human needs. His mental and physical health have deteriorated dangerously.

Respondents, however, assert that the Court is *required* to ignore Hamdan's plight and must abstain from adjudicating his claims until some later time after the military commission completes its work. Respondents misstate the requirements of the abstention doctrine and disregards the harm Hamdan will suffer if he is required to endure even longer delays.

A. Abstention Is Not Appropriate Because Hamdan Challenges Executive Branch Authority.

Hamdan asserts that Respondents are unlawfully denying him protections to which he is entitled under the Geneva Conventions by proposing to try him before a military commission that, by its design, violates the Conventions. The commissions cannot determine their own lawfulness, especially when their existence reflects Respondents' determination not to follow the Conventions' requirements. Abstention is not appropriate.

The core function of the Judicial Branch – ensuring that neither it nor the Political Branches transgress the limits of their constitutional authority – cannot be assumed by the other Branches. As the plurality stated in *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, , "[t]he judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III." 458 U.S. 50, 59 (1982). The courts have consistently granted litigants access to a judicial tribunal despite government appeals for deference to military tribunals.

In *Reid v. Covert*, 354 U.S. 1 (1957), the Supreme Court affirmed the power of a district court to grant relief to the spouses of military personnel whom they claimed were being unconstitutionally subjected to prosecution under the UCMJ. In *McElroy v. Guarliardo*, 361 U.S. 281 (1960), the Court held that a civilian employee of the armed forces serving with the armed forces in a foreign country could not constitutionally be subjected to a court-martial in time of peace. And in *Toth v. Quarles*, 350 U.S. 11 (1955), the Court held that a former Air

Force serviceman could not constitutionally be subjected to trial by court-martial for crimes alleged to have been committed while he was in the military.

In each of these cases, the Court determined that adjudication of the petitioner's claim should proceed immediately in the Article III court and not await further proceedings by the military tribunal. As in *Reid*, *McElroy* and *Toth*, this Court may vindicate Hamdan's claims "without requiring exhaustion of military remedies" because "the expertise of military courts [do not extend] to the consideration of constitutional claims of the type presented." *Noyd v. Bond*, 395 U.S. 683, 696 n.8 (1969).

B. Abstention Is Not Appropriate Because Hamdan Raises Substantial Arguments Challenging the Jurisdiction of the Military Commissions.

A person need not submit to a trial before a military tribunal "if the military court has no jurisdiction over him." *New v. Cohen*, 129 F.3d 639, 644 (D.C. Cir. 1997). For this reason, a federal court need not abstain in deference to military commissions (and a petitioner need not exhaust his claims before the military tribunal) where the petitioner "rais[es] substantial arguments denying the right of the military to try [him] at all." *Id.* (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 759 (1975)).

Respondents' amicus, relying on *New*, asserts that this Court is required to abstain unless it is "undisputed that the persons subject to the court-martials never ha[ve] been or no longer [are], in the military." Washington Legal Foundat. Amicus Br. 11. In *New*, however, the D.C. Circuit held that the Article III courts have the authority to consider all "substantial" arguments challenging the jurisdiction of military tribunals. *New*, 129 F.3d at 644. The Court in *New* rejected the petitioner's jurisdictional challenge to the military tribunal only *after* considering the merits of the challenge. *Id.* at 646.

Abstention is not required or appropriate here because Hamdan's claim is that the military commissions have no right to adjudicate Respondents' charges against him. His petition raises "substantial" arguments that the military tribunals lack both personal and subject matter

jurisdiction over him. *See* Hamdan Pet. 69-72. Accordingly, Hamdan's challenges to the jurisdiction of the military tribunals can and must be resolved by an Article III court.[21]

C. *Councilman* Does Not Require This Court To Abstain.

In *Councilman*, 420 U.S. 738, the Supreme Court held that an Article III court should not enjoin a pending court-martial proceeding against a service member who was charged with committing a criminal offense while on active duty. *Id.* at 746. The Court gave three reasons why considerations of comity can preclude a federal court from enjoining such a pending proceeding. None of those reasons applies here.

First, the Court recognized that the military justice system must remain free from undue interference in disciplining its own officers because "[t]he military is a 'specialized society separate from civilian society' with 'laws and traditions of its own developed during its long history.'" *Id.* at 757 (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)). The military's "primary business" is to "fight or be ready to fight wars should the occasion arise," and the military must "insist upon a respect for duty and a discipline without counterpart in civilian life" and must have a mechanism for enforcing this discipline that is separate from civilian courts. *Id.* (internal citations and quotations omitted).

Second, the Court noted that Congress, in enacting the UCMJ, had established "an integrated system of military courts and review procedures" to balance the interest in military preparedness and with the interest in fairness to service members charged with military offenses." *Id.*; *see also Parisi v. Davidson*, 405 U.S. 34, 40 (1972). The Court has noted that "[f]ree countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." *Toth*, 350 U.S. at 22.

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[21] Hamdan has moved that the military commission hold its proceedings in abeyance, pending this Court's decision, *inter alia*, on the applicability of the Geneva Conventions to the commission. *See, e.g.*, Defense Notice of Motion (Violation of Common Article 3 of the Geneva Conventions), Aug. 19, 2004 at ¶ 6.

Third, the Court noted that the issues raised in *Councilman* were "matters as to which the expertise of military courts is singularly relevant." 420 U.S. at 760 (*e.g.*, whether offense was "service-related"). As the Court explained in *Toth*, "military personnel because of their training and experience may be especially competent to try soldiers for infractions of military rules. Such training is no doubt particularly important where an offense charged against a solider is purely military, such as disobedience of an order, leaving a post, etc." 350 U.S. at 18.

These rationales do not apply to Hamdan. Hamdan is not a member of the United States military. His alleged offenses have no bearing on the military's ability to maintain order and discipline. *Councilman*, 420 U.S. at 760. Whether he is tried before a military commission has no relevance to the "military discipline, morale and fitness" of our armed services. And Hamdan's claims go to the very legitimacy of the military commissions, which is a matter that Respondents must defend in an Article III court.

Anticipating theses objections, Respondents assert that the Court should nevertheless abstain because the Executive Branch "is in the best position to determine appropriate procedures for trying enemy combatants charged with violations of the laws of war." (Motion, at 16). This is simply a variation on Respondents' argument that the Executive Branch knows best and has the last word on whether and how its actions are constrained by the treaty obligations of the United States. As demonstrated earlier, however, "[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." *Sterling v. Constantin*, 287 U.S. 378, 400-01 (1932). It is the province of Article III courts to decide "the allowable limits of military discretion." *Id.*

D. Hamdan Will Suffer Irreparable Harm Unless The Court Intervenes.

Hamdan has already spent nearly three years imprisoned at Guantanamo. He is currently held in solitary confinement with limited access to sunlight and limited opportunities for physical exercise. He is on a hunger strike and has lost 50 pounds. Even spiritual succor has been largely denied. Without court intervention, Hamdan will be kept in solitary confinement and his psychological and physical health with continue to deteriorate.

Hamdan can draw no solace from Respondents' bland assurance that he will be free to petition an Article III court for relief *after* the military commission proceedings are complete. Hamdan should not be forced to endure unlawful conditions, which are taking a toll on his physical and mental health, or to submit to proceedings before an unlawful tribunal. He has a right to conditions of confinement and trial that satisfy the Geneva Conventions. Once tried before the military commissions, his right to the protections of the Geneva Conventions and international law will have been irretrievably lost.

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). Hamdan is entitled to the protections of the Geneva Conventions, and the Court should order Respondents to begin providing him with those protections forthwith.

Respectfully submitted,

DATED: September 30, 2004

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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO

I am a resident of the United States. My business address is One Front Street, 34th Floor, San Francisco, California 94111. I am employed in the City and County of San Francisco where this service takes place. I am over the age of 18 years, and not a party to the within cause. I am readily familiar with my employer's normal business practice for collection and processing of correspondence for mailing with the U.S. Postal Service. On the date set forth below, I served the foregoing document(s) described as:

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on the following person(s) in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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