[ORAL ARGUMENT SCHEDULED FOR MARCH 8, 2005]
No. 04-5393

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SALIM AHMED HAMDAN,

Petitioner-Appellee,

v.

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

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR AMICUS CURIAE THE URBAN MORGAN INSTITUTE FOR HUMAN RIGHTS IN SUPPORT OF APPELLEE AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28, counsel for the Urban Morgan Institute for Human Rights, *Amicus Curiae* in support of Petitioner-Appellee, certifies as follows:

A. PARTIES

All parties appearing in this Court are listed in the Brief for Appellants. In addition to the instant *Amicus Curiae* the Urban Morgan Institute for Human Rights, the American Center for Law and Justice, *Amicus Curiae* in support of Respondents-Appellants, appears in this Court.

All parties and *amici* participating in the proceedings below are listed in the Brief for Appellants.

B. RULING UNDER REVIEW

References to the ruling at issue appear in the Brief for Appellants.

C. RELATED CASES

There are several related cases brought by detainees at the Guantanamo Naval Base pending in the district court in this Circuit:

1. *Hicks (Rasul) v. Bush*, S. Ct.; D.C. Cir. No. 02-5284; No. 02-CV-0299 (D.D.C.) (J. Kollar-Kotelly)

2. *Al-Odah v. United States*, No. 02-CV-0828 (D.D.C.) (J. Kollar-Kotelly)

3. *Habib v. Bush*, No. 02-CV-1130 (D.D.C.) (J. Kollar-Kotelly)

4. *Kurnaz v. Bush*, No. 04-CV-1135 (D.D.C.) (J. Huvelle)

5. *O.K. v. Bush*, No. 04-CV-1136 (D.D.C.) (J. Bates)

6. *Begg v. Bush*, No. 04-CV-1137 (D.D.C.) (J. Collyer)

7. *Khalid (Benchellali) v. Bush*, No. 04-CV-1142 (D.D.C.) (J. Leon)

8. *El-Banna v. Bush*, No. 04-CV-1144 (D.D.C.) (J. Roberts)

9. *Gherebi v. Bush*, No. 04-CV-1164 (J. Walton)

10. *Boumediene v. Bush*, No. 04-CV-1166 (D.D.C.) (J. Leon)

11. *Anam v. Bush*, No. 04-CV-1194 (D.D.C.) (J. Kennedy)

12. *Almurbati v. Bush*, No. 04-CV-1227 (J. Walton)

13. *Abdah v. Bush,* No. 04-CV-1254 (D.D.C.) (J. Kennedy)

14. *Belmar v. Bush*, No. 04-CV-1997 (D.D.C.) (J. Collyer)

15. *Al-Qosi v. Bush,* No. 04-CV-1937 (D.D.C.) (J. Friedman)

16. *Jarallah Al-Marri v. Bush* (according to the Brief for Appellants, this suit will be filed in the D.C. federal district court shortly, but it has not been docketed yet).

17. *Al-Marri v. Bush,* No. 04-CV-2035-GK (J. Kessler)

18. *Paracha v. Bush*, No. 04-CV-2022-PLF (J. Friedman)

19. *Zemiri v. Bush,* No. 04-CV-2046-CKK (J. Kollar-Kotelly)

Counsel is not aware at this time of any other related cases within the meaning of D.C. Cir. Rule 28(a)(1)(C).

D. STATUTES AND REGULATIONS

All pertinent statutes and regulations are contained in the Brief for Appellants.

Respectfully submitted,

By:_____

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* Authorities on which we chiefly rely are marked with asterisks.

I. INTEREST OF *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29, the Urban Morgan Institute for Human Rights, *Amicus Curiae*, respectfully submits this brief in support of appellee, Salim Ahmed Hamdan. All parties have consented to the filing of this brief, and correspondence indicating such consent is available from counsel for *Amicus*.

The Urban Morgan Institute for Human Rights was founded in 1979 at the University of Cincinnati College of Law. The Institute edits the Human Rights Quarterly, a scholarly journal published by The Johns Hopkins University Press, and sponsors Pennsylvania Studies in Human Rights, a book series published by the University of Pennsylvania Press. The Institute is devoted to the study of international human rights law and is thus particularly well-suited to express an informed and balanced view on the use of international law to interpret acts of Congress.

II. SUMMARY OF ARGUMENT

The heart of the Government's position in this case is that, in ordering Hamdan's trial by special military commission, "[t]he President is acting with the approval of Congress reflected in [10 U.S.C. § 821] and the Authorization to Use Military Force." Appellants' Br. at 38-39. Indeed, the assumption of congressional approval is so integral to the Government's arguments that its sixty-two page brief devotes only five pages to the alternative (and startling) claim that the President has authority so to act even absent congressional authorization.

The Government's assumption is simply wrong. A well-established canon of statutory interpretation, affirmatively "adopted by this Circuit," *Federal Trade Comm'n v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1323 n.130 (D.C. Cir.

1980), compels the opposite conclusion. Specifically, as further set forth herein, under the "*Charming Betsy*" canon — requiring courts, "wherever possible," to construe federal law so that its application "will not violate international law," *In re Application to Enforce an Administrative Subpoena of the CFTC*, 738 F.2d 487, 493 (D.C. Cir. 1984) — Congress has *not* authorized Hamdan's trial by the special military commission created by the November 13, 2001 executive order and Department of Defense implementing regulations.

The *Charming Betsy* doctrine was established by the Supreme Court two hundred years ago, and has been consistently applied by both the Supreme Court and this Court to avoid constructions of federal law that would violate international law. Other briefing before this Court amply demonstrates — and we therefore do not reiterate — that the commission convened to try Hamdan and the procedures contemplated therein violate numerous aspects of international law, including core provisions of the Geneva Conventions of 1949. *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316.

As further set forth below, not only does the *Charming Betsy* canon apply to this case, but its application will advance core constitutional and public policy values. First, applying the canon here will advance fundamental separation-of-powers principles — the Framers conferred on *Congress*, not the President, primary authority over the extent and manner of U.S. compliance with international law, particularly in wartime. Second, applying the *Charming Betsy* canon in this case would be consistent with the Executive Branch's own public commitment to follow the very international legal norms at issue in the case. And third, applying the *Charming Betsy* canon here would give effect to the

will of a supermajority of the Senate, which gave its formal advice and consent in ratifying the Geneva Conventions.

The final sections of this filing briefly apply the *Charming Betsy* doctrine to the sources of federal law at issue here, the Authorization for Use of Military Force (AUMF), Pub. L. 107-40 (S.J. Res. 23) 115 Stat. 224 (Sept. 18, 2001), and 10 U.S.C. § 821. In short, nothing about those statutes provides any justification for overriding the basic rule of the *Charming Betsy* canon — Congress should be presumed *not* to authorize violations of international law, and particularly the Geneva Conventions. Accordingly, this Court should conclude that the President has acted without congressional authorization and affirm the ruling of the district court.

III. ARGUMENT

A. The *Charming Betsy* Doctrine Requires the Courts to Avoid Constructions of Federal Law that Would Violate International Law.

The *Charming Betsy* canon derives its name from Chief Justice Marshall's 1804 opinion for a unanimous Court in *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). The question there was whether the schooner's owner had violated the Nonintercourse Act of 1800 prohibiting trade with France during our undeclared war with that nation. The Act applied to "any person or persons resident within the United States, or under their protection." Federal Nonintercourse Act, ch. 10, § 1, 2 Stat. 7, 8 (1800). The Charming Betsy's owner argued in part that applying the Act to him, as a Dutch citizen, would violate "rights of neutrality" under international law. *Id.* at 107. The Court reasoned that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains" and concluded that the Act did not

apply to the owner because he was not under the diplomatic protection of the United States. *Id.* at 118.[1]

For two hundred years, the Supreme Court has emphasized that this rule facilitates the implementation of congressional intent. In 1884, for example, the Court construed a federal law restricting Chinese immigration not to override a treaty with China according a right of re-entry to laborers previously residing in the United States. *See Heong v. United States*, 112 U.S. 536 (1884). The Court wrote:

> [I]t would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation was enacted.

Id. at 540. A hundred years later, in *Weinberger v. Rossi*, 456 U.S. 25 (1982), the Court reiterated this justification for the *Charming Betsy* doctrine. There, the Court construed a federal statute prohibiting employment discrimination not to apply at U.S. military bases in the Philippines so as to avoid conflict with an international agreement concluded by the President that mandated preferential employment of Filipinos at those facilities. 456 U.S. at 26-27. The Court indicated that "some affirmative expression of congressional intent" was required before it would construe a statute to conflict with the international obligations of the United States. *Id.* at 32; *See also F. Hoffman-La Roche, Ltd. v. Empagran, S.A.* 124 S. Ct. 2359 (2004) (employing the canon and invoking congressional

[1] Notably, even *Charming Betsy* does not appear to have been the Court's first application of this principle. In *Talbot v. Seaman*, 5 U.S. (1 Cranch) 1, 43 (1801), Chief Justice Marshall wrote that "the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations." *See* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Georgetown L. J. 479, 486 (1998).

intent to conclude that the Sherman Act does not apply to foreign plaintiffs complaining of foreign adverse economic effects).[2]

Significantly, courts have employed the *Charming Betsy* canon to aid in interpreting many different kinds of federal laws. *See, e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10 (1963) (using the canon to interpret the National Labor Relations Act); *Lauritzen v. Larsen*, 345 U.S. 571 (1953) (Jones Act); *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001) (Immigration and Nationality Act); *George E. Warren Corp., v. E.P.A.* 159 F.3d 616, 624 (D.C. Cir. 1998) (Clean Air Act); *United States v. Robinson*, 843 F.2d 1 (1st Cir. 1988) (smuggling statutes). Moreover, the *Charming Betsy* canon is triggered by all the various sources of international law. In *Charming Betsy* itself and the *F. Hoffman-La Roche* case, for example, the Court relied upon the canon to avoid conflicts with customary international law, while *Heong* invoked the canon to avoid potential conflict with a treaty. The

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[2] The theory underlying the *Charming Betsy* canon finds support in two other interpretive canons. First, Courts require a clear statement by Congress before concluding that a subsequent statute has "abrogated or modified" a treaty (like the Geneva Conventions). *See, e.g., Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). Courts also typically assume that Congress does not intend to repeal domestic law by implication. *See, e.g., United States v. United Cont'l Tuna Corp.*, 425 U.S. 164, 168 (1976). The Supreme Court has applied this canon to avoid an interpretation that would permit the "evasion" of a prior act of Congress, reasoning that "[b]oth types of 'repeal' — effective and actual — involve the compromise or abandonment of previously articulated policies, and we would normally expect some expression by Congress that such results are intended." *United Cont'l Tuna Corp.*, 425 U.S. at 169. For exactly the same reason, this Court should require clear language from Congress before concluding that the President has been authorized to act contrary to international law, and particularly those provisions of the Geneva Conventions that have been incorporated into domestic law. *See* Army Regulations 190-8; *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2658 (2004) (Souter, J. concurring in part, dissenting in part, and concurring in the judgment) (describing Army Reg. 190-8, which was adopted to implement part of the Geneva Conventions);

Weinberger case applied the canon to avoid a conflict with an executive agreement, even though that agreement had not received the approval of the Senate constitutionally required for treaties. *Weinberger* thus confirms that even non-self-executing treaties, which (like executive agreements) are not directly enforceable in domestic courts absent implementing legislation, can provide the basis for application of the canon.

This Court has, of course, followed the Supreme Court's lead in acknowledging and applying the *Charming Betsy* doctrine. *See South African Airways v. Dole*, 817 F.2d 119, 125 (D.C. Cir. 1987) ("Since the days of Chief Justice Marshall, the Supreme Court has consistently held that congressional statutes must be construed wherever possible in a manner that will not require the United States 'to violate the law of nations.'") (quoting *The Schooner Charming Betsy*, 6 U.S. (2 Cranch.) at 118.); *Federal Trade Comm'n* v. *Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300 at 1323 n.130 ("This [*Charming Betsy*] principle has been adopted by this Circuit."). Like the Supreme Court, this Court has emphasized that applying the doctrine aids in implementing the intent of Congress. *See, e.g., Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804, 814 (D.C. Cir. 1968) ("[I]t may fairly be inferred, in the absence of clear showing to the contrary, that Congress did not intend an application that would violate principles of international law.").

In addition to its articulation by the courts, the *Charming Betsy* doctrine has long been canonized in the American Law Institute's *Restatements of Foreign Relations*. The *Restatement (Second)*, published in 1965, stated: "If a domestic law of the United States

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Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, http://www.apd.army.mil/pdffiles/r190 8.pdf.

may be interpreted either in a manner consistent with international law or in a manner that is in conflict with international law, a court in the United States will interpret it in a manner that is consistent with international law." Note 53, § 3(3). Similarly, the 1987 *Restatement Third* provides that wherever "fairly possible," courts will construe statutes or acts of Congress "so as not to conflict with international law or with an international agreement of the United States." Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987).

The well-established *Charming Betsy* canon thus reflects the presumption — unchallenged in this litigation — that Congress generally intends to keep the United States in compliance with the nation's international obligations. *Amicus* submits that this fundamental principle is dispositive of this case. Moreover, although the Supreme Court's recent ruling on related issues in *Hamdi v. Rumsfeld* did not cite the *Charming Betsy* doctrine, the Court's analysis in that case mirrored the canon's application. In *Hamdi*, the plurality rejected the Government's claim that the AUMF authorized "indefinite detention" of enemy combatants, 124 S. Ct. at 2641 (O'Connor, J. plurality opinion), a conclusion joined by all of the Justices with the exception of Justice Thomas. *Id.* at 2652 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment, joined by Justice Ginsburg); *id.* at 2671-72 (Scalia, J., dissenting, joined by Justice Stevens). The plurality reasoned that the AUMF (upon which the Government relies in this litigation as well), could not reasonably be read as authorization for indefinite detention *because* "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities." *Id.* at 2641 (citing, *inter alia*, Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War).

Justice Souter, joined by Justice Ginsburg, agreed with the plurality that potential violations of international law made it impossible to credit the Administration's broad reading of the AUMF. *Id.* at 2657-58. In *Hamdi*, the Court thus rebuffed the Administration's proffered interpretations of the AUMF precisely *because* those constructions would have created a conflict between U.S. and international law. That is the essence of the *Charming Betsy* doctrine that *Amicus* urges this Court to apply.

B. Applying the *Charming Betsy* Canon in this Case Will Advance Core Constitutional and Public Policy Values.

The justifications for applying the *Charming Betsy* canon are particularly strong given the circumstances of this case. First, the doctrine will advance separation-of-powers principles — the Framers conferred on *Congress*, not the President, primary authority over the extent and manner of U.S. compliance with international law, particularly in wartime. Second, the Executive Branch's own repeated commitments to follow the international legal norms at issue in this case make application of the canon especially appropriate. And third, applying the *Charming Betsy* canon here will give effect to the will of a supermajority of the Senate.

1. *Separation of Powers.*

The grounds for construing the AUMF and 10 U.S.C. § 821 to avoid violations of international law are stronger here than in most statutory interpretation cases because the text of the Constitution vests Congress — not the President — with substantial authority over core issues of international law implicated by war. Moreover, to the extent that there remains any ambiguity regarding congressional intent, it is the President — not

individuals like Mr. Hamdan — who has the greater capacity to influence Congress's agenda and to seek explicit authorization for his actions.

Article I of the Constitution grants Congress the power to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." U.S. Const. art. 1, sec. 8, cl. 11. At the time of the Framing, all three of these powers relating to the conduct of war were defined terms at international law. By vesting these powers in Congress, the Framers deliberately placed core questions of international law relating to the conduct of war under the control of Congress rather than the President. *See, e.g.,* Michael D. Ramsey, *Presidential Declarations of War*, 37 U.C. Davis L. Rev. 321, 337-57 (2003) (describing the meaning of "declare war" in eighteenth-century international law); Francis Wharton, *Commentaries on Law* §§ 216-218, 455 (1884) (describing international law governing the right of capture and noting that the Constitution vests Congress with the power to authorize captures); David Lewittes, *Constitutional Separation of War Powers: Protecting Public and Private Liberty*, 57 Brook. L. Rev. 1083, 1173 (1992) (describing letters of "marque and reprisal" and noting that although under British precedent it was the executive who issued such letters, the U.S. Constitution expressly lodges this authority with Congress).

The Framers thus made a deliberative judgment that in this context Congress, not the Executive, would have primary responsibility to determine the extent and manner of U.S. compliance with international law. The *Charming Betsy* canon's strong presumption against interpretations of federal statutes that would permit violations of international law can serve as a critical tool for realizing that judgment. The canon sensibly limits congressional authorizations of non-compliance with international law to

those circumstances where Congress has specifically authorized the violation. As further set forth in Parts III.C and III.D, *infra*, neither the AUMF nor section 821 evidence any congressional consideration — let alone approval — of the serious violations of international law threatened here.

Requiring explicit congressional authorization for violations of international law also serves separation of powers principles because the Executive has the best chance of securing legislation from Congress to correct interpretations by the courts with which the Executive disagrees. *See* Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 Colum. L. Rev. 2162, 2174 (2002) (*citing* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 348 tbl. 7 (1991)). Certainly the array of legislation enacted following the September 11 attacks provides strong evidence of the President's power to control the legislative agenda in times of war. *See, e.g.,* A. Christopher Bryant & Carl Tobias, Youngstown *Revisited*, 29 Hastings Const. L.Q. 373, 386-391 (2002) (describing the Senate's suspension of its normal operating procedures in the days after September 11 in order to expedite the President's requests); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259, 1276-77 (2002) (noting that after September 11, Congress managed "[i]n record time" to "consider[] and enact[] a broad array of laws, many of them in almost precisely the form sought by the President") (footnote omitted). The *Charming Betsy* doctrine also serves separation of powers values by providing a bright-line rule against which Congress can make future authorizations and against which the President can take action. *Cf. Finley v. United States*, 490 U.S. 545, 556 (1989)

("What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules.").[3]

In a relatively recent case, the Ninth Circuit questioned in *dicta* whether the *Charming Betsy* canon should be applied against the Executive Branch. *See United States v. Corey*, 232 F.3d 1166, 1177-79 (9th Cir. 2002). *Corey* addressed the applicability of a federal criminal statute to conduct in a foreign country. The criminal defendant in that case argued that applying the statute to his conduct would violate customary international law governing extraterritorial application of statutes, and that under the *Charming Betsy* canon the court should accordingly refuse this interpretation. The panel rejected this argument on the ground that the concurrent jurisdiction did not violate international law. *Id.* at 1179. In *dicta*, however, the court reasoned that the concerns underlying the *Charming Betsy* canon "are obviously much less serious where the interpretation arguably violating international law is urged upon us by the Executive Branch of our government" and that "we must presume that the President has evaluated the foreign policy consequences of such an exercise of U.S. law and determined that it serves the interests of the United States." *Id.* at 1179 n.9.

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[3] Notably, the *Charming Betsy* canon's limited field of operation also helps to preserve separation of powers. The canon does not apply if constitutional text puts the power in question squarely in the President's hands (under the Commander-in-Chief clause, for example) because in that context the scope of authorization by Congress is irrelevant. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) ("The President's power, if any, . . . must stem *either* from an act of Congress *or* from the Constitution itself.") (emphasis added). Nor does the canon apply if Congress has explicitly authorized the President to take the action in question. In other words, the canon matters only to the extent that the President's authority depends upon congressional authorization and that the scope of such authorization is itself unclear.

This *dicta* from *Corey* is entirely inaccurate. The opinion reasoned in part, for example, that the Supreme Court had never invoked the canon against the Executive Branch in a case to which it was a party. That is wrong: In 1913, the Supreme Court ruled against the Executive Branch in *MacLeod v. United States*, 229 U.S. 416 (1913), a case involving the collection of duties in occupied territory. The Executive Branch claimed that a subsequent act of Congress had ratified the collection of duties by a military collector of customs in Manila, but the Court disagreed, reasoning that "it should not be assumed that Congress proposed to violate the obligations of this country to other nations."[4] 229 U.S. at 434. Lower courts, too, have used the canon to defeat the Executive Branch's interpretation of a statute. *See Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339, 1348 (Fed. Cir. 2004); *Yusuf Ali v. Ashcroft*, 346 F.3d 873, 885-86 (9th Cir. 2003); *Kim Ho Ma*, 257 F.3d at 1114; *Commodities Futures Trading Commis'n v. Nahas*, 738 F.2d 487, 493-5 (D.C. Cir. 1984); *United States v. Laden*, 92 F. Supp. 2d 189, 214-15 (S.D.N.Y. 2000).[5] These cases demonstrate the Court's insistence that *Congress* make clear its intention to violate international law, even where the Executive Branch has made its position clear.

2. *The Executive Branch's Long-Standing Commitment to Abide by International Humanitarian Law.*

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[4] The Supreme Court has also relied upon the presumptions against implied repeal of a treaty and against extraterritorial application of statutes — *see* n.2, *supra* — to reject interpretations of federal statutes proffered by the executive branch in cases in which it is a named party. *See, e.g., United States v. Payne*, 264 U.S. 446 (1924); *Cook v. United States*, 288 U.S. 102 (1933). Similarly, the Court has applied the presumption against extraterritorial application of U.S. law to defeat an agency's interpretation of a statute. *See, e.g., EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).

[5] To be sure, various agencies litigate on behalf of the Executive, but nothing in these cases suggests that courts should differentiate among agencies when applying the *Charming Betsy* canon to construe a statute.

In this case, the Executive Branch's own consistent, publicly-avowed commitment to follow international law provides a further reason to apply the *Charming Betsy* doctrine. It is unlikely that Congress would have intended to authorize violations of the very international norms that the Executive Branch has pledged to uphold.

The Executive Branch has consistently reiterated its commitment to follow the law of war, both customary and treaty-based. From the famous blockade ordered by President Lincoln at the outset of the Civil War that generated *The Prize Cases*, to the seizure of Cuban fishing vessels during the Spanish-American war, to the military trials of World War II, to U.S. conduct in the Persian Gulf war, Presidents have made explicit their desire to comport with the law of war. *See* David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. Int'l L. & Pol. 363, 378-94 (2003); Colonel James P. Terry, *Operation Desert Storm: Stark Contrasts in Compliance With the Rule of Law*, 41 Naval L. Rev. 83 (1993). This remains true today with the Bush administration defending its treatment of detainees around the world as consistent with international law.[6] Indeed, the Department of Defense requires *all branches* of the armed forces to comply with the law of war in

[6] News Transcript, United States Dept. of Defense, Briefing on Geneva Convention, EPW's and War Crimes 1 (April 7, 2003), *available at* http://www.defenselink.mil/transcripts/2003/t04072003_t407genv.html ("Let me talk a little bit about [Department of Defense] policies and the conflict in Iraq. The United States and coalition forces conduct all operations in compliance with the law of war. No nation devotes more resources to training and compliance with the laws of war than the United States. U.S. and coalition forces have planned for the protection and proper treatment of Iraqi prisoners of war under each of the Geneva conventions I have identified. These plans are integrated into current operations.").

conducting military operations and related activities. Dep't of Defense, Directive 5100.77: DoD Law of War Program (Dec. 9, 1998).

The Executive Branch has also explicitly committed itself to the Geneva Conventions. Specifically with respect to detainees at Guantanamo like Mr. Hamdan, the Department of Defense has publicly maintained that their treatment comports with the Geneva Conventions. News Transcript, United States Dept. of Defense, Briefing on Detainee Operations at Guantanamo Bay 3 (February 13, 2004), *available at* http://www.defenselink.mil/transcripts/2004/tr20040213-0443.html. Although the Bush Administration has made controversial decisions about the *scope* of the Geneva Conventions,[7] it has not denounced or repudiated them, but rather has repeatedly reaffirmed its intention to comply with them.

Moreover, the Executive Branch's commitment to comply with the Geneva Conventions is reflected in the Army Regulations themselves:

> All persons taken into custody by U.S. forces will be provided with the protections of the [Geneva Convention Relative to the Treatment of Prisoners of War] until some other legal status is determined by competent legal authority.

Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, S. 1-5(a)(2), *available at* http://www.au.af.mil/au/awc/awcgate /law/ar190-8.pdf. The purpose of army regulation 190-8 was to implement customary international law as well as the Geneva Conventions. Army Reg. 190-8 S. 1-1(b). *See*

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[7] *See, e.g.*, Memorandum to William J. Haynes II, General Counsel, Dept. of Defense from U.S. Department of Justice, Office of Legal Counsel, re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (January 9, 2002) (concluding that the Geneva Conventions do not apply to detainees from the war in Afghanistan), *available at* http://www.msnbc.msn.com/id/5025040/site/newsweek/.

also Hamdi, 124 S. Ct. at 2658 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment, joined by Justice Ginsburg) (noting that these regulations were adopted to implement the Geneva Conventions). This regulation itself provides that "[i]n the event of conflict or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence." Army Reg. 190-8, S. 1.1(b). The consistent commitment by the Executive Branch to comply with international law, and specifically with the Geneva Conventions, reinforces the *Charming Betsy* presumption that general authorizations by Congress, such as the AUMF and 10 U.S.C. § 821, extend only to those actions that do not violate international law.

3. The Geneva Conventions Have Received the Advice and Consent of a Supermajority of the Senate.

The Geneva Conventions provide a robust basis for the *Charming Betsy* canon for another reason: they reflect limitations on government conduct to which the Senate has already given its formal advice and consent via the constitutionally required supermajority vote. U.S. Const. art. II. The Senate's ratification of these treaties means that the Senate itself (as well as the President) has previously considered and approved the limitations on the use of force that are codified in the Geneva Conventions. Moreover, the Senate has considered the issue in the same context as it arises in this case: defining and limiting the actions that the U.S. military is permitted to take. Because the *Charming Betsy* canon is based on presumed intentions of Congress, it applies particularly well here, where a supermajority of the Senate has already specifically approved the limitations imposed by international law.

C. The Authorization for Use of Military Force Does Not Authorize the President to Establish Military Commissions in Violation of International Law.

The AUMF provides, in pertinent part:

> (a) IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Authorization for Use of Military Force (AUMF), Pub. L. 107-40 (S.J. Res. 23) 115 Stat. 224 (Sept. 18, 2001). Far from *Charming Besty*'s requisite "affirmative expression of congressional intent," *see Weinberger*, 456 U.S. at 32, this general language says nothing at all about detentions or trials by military commission. As other briefing before this Court amply demonstrates, the commission convened to try Hamdan and the procedures contemplated therein violate numerous aspects of international law, including core provisions of the Geneva Conventions of 1949. *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316. Accordingly, pursuant to *Charming Betsy*, this Court should not construe the generalized text of the AUMF as sanctioning such international law violations.

Moreover, nothing in the legislative history of the AUMF provides any basis to conclude that Congress intended to authorize the President to violate international law. Indeed, comments by some members of the House confirm that the scope of the AUMF is limited by international law. 147 CONG. REC. H5638, H5653 (daily ed. Sept. 14, 2001) (statement of Mr. Barr) (arguing that Congress should declare war so as to give "the President the tools, the absolute flexibility he needs under international law and The

Hague Convention to ferret these people out..."); *id.* (statement of Mrs. Clayton) (noting that Congress would monitor the President's use of force to make sure it is "in accordance with international laws"); *id.* (statement of Mr. Jackson) ("we must [] affirm the principles that came under attack on September 11 — respect for innocent life and international law.").

The Supreme Court's recent decision in *Hamdi* supports this reading of the AUMF. As discussed *supra* at 6-7, the plurality opinion by Justice O'Connor, joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, reasoned that the AUMF did *not* authorize "indefinite detention" 124 S. Ct. 2633, 2641 (O'Connor, J., plurality opinion), a conclusion joined by all of the Justices with the exception of Justice Thomas. *Id.* at 2652 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment, joined by Justice Ginsburg); *id.* at 2671-72 (Scalia, J., dissenting, joined by Justice Stevens). The plurality reasoned that the AUMF did not authorize such detention because it is contrary to the law of war, and cited Article 118 of the Third Geneva Convention in support. *Id.* at 2641. For precisely the same reason, the AUMF does not authorize trials by military commissions or detentions that violate international law, including the Geneva Conventions.

D. Section 821 Does Not Authorize the President to Establish Military Commissions in Violation of International Law.

Charming Besty's presumption is even stronger with respect to 10 U.S.C. § 821, the federal statute that purportedly authorizes the military commissions at issue in this case. Indeed, the express language of section 821 demonstrates that Congress did not

intend to authorize the President to establish military commissions in violation of international law.

Section 821 provides that the jurisdiction of courts-martial does not deprive "military commissions" of "concurrent jurisdiction with respect to offenders or offenses that by statute or by the *law of war* may be tried by military commission ...." 10 U.S.C § 821 (emphasis added). While the *Charming Betsy* canon applies even to statutes that make no mention of international law, in this case, the text of section 821 itself limits the use of military commissions to those permitted under the "law of war." Applied to section 821, therefore, the presumption that "Congress did not intend an application that would violate principles of international law" is not just "fairly inferred," but explicitly rendered. *See Pacific Seafarers*, 404 F.2d at 814. For this Court to conclude otherwise — that section 821 authorizes the use of military commissions that *violate* the law of war — undermines not only the *Charming Betsy* canon, but also the plain language of the statute.

The Supreme Court's interpretation of Article 15 of the Articles of War, the precursor to 10 U.S.C. § 821, confirms that section 821 does not empower the President to violate international law. In both *Ex Parte Quirin*, 317 U.S. 1, 29-36 (1942), and *In re Yamashita*, 327 U.S. 1, 14-17 (1946), the Court carefully scrutinized whether the alleged conduct violated the law of war before upholding the military commissions. *See* A. Christopher Bryant & Carl Tobias, Quirin *Revisited*, 2003 Wisc. L. Rev. 309, 327-29 (2003) (noting that in *Ex Parte Quirin* the Supreme Court independently determined whether the charges against the Nazi saboteurs constituted offenses against the law of war cognizable by a military tribunal). In *Yamishita*, the petitioner alleged that his trial by

military commission for offenses committed while he was a combatant violated certain protections afforded by the Geneva Convention of 1929, a precursor to the 1949 Geneva Conventions. 327 U.S. at 20-23. The Court carefully reviewed the 1929 Convention before concluding that the relevant protections applied only to trials for offenses committed during detention as a prisoner of war, not to trials for offenses committed during combat. *Id.*[8] If the President had the authority under 10 U.S.C § 821 to violate international law, this discussion would have been entirely unnecessary.

The Supreme Court's opinions in *Quirin* and *Yamashita* confirm what is already clear from the text of 10 U.S.C. § 821 and the application of the *Charming Betsy* canon: the statute does not authorize the President to convene military commissions in violation of international law.

[8] The 1949 Geneva Conventions extended these protections to cover trials for offenses committed during combat. *See* David Glazier, *Note: Kangaroo Court or Competent Tribunal: Judging the 21st Century Military Commission*, 89 Va. L. Rev. 2005, 2079-80 (2003).

IV. CONCLUSION

Congressional authorization is the key to the government's argument in this case, yet the *Charming Betsy* canon — a basic rule of statutory interpretation with deep historical roots — shows that Congress has not authorized the President to try Hamdan by special military commission. Pursuant to the *Charming Betsy* canon, courts presume that Congress does not intend to authorize violations of international law. Because Hamdan's trial would violate international law, this Court should conclude that neither the AUMF nor 10 U.S.C § 821 provides authorization for such a trial.

Respectfully Submitted,

Dated: December 29, 2004

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for *Amicus Curiae* the Urban Morgan Institute for Human Rights certifies that, as counted by Microsoft Word 2000, this brief complies with the requirements of Fed. R. App. P. 32 (a)(7)(B) in that it contains fewer than 7,000 words.

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RULE 29(d) CERTIFICATE OF AMICUS CURIAE

Pursuant to D.C. Circuit Rule 29(d), the undersigned counsel for *Amicus Curiae* the Urban Morgan Institute for Human Rights certifies that the filing of this separate *amicus* brief is necessary. Counsel is aware that other *amicus* briefs may be submitted in this case in support of Petitioner-Appellee, but it is not practicable for the Institute to join the briefs of other *amici*. The expedited briefing schedule makes coordination extremely difficult in this case. Even more importantly, this brief advances only the argument that courts should use international law to construe acts of Congress; the Institute is not aware of any other *amici curiae* who make this argument and is currently unwilling to join other *amicus* briefs.

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