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

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REAR ADMIRAL DONALD J. GUTER (ret.)
REAR ADMIRAL JOHN D. HUTSON (ret.)
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DATED: November 17, 2006

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INTEREST OF AMICI

Amici are retired generals and admirals who have spent their careers commanding troops at home and overseas and protecting the nation from attack, and a retired intelligence officer who ran the CIA's covert operations in Afghanistan during the Soviet occupation. Amici have extensive experience dealing with issues relating to the Geneva Conventions and armed conflict, and more than 200 years of combined service in the military and intelligence branches. Some of the amici filed a brief in this matter in September 2004 urging that the Court ensure that Respondents afford Petitioner the protections of the Geneva Conventions. (Dkt. 25.) The Court did so, and the Supreme Court upheld the Court's decision.

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

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

Rear Admiral Donald J. Guter was a line officer in the United States Navy from 1970 through 1974. After law school, he served in the Navy from 1977 until he retired in 2002. From June 2000 through June 2002, Admiral Guter was the Navy's Judge Advocate General. Admiral

Guter is now Dean of Duquesne University School of Law in Pittsburgh, Pennsylvania. Admiral Guter was inside the Pentagon when it was attacked on September 11, 2001.

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

Brigadier General 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.

Brigadier General James P. Cullen served in the United States Army for 27 years as an active and reserve officer in the Judge Advocate General's Corps, retiring as the Chief Judge (IMA) of the Army Court of Criminal Appeals. Before that, General Cullen served as the Staff Judge Advocate of the 77th Army Reserve Command and the commander of the 4th Judge Advocate General Military Law Center, which had responsibility for the 150 Army Reserve legal officers, court reporters, and legal clerks headquartered between Boston and Philadelphia.

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

and the rule of law in such diverse locales as Cambodia, Rwanda, and the Ukraine, and serves as a defense expert before the Special Court in Sierra Leone.

ARGUMENT

I. THE MILITARY COMMISSIONS ACT DOES NOT BAR HAMDAN'S ASSERTION OF RIGHTS PROTECTED BY THE GENEVA CONVENTIONS.

In June, the Supreme Court held that Petitioner Hamdan could enforce rights guaranteed by the Geneva Conventions in a habeas action, rejecting the D.C. Circuit's holding to the contrary. *Compare Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2793 (2006), *with Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005). In response, Congress passed the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) ("MCA"), two provisions of which purport to preclude individuals from seeking such judicial enforcement. MCA § 5(a) provides:

> IN GENERAL.—No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.

10 U.S.C. 948b(g) (added by MCA § 3(a)), provides:

> GENEVA CONVENTIONS NOT ESTABLISHING SOURCE OF RIGHTS.—No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.

These provisions do not extinguish Hamdan's claims under the Geneva Conventions or its protocols. First, these provisions do not by their terms apply retroactively. Second, if these provisions are interpreted to bar enforcement of Geneva Conventions rights on habeas review, the provisions violate the Suspension Clause. Third, the effect of these provisions is to abrogate

the Geneva Conventions, but Congress has not provided the requisite clear statement of intent, and the provisions therefore cannot be given effect.[1]

A. MCA § 5(a) and § 948b(g) Do Not Apply to Pending Claims.

MCA § 5(a) and § 948b(g) do not apply to claims pending on the date of enactment of the MCA. They do not by their terms apply retroactively and therefore are presumed not to do so. None of the exceptions to the presumption against retroactivity applies.

1. MCA § 5(a) and § 948b(g) are presumed not to apply retroactively.

Statutes are presumed to operate prospectively only. This presumption, which "is deeply rooted in our jurisprudence," *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994); *see also Hamdan*, 126 S. Ct. at 2764-65, responds to the "special concerns" raised by retroactive application of laws, *INS v. St. Cyr*, 533 U.S. 289, 315 (2001):

> The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.

Id. (citation omitted). Because of these "special concerns," "congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result." *Id.* at 316 (citation omitted). The statutory language must be "so clear that it could sustain only [that] interpretation." *Lindh v. Murphy*, 521 U.S. 320, 329 n.4 (1997).

The individuals held at Guantanamo certainly qualify as "unpopular . . . individuals." Application of § 5(a) and § 948b(g) to their Geneva Conventions claims would be retroactive because such application would "take[ ] away or impair[ ] vested rights acquired under existing

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[1] This brief does not address the scope of the claims purportedly foreclosed by MCA § 5(a) and 10 U.S.C. § 948b(g).

laws," *Landgraf*, 511 U.S. at 269 (citation omitted), and "impair rights a party possessed when he acted," *id.* at 280.

That MCA § 5(a) and § 948b(g) do not apply retroactively is confirmed by the fact that other MCA provisions by their terms apply retroactively. For example, MCA § 6(b)(2), entitled "RETROACTIVE APPLICABILITY," states that the amendments to the War Crimes Act, 18 U.S.C. § 2441, made by MCA § 6(b) are generally to "take effect as of November 26, 1997." And MCA § 7(b), entitled "EFFECTIVE DATE," provides that amendments made in MCA § 7(a) apply to "all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." "Nothing, indeed, but a different intent explains the different treatment." *Lindh*, 521 U.S. at 329 (by negative implication, certain provisions of the Antiterrorism and Effective Death Penalty Act do not apply retroactively); *see also Hamdan*, 126 S. Ct. at 2765-66 (by negative implication, the Detainee Treatment Act of 2005 does not apply to pending habeas claims).

Nor does MCA § 7 bear on whether MCA § 5(a) or § 948b(g) is retroactive. As Hamdan discusses in his brief, MCA § 7(b), the 'Effective Date' provision, does not apply to habeas actions. Specifically, the language of MCA § 7(b) tracks the language of Detainee Treatment Act ("DTA") § 1005(e)(2) (as modified by MCA § 7(a)), which encompasses *non*-habeas claims. By implication, MCA § 7(b) does not make DTA § 1005(e)(1) (as modified by § 7(a)), which encompasses habeas claims, retroactive. MCA § 7 therefore has no bearing on whether MCA § 5(a) or § 948b(g) is retroactive. Indeed, if MCA § 7 applied to Geneva Conventions claims, MCA § 5(a) and § 948b would be superfluous. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (stating rule against interpreting statutory provisions in manner that renders them superfluous).

The drafting history confirms that Congress did not intend MCA § 5(a) or § 948b(g) to be retroactive. *See Hamdan*, 126 S. Ct. at 2766 (applying similar analysis to jurisdiction-stripping provision of DTA). On September 6, 2006, Senator Frist introduced S. 3861. Like the MCA as enacted, S. 3861 contained a provision prohibiting the invocation of the Geneva Conventions in habeas actions. S. 3861 also contained a provision titled "RETROACTIVE APPLICATION" that stated: "This *Act* shall take effect on the date of enactment of this Act and shall apply retroactively, including to any aspect of the detention, treatment, or trial of any person detained at any time since September 11, 2001, and to *any* claim or cause of action pending on or after the date of the enactment of this Act." S. 3861, 109th Cong. § 9 (2006) (emphases added). On September 12, 2006, Representative Duncan Hunter, the chairman of the House Armed Services Committee, introduced a companion bill containing a similar provision. H.R. 6054, 109th Cong. § 8 (2006). This provision was eliminated from the MCA as enacted. "Congress' rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation." *Hamdan*, 126 S. Ct. at 2766.

2. No exception to the presumption against retroactivity applies.

The presumption against retroactivity does not apply to new procedural rules, the elimination of certain forms of prospective relief, and statutes ousting jurisdiction. *Landgraf*, 511 U.S. at 273-75. None of these narrow exceptions applies here.

(a) Procedural rules

"Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity" because "rules of procedure regulate secondary rather than primary conduct," *Landgraf*, 511 U.S. at 275, and "[n]o one has a vested right in any given mode of procedure," *Ex Parte Collett*, 337 U.S. 55, 71 (1949). Thus, the Supreme Court has held that a law enabling an appellate court to reform an improper sentence may be applied to

a pending case, *Collins v. Youngblood*, 497 U.S. 37 (1990); that an ameliorative change to state death penalty procedures, under which the role of a jury was altered to comport with Constitutional requirements, may be applied to a pending case, *Dobbert v. Florida*, 432 U.S. 282 (1977), and that a new venue rule permitting transfer of a case based on *forum non conveniens* may be applied to a pending case, *Collett*, 337 U.S. at 71.

Eliminating the ability of an individual in Hamdan's position to invoke the Geneva Conventions is no mere change in procedure but deprives the individual of a broad range of substantive protections – *e.g.*, the right of a prisoner of war to trial under equivalent procedures as the soldiers of the detaining country (Third Geneva Convention, art. 102) and the right of a civilian to be free from interrogation based on "physical or moral coercion" (Fourth Geneva Convention, art. 30). *See* Amicus Br. of Gen. David M. Brahms *et al.*, in Support of Pet'r 23-35 (Sept. 30, 2004) (Dkt. 25) (listing violations of Hamdan's rights under Geneva Conventions). The procedural exception to the presumption against retroactivity thus does not apply.

(b) Prospective relief

"When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." *Landgraf*, 511 U.S. at 273. This rule permits retroactive application of statutes regulating injunctive relief governing the future behavior of the parties. In *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921), the Supreme Court held that the Clayton Act, which prohibited the issuance of certain injunctions barring labor stoppages and picketing, was applicable to modify a previously issued injunction. "[B]ecause relief by injunction operates *in futuro* and the right to it must be determined as of the time of the hearing[,] . . . [t]he complainant has no vested right in the decree." *Id*. at 201. The MCA does not regulate injunctive relief governing future conduct in which the "complainant

has no vested right"; it purports to prohibit Hamdan's invocation of fully "vested" treaty rights in a pending proceeding. The exception governing prospective relief does not apply.

(c) Statutes ousting jurisdiction

The Supreme Court has "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Landgraf*, 511 U.S. at 274. The Court, however, has typically ousted jurisdiction in a pending case only when doing so "takes away no substantive right but simply changes the tribunal that is to hear the case." *Id*. (citation omitted). "Such statutes affect only where a suit may be brought, not whether it may be brought at all." *Hughes Aircraft*, 520 U.S. 939, 951 (1997).[2] MCA § 5(a) and § 948b(g) do not purport to be, and are not, jurisdictional statutes. They do not speak to the power of a court, but rather to an individual's right to invoke Geneva Conventions protections; and they do not provide individuals with an alternative forum for the assertion and vindication of their Geneva Conventions rights. Thus, this exception to the presumption against retroactivity also does not apply.

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[2] *See Bruner v. United States*, 343 U.S. 112 (1952) (applying to pending case statute withdrawing jurisdiction of District Courts over certain actions against the government where the Court of Claims was available as a forum); *Hallowell v. Commons*, 239 U.S. 506 (1916) (applying to pending case statute shifting jurisdiction to decide Indian intestacy to Secretary of the Interior); *The Assessors v. Osbornes*, 76 U.S. 567 (1869) (applying to pending case statute removing jurisdiction over actions against tax assessors from federal courts and requiring such actions to be maintained in state courts).

B. MCA § 5(a) and § 948b(g) Must Be Read To Permit the Assertion of Rights Protected by Multiple Sources of Law.

1. Such a reading is required to avoid a Suspension Clause violation.

(a) MCA § 5(a) and § 948b(g) violate the Suspension Clause if read to bar assertion of any rights protected by the Geneva Conventions.

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. A suspension of the Great Writ occurs when Congress acts to completely foreclose judicial review of a "pure question of law" challenging the legality of executive detention. *St. Cyr*, 533 U.S. at 300. If construed to foreclose judicial enforcement of rights protected by the Geneva Conventions in habeas cases, MCA § 5(a) and § 948b(g) would violate the Suspension Clause.

The Suspension Clause, "at the absolute minimum," protects the writ of habeas corpus "as it existed in 1789." *Id*. at 301 (citation omitted). "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention" of citizens or non-citizens. *Id*.; *Rasul v. Bush*, 542 U.S. 466, 481 (2004); *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial."). Challenges to executive detention – such as those presented here – invoke the writ's protections in their purest form and where the writ's protections "have been the strongest." *St. Cyr*, 533 U.S. at 301.

It is of no moment that the particular protections provided by the Geneva Conventions may not have been contemplated in 1789. The question is not whether the Founders contemplated the Geneva Conventions themselves, but rather "whether the *general nature* of the claims at issue were historically reviewable on a writ of habeas corpus." *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 220 (3rd Cir. 2003) (emphasis in original) (rejecting government's argument that the Suspension Clause does not protect habeas rights conferred by the Convention Against Torture).

Further, the writ of habeas corpus has "traditionally issued as a means of reviewing the legality of the detention of aliens in the face of alleged treaty violations." *Id*., at 221.[3] That Hamdan has been declared an enemy combatant by the Executive Branch does not change the analysis. The United States exercises "plenary and exclusive jurisdiction" over Guantanamo Bay, *Rasul*, 542 U.S. at 475, and its detainees are within the "historical reach of the writ of habeas corpus" at common law. *Id.* at 481-82. *See also King v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759) (reviewing, but denying, the habeas petition of an alien deemed a prisoner of war because he was captured aboard an enemy French privateer).

Construed to bar assertion of rights protected by the Geneva Conventions in habeas cases, MCA § 5(a) and § 948b(g) might avoid Suspension Clause difficulties if they provided "a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention." *Swain v. Pressley*, 430 U.S. 372, 381 (1977). But the MCA provides no such alternative: It precludes invoking the Geneva Conventions in *any* habeas or civil action in *any* federal or state court throughout the United States. *See* MCA § 5(a). The "absence of [an alternative judicial] forum, coupled with the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas of such an important question of law, strongly counsels against adopting a construction that would raise serious constitutional questions." *St. Cyr*, 533 U.S. at 314.

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[3] *See Wildenhus's Case*, 120 U.S. 1 (1887) (considering habeas corpus challenge of non-citizen alleging violations of consular agreement between United States and Belgium); *Saint Fort v. Ashcroft*, 329 F.3d 191, 201 (1st Cir. 2003) ("American courts have exercised habeas review over claims of aliens based on treaty obligations since the earliest days of the republic.").

(b) MCA § 5(a) and § 948b(g) do not violate the Suspension Clause if read to allow the assertion of rights protected by multiple sources of law.

MCA § 5(a) and § 948b(g) bar the invocation of the Geneva Conventions "as a source of rights." MCA § 3(a) ("No person may invoke the Geneva Conventions or any protocols thereto . . . *as a source of rights.*" (emphasis added)); 10 U.S.C. § 948b(g) ("GENEVA CONVENTIONS NOT ESTABLISHING SOURCE OF RIGHTS. No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions *as a source of rights*." (emphasis added)).

The qualifying phrase "as a source of rights" would appear to have meaning only if construed to refer to rights afforded exclusively by the Geneva Conventions, not to rights afforded by *other* sources of law, regardless of whether the rights are also afforded by the Geneva Conventions. Thus, MCA § 5(a) and § 948b(g) may be read not to bar enforcement of rights afforded by the laws of war or customary international law, even though such law may incorporate rights afforded by the Geneva Conventions, and even though the Geneva Conventions may incorporate rights afforded by such law. *See Hamdan*, 126 S. Ct. at 2786 (Geneva Conventions incorporated within the law of nations).

Congress recognized the distinction between "direct" reliance on the Conventions as the source of a right, and reliance on other law as the source of the right, even though reliance on such other law might be considered "indirect" reliance on the Conventions. S. 3861 provided:

> No person in any habeas action or any other action may invoke the Geneva Conventions or any protocols thereto as a source of rights, *directly or indirectly*, for any purpose in any court of the United States or its States or territories.

S. 3861, § 6(b)(1) (emphasis added), *available at* http://thomas.loc.gov; *see also* H.R. 6054, §6(b)(1). As enacted, however, the MCA does not include the phrase "directly or indirectly." This omission suggests that Congress did not intend to bar "indirect" reliance on the Geneva

Conventions by invoking other sources of law. *See Doe v. Chao*, 540 U.S. 614, 622 (2004) (rejecting interpretation proffered by government where Congress "cut out the very language in the bill that would have authorized" that interpretation).

Thus construed, MCA § 5(a) and § 948b(g) do not violate the Suspension Clause to the extent that other law also affords the rights at issue. Such a construction comports with "the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction," *St. Cyr*, 533 U.S. at 298; *Ogbudimkpa*, 342 F.3d at 217 (holding "nothing will suffice [to repeal habeas] but the most explicit statement"), and also with the canon that statutes "ought never to be construed to violate the law of nations, if any other possible construction remains," *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see also Weinberger v. Rossi*, 456 U.S. 25, 32 (1982).

Thus, the MCA leaves undisturbed *Hamdan's* holding that Uniform Code of Military Justice, 10 U.S.C. §§ 801 *et seq*., conditions the President's use of military commissions on compliance with the American common law of war and with the "'rules and precepts of the law of nations'. . . including, *inter alia*, the four Geneva Conventions signed in 1949." *Hamdan*, 126 S. Ct. at 2786 (citation omitted). Hamdan may not be tried or punished in violation of the protections of the Geneva Conventions because the law of war and customary international law, which incorporate the Conventions, continue to bind the military commissions.

2. Such a reading would render academic the de facto abrogation of the Conventions without a clear statement of an intent to do so.

Construing MCA § 5(a) and § 948b(g) to bar Hamdan from asserting any right protected by the Geneva Conventions would effectively abrogate the Conventions, because the Conventions "were written first and foremost to protect individuals, not to serve State interests," *Hamdan*, 126 S. Ct. at 2754 n.57 (quotations omitted), and would thus constitute an implicit repeal of

U.S. treaty obligations. *See* Amicus Br. of Gen. David M. Brahms *et al.*, *supra*, 12-13. That is because, as a practical matter, private enforcement of the Conventions is the only means of vindicating individual rights that the Conventions protect. *See id.* at 13-14.

"There is . . . a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action." *TWA, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). Under this canon, "[a] treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed." *Id.*[4] Courts apply this canon to ensure that "Congress – and the President – have considered" the weighty consequences of abrogating treaty obligations. *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 238 (D.C. Cir. 2003). The "requirement of clear statement" of intent to abrogate treaty obligations "assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* Congress must state clearly that it is abrogating the Geneva Conventions in order for MCA § 5(a) and § 948b(g) to be given that effect.

The MCA includes no such clear statement. On the contrary, the MCA makes clear its intent to implement treaty obligations, including the Geneva Conventions, not abrogate them. For example, MCA § 6(a), entitled "IMPLEMENTATION OF TREATY OBLIGATIONS," purports to define "grave breaches" of Common Article 3 of the Geneva Conventions. Had Con-

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[4] *See Cook v. United States*, 288 U.S. 102, 120 (1933); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 237 (D.C. Cir. 2003); *see also Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Chae Chan Ping v. United States*, 130 U.S. 581, 599 (1889); *Chew Heong v. United States*, 112 U.S. 536, 550 (1884); *United States v. Forty-Three Gallons of Whisky*, 108 U.S. 491, 496 (1883) ("The laws of congress are always to be construed so as to conform to the provisions of a treaty, if it be possible to do so without violence to their language.").

gress intended abrogation, it would not have signaled its intent to "implement" the treaty nor had reason to define "grave breaches."

The legislative history includes statements by the MCA's supporters indicating that they did not intend for the statute to abrogate the Conventions. During floor debate, Senator McCain and Senator Warner, a sponsor of the bill enacted as the MCA, stated that the MCA preserves the Geneva Conventions:

> MR. MCCAIN. I am pleased that *this legislation before the Senate does not amend, redefine, or modify the Geneva Conventions in any way. The conventions are preserved intact.*
>
> *This point is critical*, because our personnel deserve not only the legal protections written into this legislation, but also the undiluted protections offered since 1949 by the Geneva Conventions. Should the United States be seen as amending, modifying, or redefining the Geneva Conventions, it would open the door for our adversaries to do the same, now and in the future. The United States should champion the Geneva Conventions, not look for ways to get around them, lest we invite others to do the same. America has more personnel deployed, in more places, than any other country in the world, and this unparalleled exposure only serves to further demonstrate the critical importance of our fulfilling the letter and the spirit of our international obligations. To do any differently would put our fighting men and women directly at risk. We owe it to our fighting men and women to uphold the Geneva Conventions, just as we have done for 57 years.
>
> *For these reasons, this bill makes clear that the United States will fulfill all of its obligations under those Conventions.*
>
> MR. WARNER. Mr. President, I wish to commend our distinguished colleague on an excellent summary of the bill and his heartfelt expressions and interpretations of this bill, which I share.

152 Cong. Rec. S10354-02, S10414 (Sept. 28, 2006) (emphases added).

Congress cannot be said to "have considered the consequences" of abrogating the Geneva Conventions when the text does not explicitly abrogate them and, to the contrary, the legislative history shows that Congress believed just the opposite. *Cf. Roeder*, 333 F.3d at 238 (construing statute to avoid abrogation where the statute is silent and the legislative history contains evidence that Congress *did intend* to abrogate a treaty). To the extent that MCA § 5(a) and § 948b(g) are

read to permit the assertion of rights protected by multiple sources of law, however, the issue of abrogation, like the issue of suspension, is academic.

II. THE MCA TRENCHES ON THE POWER OF THE COURTS TO INTERPRET TREATIES.

The MCA contains several provisions that purport to declare the meaning of the Geneva Conventions. These provisions (i) declare that the military commissions established by the MCA are "regularly constituted courts" under Common Article 3; (ii) define the offenses "traditionally triable" by military commissions; (iii) define the extent of the United States' obligations to penalize "grave breaches" of Common Article 3; (iv) define the offenses that constitute "grave breaches"; and (v) grant the President the authority to interpret the Conventions.

> **10 U.S.C. § 948b(f)** (added by MCA § 3(a)(1)): STATUS OF COMMISSIONS UNDER COMMON ARTICLE 3.—A military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions.
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> **10 U.S.C. § 950p** (added by MCA § 3(a)(1)): (a) PURPOSE.—The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.
>
> (b) EFFECT.—Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.
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> **MCA § 6(a)(2)**: PROHIBITION ON GRAVE BREACHES.—The provisions of section 2441 of title 18, United States Code, as amended by this section, fully satisfy the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character. No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of such section 2441.
>
> **MCA § 6(a)(3)**: INTERPRETATION BY THE PRESIDENT.—(A) As provided by the Constitution and by this section, the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions

> and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.
>
> **MCA § 6(b)**: PROHIBITED CONDUCT.—. . . [T]he term 'grave breach of common Article 3' means any conduct (such conduct constituting a grave breach of common Article 3 of the international conventions done at Geneva August 12, 1949), as follows: (A) TORTURE . . . (B) CRUEL OR INHUMAN TREATMENT . . . (C) PERFORMING BIOLOGICAL EXPERIMENTS . . . (D) MURDER . . . (E) MUTILATION OR MAIMING . . . (F) INTENTIONALLY CAUSING SERIOUS BODILY INJURY . . . (G) RAPE . . . (H) SEXUAL ASSAULT OR ABUSE . . . (I) TAKING HOSTAGES.[5]

None of these legal conclusions are binding upon Article III courts. As discussed in our earlier amicus brief, (1) federal courts are empowered and obligated to interpret treaties; (2) the courts may compel the Executive Branch to conform its actions to the requirements of the Geneva Conventions as judicially construed; and (3) judicial enforcement of the Conventions does not de-

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[5] The MCA contains other provisions that may be understood to imply conclusions of law with respect to Geneva Conventions obligations:

> (i) 10 U.S.C. § 948a(1) (added by MCA §3(a)(1)), defining those potentially subject to military commission (unlawful enemy combatants) in a manner that purports to accept as definitive the findings of a Combatant Status Review Tribunal (see also §3(a)(1) (adding 10 U.S.C. §948d(c)));
>
> (ii) 10 U.S.C. § 948b(d) (added by MCA §3(a)(1)), rendering inapplicable the speedy trial provisions and the prohibitions on compulsory self-incrimination from the Uniform Code of Military Justice;
>
> (iii) 10 U.S.C. § 948r(c) (added by MCA §3(a)(1)), potentially admitting as evidence statements "in which the degree of coercion is disputed";
>
> (iv) 10 U.S.C. § 949a(b)(2)(E)(i) (added by MCA §3(a)(1)), permitting hearsay evidence in certain circumstances;
>
> (v) 10 U.S.C. § 949d(f) (added by MCA §3(a)(1)), permitting the use of classified evidence to which the defendant would not have full access, see also 10 U.S.C. §949j(c) (added by MCA §3(a)(1)); and
>
> (vi) 10 U.S.C. § 950v(b) (added by MCA §3(a)(1)), listing terrorism, material support for terrorism, and conspiracy as offenses triable by military commission (including retroactively, see 10 U.S.C. § 950p (added by MCA §3(a)(1)).

pend on further action by Congress. *See* Amicus Br. of Gen. David M. Brahms *et al.*, *supra*, 7-15.

"If treaties are to be given effect as federal law, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court.'" *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2673 (2006) (citation omitted). As the Supreme Court has stated:

> No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text. As we emphasized in *United States v. Nixon*: "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. . . . Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury* that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'"

United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) (citations omitted). Accordingly, with treaties as with statutes, Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *United States v. Klein*, 80 U.S. 128, 146 (1871); *Miller v. French*, 530 U.S. 327, 348-49 (2000). In *Klein*, Congress enacted a statute that required courts deciding claims to confiscated Confederate property to give certain Presidential pardons conclusive weight in determining that the petitioner had been disloyal (and therefore had no claim to the property). The Court held that Congress could not so dictate determinations that fell squarely within the Judicial Power.

Only a court can decide, using the traditional tools of judicial analysis, whether the military commissions are "regularly constituted courts" under Common Article 3, *see* 10 U.S.C. § 948b(f); whether a particular crime has traditionally been triable by military commissions, *see*

id. § 950p[6]; whether the United States has met its obligations to penalize 'grave breaches' of Common Article 3, *see* MCA § 6(A)(2); or whether a particular offense is such a breach, *see id.* § 6(b).[7]

Moreover, like an interpretation of a treaty by Congress, an interpretation of a treaty by the Executive Branch does not bind the judiciary. *See* Amicus Br. of Gen. David M. Brahms *et al.*, *supra* 9-10. Therefore, any authority purportedly granted by Congress to the Executive to interpret the Geneva Conventions, *see* MCA § 6(a)(3)(A)-(C), does not bind the judiciary. Indeed, the MCA appears to say as much. *See* MCA § 6(a)(3)(D) ("Nothing in this section shall be construed to affect the constitutional functions and responsibilities of Congress and the judicial branch of the United States.").

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[6] In fact, the *Hamdan* plurality expressed the view that at least one of the crimes defined by the MCA to be "traditionally been triable by military commissions" is *not* such a crime. *Compare* 10 U.S.C. § 950v(b) (added by MCA § 3(a)(1)), defining "conspiracy" as a triable offense, *with Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2785 (2006) (plurality opinion) ("[T]he Government has failed even to offer a 'merely colorable' case for inclusion of conspiracy among those offenses cognizable by law-of-war military commission.").

[7] The MCA's list of 'grave breaches' is incomplete. Article 130 of the Third Geneva Convention states that "willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention" is an offense considered a "grave breach." MCA § 6(b) does not include such an offense.

CONCLUSION

The government's motion to dismiss this action should be denied.

Respectfully submitted,

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