No. 05-184

In the Supreme Court of the United States

SALIM AHMED HAMDAN, PETITIONER

v.

DONALD H. RUMSFELD, ET AL.

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

AMICUS CURIAE BRIEF OF RETIRED GENERALS AND ADMIRALS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the President may deny an individual captured in an armed conflict the protections of the Geneva Conventions by "finding" that the Conventions do not apply to the individual.

2. Whether the federal courts may review a habeas petitioner's claim that he is being held in the custody of the United States in violation of the Geneva Conventions.

3. Whether the military commission established by the President to try Petitioner for offenses against the laws of war violates the Geneva Conventions.

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TABLE OF AUTHORITIES

FEDERAL CASES

Abney v. United States,
431 U.S. 651 (1977) 19

Bates v. United States,
522 U.S. 23 (1997) 19

Central Bank v. First Interstate Bank,
511 U.S. 164 (1994) 19

Diggs v. Richardson,
555 F.2d 848 (D.C. Cir. 1976) 13

Ernst & Ernst v. Hochfelder,
425 U.S. 185 (1976) 19

F. Hoffman-La Roche Ltd. v. Empagran S.A.,
124 S. Ct. 2359 (2004) 15

Hamdi v. Rumsfeld,
124 S. Ct. 2633 (2004) 16

Head Money Cases,
112 U.S. 580 (1884) 13

Helstoski v. Meqanor,
442 U.S. 500 (1979) 19

INS v. St. Cyr,
533 U.S. 289 (2001) 17

Johnson v. Eisentrager,
339 U.S. 763 (1950) 14

Medellin v. Dretke,
125 S. Ct. 2088 (2005) 13

Murray v. Schooner Charming Betsy,
6 U.S. (2 Cranch) 64 (1804) 15

Ogbudimkpa v. Ashcroft,
342 F.3d 207 (3d Cir. 2003) 16

Ex Parte Quirin,
317 U.S. 1 (1942) 19

Rasul v. Bush,
124 S. Ct. 2686 (2004) 14

Santa Fe Industries, Inc. v. Green,
430 U.S. 462 (1977) 19

Sell v. United States,
539 U.S. 166 (2003) 19

Solorio v. United States,
483 U.S. 435 (1987) 19

Stack v. Boyle,
342 U.S. 1 (1951) 19

United States v. *Nixon*,
418 U.S. 683 (1974) 19

Youngstown Sheet & Tube Co. v. *Sawyer*,
343 U.S. 579 (1952) 16

FEDERAL MATERIALS

U.S. Const. art. I § 9, cl. 2 17

10 U.S.C. § 821 ..... 15, 16

10 U.S.C. § 836 15

10 U.S.C. § 839(b) 17, 18

Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) 15

Uniform Code of Military Justice, 47 U.S.C. 801 et seq. ..... *passim*

101 Cong. Rec. 9960 (1955) 5

Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* 11, 13

Dep't of the Army, *Field Manual No. 27-10, The Law of Land Warfare* (1956) 13

Dep't of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* (1992) 12

Dep't of Defense, *Fact Sheet, Changes to Military Commission Procedures* (Aug. 31, 2005) 17

Dep't of State Bull. 10 (Jan. 4, 1971) 6

Geneva Conventions for the Protection of War Victims: Hearing Before the Senate Comm. on Foreign Relations, 84th Cong., 1st Sess. 3-4 (1955) 4

Geneva Conventions for the Protection of War Victims: Report of the Senate Comm. on Foreign Relations, S. Rep. No. 9, 84th Cong. 1st Sess. (1955) 12

Presidential Mem. and Order to the Vice President, *et al.* (Feb. 7, 2002) 10

INTERNATIONAL LEGAL MATERIALS

Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, art. 102, 6 U.S.T. 3316, 74 U.N.T.S. 135 ..... *passim*

Uhler, Oscar M., et al., *Commentary IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Jean S. Pictet ed., 1958) 11, 13-14

MISCELLANEOUS

59 *International Law Studies: Prisoners of War in International Armed Conflict* (Naval War College Press, 1978) 14

Brief Amici Curiae of Fifteen Law Professors, filed Dec. 29, 2004, Hamdan v. Rumsfeld, Civ. Action No. 04-CV-1519 16

Brief Amici Curiae of the Urban Morgan Institute for Human Rights, filed Dec. 29, 2004, Hamdan v. Rumsfeld, Civ. Action No. 04-CV-1519 15-16

Prugh, Maj. Gen. George S., *Vietnam Studies, Law at War: Vietnam 1964-73* (1974) 6

Kunz, Josef L., *The Chaotic Status of the Laws of War and the Urgent Need for Their Revision*, 45 Am. J. Int'l L. 37 (1951) 6

Lawyers' Committee for Human Rights, *Assessing the New Normal: Liberty and Security for the Post-September 11 United States* (2003) 9

Levie, Howard S., *Prisoners of War in International Armed Conflict* (1977) 6

Lewis, Paul, *U.N., Urged by U.S., Refuses to Exchange Somalis*, N.Y. Times, Oct. 8, 1993, at A16 8

McDonald, Neil & Sullivan, Scott, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror"*, 44 Harv. Int'l L.J. 301 (2003) 7, 8

McGirk, Jan, *Pakistani Writes of His US Ordeal*, Boston Globe, Nov. 17, 2002, at A30 11

Mofidi, Manooher & Eckert, Amy E., *"Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels*, 36 Cornell Int'l L.J. 59 (2003) 8

Naqvi, Yasmin, *Doubtful Prisoner-of-War Status*, 847 Int'l Rev. Red Cross 571 (2002) 11

Restatement (Third) of the Foreign Relations Law of the United States, §111 cmt. h (1987) 13

Stern, Robert, et. al., *Supreme Court Practice* (8th ed. 2002) 19

Scarborough, Rowan, *Powell Wants Detainees to be Declared POWs*, Wash. Times, Jan. 26, 2002, at A1 10

William H. Taft IV, Legal Adviser, Dep't of State, Memorandum to Counsel to the President (Feb. 2, 2002) 5, 11

Vladeck, Stephen, Comment, *Non-Self-Executing Treaties and the Suspension Clause After St. Cyr*, 113 Yale L. J. 2007 (2004) 17

INTEREST OF AMICI [1]

Amici are retired senior military officials with extensive experience in legal policy, the laws of war, and armed conflict. Amici have spent their careers leading troops at home and overseas and protecting the nation from attack. Amici filed briefs supporting Petitioner in the district court and the court of appeals. The district court relied on their brief. (*See* Pet. App. 30a, 31a, 33a-34a, 37a.)

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.

Major General John L. Fugh served in the United States Army from 1961 to 1993. From 1991 to 1993, he served as the Army's Judge Advocate General. Before that, General Fugh served as the

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[1] Letters of consent have been lodged with the Clerk. No counsel for a party authored any part of this brief. Amici or its counsel will bear all costs associated with this brief.

Army's chief litigator in federal courts and acted as a legal policy advisor to the Department of Defense.

Vice Admiral Lee F. Gunn served in the United States Navy for 35 years. From 1997 to 2000, he was the Inspector General of the Department of the Navy. Admiral Gunn commanded the USS Barbey, Destroyer Squadron Thirty-One, and Amphibious Group Three, comprising the 21 ships, 12 shore commands, and 15,000 Sailors and Marines of the Pacific Amphibious Forces. He also 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 United States 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 Army after thirty-six 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 is a professor of International Relations at Monmouth University in New Jersey and 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 venues as Cambodia, Rwanda, and the Ukraine, and serves as a defense expert before the Special Court in Sierra Leone.

REASONS FOR GRANTING THE WRIT

The Court should grant review because the decision of the court of appeals immediately and directly endangers American soldiers and undermines the laws of war.

1. The United States adopted the Geneva Conventions to protect American soldiers captured in battle. The United States has consistently applied the Conventions to all enemies – from signatory states to Somali warlords – in the belief that doing so would encourage our enemies to apply the Conventions to our soldiers.

By applying the Conventions in this manner, the United States has saved untold numbers of American soldiers from torture and death.

2. The President in this case claims authority to deny an individual captured in an armed conflict the protections of the Geneva Conventions by making "findings" that render the Conventions inapplicable to the individual. Here, the President seeks to avoid the requirements of the Article 5 of the Third Geneva Convention and Common Article 3 by making findings that (i) preempt the prescribed inquiry into whether Petitioner is entitled to be treated as a prisoner of war, and (ii) define the conflict in which Petitioner was captured as one to which the Geneva Conventions simply do not apply. In sustaining the President's circumvention, the court of appeals has undermined the purpose for which the United States adopted the Conventions – to protect American soldiers captured in armed conflicts. Whether the President may deny the protections of the Geneva Conventions to individuals to whom he has "found" the Conventions inapplicable is a question of mortal consequence for American soldiers, and for that reason warrants review.

3. The court of appeals also ruled that even if the President may not deny Petitioner the protections of the Geneva Conventions, Petitioner has no judicial remedy because the President's denial is unreviewable. This ruling conflicts with the long-held view of Congress and the Executive Branch that the Conventions are judicially enforceable, disregards *The Charming Betsy* principle that federal statutes are to be construed whenever possible not to violate international law, and fails to confront the fact that Petitioner has asserted his claims in a habeas action. The court's ruling that Petitioner may not assert claims under the Geneva Conventions has the same effect, and threatens the same harms, as its ruling that the President may deny individuals the protections of the Conventions. Review of this ruling is likewise warranted.

4. The Geneva Conventions do not allow the United States to try Petitioner for violations of the laws of war by means of the military commission established by the President to try him. Unless and until Petitioner's status is determined by an Article 5

tribunal, he is entitled to be treated as a prisoner of war and tried by a body affording all the protections of a body that the United States would use to try its soldiers. The military commission also suffers from other fatal defects.

5. Review is warranted despite the interlocutory posture of the case. Whether and how the Geneva Conventions apply to prisoners such as Petitioner are questions that must ultimately be decided by this Court. The questions will recur, require no further development, and are urgent for American soldiers around the world. This is case is an appropriate vehicle to decide those questions.

I. DENYING GENEVA CONVENTION PROTECTIONS TO INDIVIDUALS SEIZED IN ARMED CONFLICTS ENDANGERS AMERICAN SOLDIERS.

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

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 declared 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.

More recently, Senator Biden stated:

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

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

As the Legal Adviser to the State Department stated:

> 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.

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

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

The United States has been steadfast in applying the Conventions – even as to soldiers of regimes that insisted the Conventions

did not bind them, and even as to agents of enemies that were not governments. 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 combatant nations 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, 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) (reprinting 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 American Red Cross "Promise of Humanity" Conference (May 6, 1999), *available at* http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content_id=820. Senator McCain stated that he and other POWs are grateful to have been "spare[d] * * * the indignity of [being] put on trial in violation of the conventions." *Id.*

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

For example, 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 the protections of the Geneva Conventions to Petitioner and others similarly situated weakens the United States' ability to demand that the Conventions be applied to Americans captured during armed conflicts abroad. That the President believes that he is entitled to deny those protections to Petitioner and others similarly situated 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).

Such erosion is already occurring. Alarmingly, but predictably, other governments have begun citing the United States' new approach to justify their repressive policies:

Egypt. President Mubarak stated that United States policies following Sept. 11 justified the use of "all means" to combat terror-

ism, and that "the events of September 11 created a new concept of democracy that differs from the concept that Western states defended before these events, especially in regard to the freedom of the individual."

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

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

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

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.

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

II. WHETHER THE PRESIDENT MAY DENY GENEVA CONVENTION PROTECTIONS TO INDIVIDUALS SEIZED IN ARMED CONFLICTS MERITS REVIEW.

The Geneva 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 5 of the Third Geneva Convention requires that an individual captured in an armed conflict be treated as a prisoner of war for purposes of Article 4 unless and until a "competent tribunal" determines that he is not entitled to such treatment. The court of appeals allowed the President to avoid the Article 5 requirement based on his "findings" that Petitioner (i) was captured in an armed conflict to which the Convention does not apply and (ii) in any

event does not qualify for POW status because he is a member of al Qaeda or has engaged in terrorism. The court also allowed the President to avoid the humanitarian requirements of Common Article 3 based on his determinstion that the article applies only to local, not international, conflicts. *See* Pet. App. 10a-13a (court of appeals opinion); *id.* at 28a-34a (district court opinion).

The President lacked authority to "find" that the Third Geneva Convention does not apply to the armed conflict in which Petitioner was captured; and the court of appeals erred in deferring to this "military-political" decision. (*See* Pet. App. 11a-13a.)

The President decided that Petitioner 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.[2] 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 there were two parallel conflicts in Afghanistan, Petitioner was captured by Afghan paramilitary forces allied with the United States and fighting the Taliban. (*See* Hamdan Aff., Pet. App. 77a.)

Secretary of State Powell was therefore correct when he concluded that the Conventions apply to both al Qaeda and Taliban fighters. Rowan Scarborough, *Powell Wants Detainees to the Declared POWs*, Wash. Times, Jan. 26, 2002, at A1. His Legal Advisor explained:

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[2] Presidential Mem. and Order to the Vice President, *et al.* (Feb. 7, 2002), at ¶ 2, *available at* http://www.library.law.pace.edu/research/020207_bushmemo.pdf.

> [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.

Taft Mem., *supra*, at 3.

Common Article 2 was written "as a catchall, to include every type of hostility which might occur without being 'declared war,'" Oscar M. Uhler et al., *Commentary IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 14-15 (Jean S. Pictet ed., 1958), ensuring that "nobody in enemy hands can be outside the law," *id.* at 51. Its expansive language was intended to "deprive belligerents, in advance, of the pretexts they might in theory put forward for evading their obligations." *Id.*

The Conventions create a presumption that a prisoner who is captured in a war zone is a prisoner of war. *See* Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 847 Int'l Rev. Red Cross 571, 571 (2002). *Accord*, Army Regulation 190-8, §1-6(b). Under Article 5 of the Third Geneva Convention, when there is doubt about a captive's status, the captive is entitled to POW treatment until his status is determined by a "competent tribunal." *Accord* Army Regulation 190-8, which implements Article 5 for the U.S. military. A captive's claim that he is a POW is sufficient to such create doubt.

It is not for the President to preempt the Article 5 inquiry by making his own determination that Petitioner does not qualify for treatment as a prisoner of war. Notwithstanding the court's decision, doubt about Petitioner's status remains. Petitioner was captured in a war zone by bounty-hunting Afghan paramilitary forces with monetary incentives to claim Al Qaeda affiliations for as many of their captives as possible. Jan McGirk, *Pakistani Writes of His US Ordeal*, Boston Globe, Nov. 17, 2002, at A30. The President may not negate Petitioner's claim to POW status under the

Conventions, at least until the Government affords Petitioner with an Article 5 "competent tribunal" to determine his status.

Article 5's requirement of an individual adjudication by a "competent tribunal" is no mere formality. 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 but a displaced civilian. Dep't of Defense, *Conduct of the Persian Gulf War: Final Report to Congress*, at 578 (1992), available at http://www.ndu.edu/library/epubs/cpgw.pdf.

III. WHETHER A HABEAS PETITIONER MAY ASSERT CLAIMS UNDER THE GENEVA CONVENTIONS MERITS REVIEW.

A. The Ruling Below Conflicts With Long-Held Views of Congress and the Executive Branch.

When it gave its consent to the 1949 Geneva Conventions, the Senate understood them 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.

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); Dep't of the Army, Field Manual No. 27-10, *The Law of Land Warfare*, ch. 3, § I 71 (1956) (adopting article 5 of Third Convention verbatim).

This congressional and Executive branch understanding is well-rooted in law. Notwithstanding the court of appeals' conclusion that treaties traditionally do not create judicially enforceable individual rights (Pet App. 7a), it has long been understood that

> a treaty may * * * contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. * * * And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

Head Money Cases, 112 U.S. 580, 598 (1884). *See also Medellin v. Dretke*, 125 S. Ct. 2088, 2099-2100 (2005) (O'Connor, J., dissenting). Whether a particular provision of a treaty is self-executing is a function of the intent of the parties as manifested by the text of the treaty and the circumstances surrounding execution of the treaty. *See Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976). "If the international agreement is silent as to its self-executing character * * * account must be taken of * * * any expression by the Senate or by Congress in dealing with the agreement." *Restatement (Third) of the Foreign Relations Law of the United States* § 111 cmt. h (1987).

The text and history of the Conventions makes clear that they 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). Article 102, offering equivalent procedural protections to a POW as those available to a soldier of the detaining power, is but one example.

Indeed, if the Conventions are not self-executing, certain provisions are rendered nonsensical. Article 7 of the Third Convention 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." Why would the Conventions address whether individuals may waive rights that are not enforceable by them?

The Court of Appeals based its holding that the 1949 Geneva Conventions are not self-executing upon dicta in a footnote in *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950). That footnote suggested that enforcement of the 1929 Geneva Conventions was left to the diplomatic process. (*See* Pet. App. 9a-10a.) But the 1949 Conventions diverge substantially from their 1929 predecessors and were written precisely to correct the "clearly demonstrated * * * deficiencies which existed in the 1929 Geneva Conventions" with respect to the scope of their application and enforceability. 59 *International Law Studies: Prisoners of War in International Armed Conflict* 1, 9-10 (Naval War College Press, 1978).

Even if the 1929 and 1949 Conventions were identical, the court of appeals read too much into *Eisentrager*. The Court of Appeals held that *Eisentrager* precluded the enforcement of the Geneva Conventions through *habeas*. But *Eisentrager* merely held that domestic courts had no territorial jurisdiction over Nazis held in China. This Court affirmed that domestic courts have territorial jurisdiction over the prisoners at Guantánamo and have jurisdiction to entertain their habeas claims. *Rasul v. Bush*, 124 S. Ct. 2686 (2004). The text of the Conventions and the long-established understandings of Congress and the Executive Branch demonstrate that Petitioner and others similarly situated may seek habeas relief based on violations of the Geneva Conventions.

B. The Ruling Below Violates The *Charming Betsy* Canon Of Statutory Construction.

In ruling that the President has authority to avoid the Geneva Conventions, the court of appeals disregarded the principle that a congressional statute is "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.). "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).

The *Charming Betsy* canon requires that courts interpret the statutes conferring congressional authorization for the military commissions to be consistent with the law of nations, and the Geneva Conventions. The court of appeals identified those statutes as the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224, 224 (2001) (authorizing the President "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); the statute recognizing the jurisdiction of military tribunals, 10 U.S.C. 821; and the statute granting the President the authority to prescribe procedures for the military commissions, 10 U.S.C. 836.

To the extent that the AUMF authorized the creation of military commissions, a court must construe such authorization to preclude commissions that are inconsistent with the Geneva Conventions. To the extent that Congress authorizes the President to write procedures for military commissions, 10 U.S.C. 836, a court must construe this authority to preclude procedures that violate the law of nations, including the Geneva Conventions. *See also*, Brief Amici Curiae of the Urban Morgan Institute for Human Rights, filed Dec. 29, 2004, Hamdan v. Rumsfeld, Civ. Action No. 04-CV-1519, available at http://www.law.georgetown.edu/faculty/nkk/documents/conlaw.profs.pdf (arguing that the Charming Betsy

canon requires construing these statutes to comply with the Geneva Conventions).

Even if military commissions are purely a product of the President's Commander-in-Chief powers (which the court of appeals did not decide (*see* Pet. App. 5a), the *Charming Betsy* canon requires a court to conclude that Congress has limited this power to creating commissions consistent with the law of war. The statute, 10 U.S.C. 821, limits the jurisdiction of military tribunals to "offenders * * * triable under the law of war," and the Geneva Conventions are foundational to the law of war, *see Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2641 (2004) (plurality opinion). Otherwise, the President is operating against Congressional will, and "his power is at its lowest ebb." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). *See also*, Brief Amici Curiae of Fifteen Law Professors, filed Dec. 29, 2004, Hamdan v. Rumsfeld, Civ. Action No. 04-CV-1519, available at http://www.law.georgetown.edu/faculty/nkk/documents/conlaw.profs.pdf (arguing that the military commissions are unconstitutional because, as currently constituted, they are not authorized by any Congressional statute fairly read, and therefore violate separation of powers).

C. The Ruling Below Disregards the Fact that Petitioner Has Asserted His Claims in a Habeas Action.

The court of appeals held that Petitioner's habeas claim failed because the Geneva Conventions are not self-executing. (Pet. App. 10a.) A self-executing treaty supplies a private right of action; a non-self-executing treaty does not. Whether the Geneva Conventions are self-executing does not matter here, however, because the habeas statute supplies Petitioner with his right of action even if the Conventions do not. *See Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 208 n.22 (3d Cir. 2003) (suggesting this point).

Construing the habeas statute to exclude claims under non-self-executing treaties would raise questions under the Suspension Clause, which provides: "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. Such a construction should therefore be avoided. *See INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001); Stephen I. Vladeck, Comment, *Non-Self-Executing Treaties and the Suspension Clause After St. Cyr*, 113 Yale L.J. 2007, 2011-12 (2004).

IV. THE MILITARY COMMISSION PROCEDURE ESTABLISHED TO TRY PETITIONER VIOLATES THE GENEVA CONVENTIONS.

Article 102 of the Third Geneva Convention states that a "[POW] can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power."

The military commission procedure established to try Petitioner violates his right under Article 102 to treatment equal to that granted U.S. soldiers under the UCMJ. Under the procedure established to try him, Petitioner does not have a right to confront all evidence admitted against him and to be present at all phases of the trial except deliberations and voting. *See* 10 U.S.C. 839(b) ("All [proceedings other than deliberations and voting] * * * shall be in the presence of the accused * * *."). The military commission established to try Petitioner allows evidence to be admitted that Petitioner would never see, and those procedures have already permitted trial proceedings, such as voir dire, to go forward without Petitioner's participation. (*See* Pet. App. 41a, 45a.)

The President recently announced modifications to the military commission procedures that address some features of the military commission procedures that the district court had ruled unlawful. *See* Dep't of Defense, *Fact Sheet, Changes to Military Commission Procedures* (Aug. 31, 2005), available at http://www.defenselink.mil/news/Aug2005/d20050831fact.pdf. These modifications,

however, do not yield the body that the United States would use to try one of its own soldiers.

Nor can the mdifications cure the fact that, contrary to 10 U.S.C. 839(b), Petitioner has *already* been excluded from voir dire. Section 839(b)'s participation rights go not simply to what the evidence is used for: An accused's participation at voir dire is essential for helping his counsel guide litigation strategy. Therefore, the underlying procedural violation that the district court enjoined, and that the court of appeals held lawful, remains.

That the Government can change the rules any time it pleases simply underlines the lawlessness of its procedures. As long as Respondents' efforts to cure these violations falls short of granting Petitioner all of the procedural protections of a court-martial under the UCMJ, the military commission will continue to violate Article 102 of the Third Geneva Convention.

V. THIS CASE IS AN APPROPRIATE VEHICLE FOR DECIDING THE QUESTIONS PRESENTED.

Petitioner's case is the first of a series of military commission cases planned by the Government. The questions presented will recur, and they require no further development. This case presents those questions in paradigmatic form, and thus is an appropriate vehicle to address them. Petitioner, the other prisoners at Guantánamo, the lower federal courts, and the nation's troops overseas should not be forced to wait several more years to learn the answers to these vital questions.

Because all Guantánamo litigation has been transferred to the federal courts in Washington DC, the issues raised in this case are unlikely to be raised elsewhere. Accordingly, there is no reason to allow the questions to await additional consideration of the questions presented by the courts of appeal.

That the case is in an interlocutory posture also should not precede review. The Court has often intervened at an interlocutory stage in cases raising issues of importance to the system of military justice. This Court did just that the last time that military commis-

sions were created. *Ex Parte Quirin*, 317 U.S. 1 (1942). *See also Solorio v. United States*, 483 U.S. 435 (1987) (jurisdiction of court-martial). Delay is simply not an option in light of the danger to American soldiers posed by the ruling below.

The Court, moreover, has reviewed general criminal cases at an interlocutory stage when the issue was sufficiently distinct and important, and when irreparable harm would otherwise result. *See, e.g., Sell v. United States*, 539 U.S. 166 (2003) (whether a court can force medication upon a defendant), *Bates v. United States*, 522 U.S. 23 (1997) (whether specific intent is an element of offense of misapplying student loan funds); *Helstoski v. Meanor*, 442 U.S. 500 (1979) (whether Congressman had immunity on bribery charge under Speech and Debate clause); *Abney v. United States*, 431 U.S. 651 (1977) (whether new trial under a different indictment implicated Double Jeopardy); *Stack v. Boyle*, 342 U.S. 1 (1951) (whether bail was excessive). *See also* Robert L. Stern *et al., Supreme Court Practice*, § 4.18 at 258 n.59 (8th ed. 2002) (listing exceptions, including in cases involving military justice, to the default rule that the Court does not grant review on interlocutory appeals in routine criminal cases).

Finally, the Court has not hesitated to review important political issues at an interlocutory stage, *see, e.g., United States v. Nixon*, 418 U.S. 683 (1974) (whether a subpoena duces tecum should issue against the President, in case with unique political ramifications), or to intervene at an interlocutory stage when doing so is likely to hasten or resolve litigation of an important issue common among a number of lawsuits, *see, e.g., Cent. Bank v. First Interstate Bank*, 511 U.S. 164 (1994); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (all involving securities litigation issues).

CONCLUSION

For the reasons stated, the petition should be granted.

Respectfully,

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