No. 09- 09-35 JUL 07 2009

IN THE

Supreme Court of the United States

GENERAL MANUEL ANTONIO NORIEGA,

Petitioner,

v.

GEORGE PASTRANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FRANK. A. RUBINO
1001 Brickell Bay Drive
Suite 2206
Miami, FL 33131
(305) 858-5300

JON MAY
Counsel of Record
1001 Brickell Bay Drive
Suite 2206
Miami, FL 33131
(305) 373-3740

Counsel for Petitioner

223816

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

I. Whether the Eleventh Circuit Court of Appeals's interpretation of Section 5 of the Military Commissions Act of 2006 violates the Supremacy Clause of the Constitution of the United States.

II. Whether the Eleventh Circuit Court of Appeals's interpretation of the Geneva Convention to permit the extradition of prisoners of war conflicts with previous decisions of this Court on treaty interpretation and statutory construction.

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Petitioner General Manuel Antonio Noriega respectfully petitions for a writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals affirming the decision of the District Court for the Southern District of Florida denying General Noriega's petition for writ of habeas corpus seeking an order to compel the United States to immediately repatriate General Noriega to Panama pursuant to the Geneva Convention Relative to the Treatment of Prisoners of War.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eleventh Circuit (Pet. App. 1a-18a) is reported at 564 F.3d 1290.

JURISDICTION

This Eleventh Circuit affirmed the order of the District Court denying the petition for writ of habeas corpus on April 8, 2009. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Art. VI, Para. 2, U.S. Const.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law

of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

Sec. 5, Military Commissions Act (2006)

(a) IN GENERAL.—No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus petition 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.

STATEMENT OF THE CASE

In 1989 General Manuel Antonio Noriega nullified the presidential elections in Panama when the candidate he supported lost the popular vote. General Noriega was subsequently made the maximum leader of Panama and on December 15, 1989, General Noriega declared that a "state of war" existed between Panama and the United States. Four days later, December 20, 1989, President George Bush ordered U.S. troops into combat in Panama on a mission whose stated goals were to "safeguard American lives, restore democracy, preserve the Panama Canal treaties, and seize General Noriega to face federal drug charges." Approximately eleven days later General Noriega surrendered to American forces. On the flight to Florida, General Noriega was formally arrested by

agents of the Drug Enforcement Administration. *United States v. Noriega*, 746 F.Supp. 1506, 1511 (S.D.Fla. 1992).

General Noriega was subsequently tried on an indictment charging him with: RICO and RICO conspiracy (18 U.S.C. § 1962(c) and (d)) (Counts 1 & 2); conspiracy to import and distribute cocaine (21 U.S.C. § 963) (Counts 3 & 9); distribution of cocaine (21U.S.C. § 959) (Counts 4, 5, & 10); manufacture of cocaine (21 U.S.C. § 959) (Count 6); conspiracy to manufacture, distribute and import cocaine (21 U.S.C. § 963) (Count 7); and unlawful travel to promote a business enterprise involving cocaine (18 U.S.C. § 1952(a)(3)) (Counts 11 & 12 — Count 12 was dismissed prior to trial).

In April 1992, General Noriega was convicted on Counts 1-7 and 11 and found not guilty on Counts 9 and 10. General Noriega was sentenced to concurrent terms of 20 years imprisonment on Counts 1 and 2, to be followed by concurrent terms of 15 years' imprisonment on Counts 3-7 and a consecutive term of 5 years' imprisonment on Count 11. General Noriega was ordered to serve concurrent terms of 3 years' special parole as to Counts 3-7. On March 4, 1999, Judge William Hoeveler reduced General Noriega's sentence to 30 years imprisonment making him eligible for mandatory release from prison after completion of two-thirds of his sentence. General Noriega was scheduled to be released on parole on September 9, 2007.

On July 17, 2007, the United States filed an initial complaint for the extradition of General Noriega to the Republic of France to stand trial on charges of engaging in financial transactions with the proceeds of illegal drug

trafficking. Thereafter, on July 23, 2007, General Noriega filed a Petition for Writs of Habeas Corpus, Mandamus, and Prohibition seeking an order that the Magistrate Judge immediately cease any proceedings on the extradition complaint based on General Noriega's argument that under the Third Geneva Convention the United States was required to repatriate him to Panama. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 (hereinafter "GC III"). That petition for writ of habeas corpus was brought under Title 28, United States Code, Section 2255, and was filed as part of General Noriega's prior criminal case. After a hearing on August 13, 2007, Judge William Hoeveler denied the petition for lack of jurisdiction, holding that Section 2255 "'applies to challenges against the sentence imposed, and [General Noriega] has not cited any defect in this Court's sentence as to [him].'" *United States v. Noriega*, 2007 WL 2947572, *1 (S.D. Fla. Aug. 24, 2007)(Noriega I) (Pet. App. 39a). Despite holding that he was without jurisdiction to rule on General Noriega's claims, Judge Hoeveler issued a 12 page opinion in which he addressed in detail Petitioner's arguments. The Court did so in contemplation that counsel would immediately file a Section 2241 petition with the Court. *Id.*

On August 28, 2007, Magistrate Judge William Turnoff conducted an extradition hearing. At that hearing General Noriega reiterated his position that pursuant to the Geneva Convention the United States was required to immediately repatriate him to Panama. The next day, Magistrate Judge Turnoff issued a Certificate of Extraditability.

On September 5, 2007, General Noriega filed an Emergency Motion for Stay of Extradition and a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241. In this petition General Noriega re-asserted the arguments that he had previously advanced in his Section 2255 petition. He further argued that the United States had failed to comply with the requirement of Article 12 of Geneva III that the detaining Power satisfy itself of the willingness and ability of France to apply the Convention prior to the extradition. These pleadings were filed as part of General Noriega's prior criminal case without objection by the government. *United States v. Noriega*, 2007 WL 2947981, *1 (S.D. Fla. Sept. 7, 2007)(Noriega II)(Pet. App. 30).

On September 7, 2007, Judge Hoeveler issued an order dismissing the Petition for Writ of Habeas Corpus. Judge Hoeveler held that he did not have jurisdiction to rule on the habeas petition since it was filed in the criminal case. Judge Hoeveler held that the proper mechanism for challenging a certificate of extraditability is to file a petition for writ of habeas corpus as a new civil action, not to file such a petition as part of a pre existing criminal case. Judge Hoeveler went on to note that, if he had jurisdiction over the petition, he would have denied it on the merits because "the United States 'has satisfied itself . . . [that Defendant] will be afforded the same benefits that he has enjoyed for the past fifteen years in accordance with this Court's 1992 order declaring him a prisoner of war.'" *United States v. Noriega*, 2007 WL 2947981, *1 (S.D. Fla. Sept. 7, 2007)(Noriega II)(Pet. App. 31a).

On October 26, 2007 General Noriega blind filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. This petition was assigned to the Honorable Paul C. Huck. Judge Huck suggested that he was disposed to adopt the previous advisory opinions issued by Judge Hoeveler subject to any additional claims that were raised in the petition before him that had not been resolved by Judge Hoeveler. Supplemental briefing was filed, a hearing was held, and Judge Huck issued an order denying General Noriega's motion (Pet. App. 19a – 28a).

On April 8, 2009, the Eleventh Circuit affirmed and held that § 5 of the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, § 5(a), 120 Stat. 2600, 2631, note following 28 U.S.C. § 2241 (2006), precluded General Noriega from invoking the Geneva Convention as a source of rights in a habeas corpus proceeding. (Pet. App. 12a – 14a). The Eleventh Circuit also concluded that extradition would not violate the Geneva Convention. (Pet. App. 14a – 17a).

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT COURT OF APPEALS'S INTERPRETATION OF SECTION 5 OF THE MILITARY COMMISSIONS ACT OF 2006 VIOLATES THE SUPREMACY CLAUSE OF THE CONSTITUTION OF THE UNITED STATES

Following the conclusion of the Korean War, the United States ratified the four Geneva Conventions of 1949. As the Report of the Senate Committee on Foreign Relations observed when it submitted the Conventions for Senate approval:

> [T]hese four conventions may rightly be regarded as a landmark in the struggle to obtain for military and civilian victims of war, a humane treatment in accordance with the most approved international usage. The United States has a proud tradition of support for individual rights, human freedom, and the welfare and dignity of man. Approval of these conventions by the Senate would be fully in conformity with this great tradition.

Report of the Committee on Foreign Relations, Exec. Rept. No.9, 84th Cong., 1st Sess, (1955).

Over the past 144 years, the Geneva conventions have evolved from a single document concerned solely with the care of wounded and sick soldiers, to a comprehensive body of law addressing a host of issues related to the treatment of both prisoners of war and

civilians. As the nature of warfare changed, from battles between armies in the field and navies at sea, to total war directed against civilian populations and economic infrastructure, the conventions changed as well, addressing new problems arising from the latest conflicts. At the conclusion of the Second World War, one of the most dramatic and difficult challenges facing the international community was the repatriation of civilians and prisoners of war who remained under the control of the various victorious powers. At the time that the new conventions were proposed, "Thousands [of prisoners of war] were still in French, British and Soviet hands and several hundreds were not accounted for." Christiane Shields Delessert, Release and Repatriation of Prisoners of War and the End of Active Hostilities: A Study of Article 118, Paragraph 1, of the Third Geneva Convention Relative to the Treatment of Prisoners of War (1977), p. 62 (hereinafter "Delessert."). Many of these soldiers lost their status as prisoners of war. Nearly 100,000 Germans in France were pressed into working on civilian reconstruction projects, essentially as slave labor. Delessert at 62, n.75. These soldiers were uppermost in the minds of the delegates who assembled in Geneva in 1948 to revise the convention. Their plight led to the promulgation of Article 118 which commands:

> *Prisoners of war shall be released and repatriated without delay after the cessation of hostilities.*

Geneva Convention Relative to the Treatment of Prisoners of War ("Geneva III"), August 12, 1949, 6 U.S.T. 3316. Delessert at 70.

Just prior to the completion of his criminal sentence, the United States sought General Noriega's extradition to France. General Noriega filed a petition for writ of habeas corpus objecting to his extradition to France arguing that under the Geneva Convention, the United States was required to immediately repatriate him to Panama.

In *Hamdan v. Rumsfeld*, 548 U.S 557, 126 S.Ct. 2749 (2006), this Court held that military commissions were not expressly authorized by Congress and that the procedures promulgated pursuant to executive order violated the Uniform Code of Military Justice. This Court also held that the procedures adopted failed to satisfy the Geneva Convention. Congress responded to *Hamdan* by enacting the Military Commissions Act of 2006 which explicitly stripped the courts of authority to consider challenges to detention brought by persons designated as enemy combatants. This provision, contained in Section 7 of the Act, was struck down by this Court in *Boumediene v. Bush*, __U.S. __, 128 S.Ct. 2229 (2008).

In Section 5 of this Act, Congress also sought to restrict the kinds of rights which could be invoked before the courts. Unlike Section 7, which applied solely to persons designated enemy combatants, Section 5 applied to any person, including United States Citizens. Section 5 of the MCA states:

> (a) IN GENERAL.—No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus petition 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. (Emphasis added)

The Eleventh Circuit held that this provision absolutely and unambiguously prohibits persons from raising any claim based upon the four Geneva Conventions of 1949.

This interpretation by the Eleventh Circuit of the word "rights" assumes a definition of the word that is nowhere found in the statute. It is just as reasonable to conclude that "rights in court" means such privilege's as the right to counsel, the right to confront ones accusers, the right to know the charges against one, as it does claims derived from the protections afforded prisoners of war under the Geneva Convention.

For instance, a legal action seeking an order directing authorities to cease the torture of a prisoner may cite to provisions of the Geneva Convention, but that is not the same thing as a right being exercised in court; rather it is a remedy being sought from a court. The question before this Court now is one that was left open in *Boumediene*, wherein the Court stated that its opinion "does not address the content of the law that governs petitioners' detention," leaving that question for another day. 128 S.Ct. at 2277. This is an important constitutional question since an interpretation of law that results in the repeal of a treaty violates the Supremacy Clause of the Constitution of the United States. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 126 S.Ct. 2669, 1271 (4th Cir. 2006).

The ultimate effect of the Eleventh Circuit's interpretation of Article 5 (GC III) is the complete repudiation of the Geneva Convention. The Convention depends upon the authority of competent tribunals to decide whether a particular individual is a prisoner of war and thus entitled to the full panoply of protections guaranteed by the Convention.

> *Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.*

Article 5, GC III. Pursuant to Eleventh Circuit's interpretation of Section 5 (MCA), no tribunal would have the authority to grant any such status.

While Congress may well have wanted to limit the ability of prisoners of war to challenge proceedings before Military Commissions, the Eleventh Circuit's interpretation of Section 5 leads to a wholesale repudiation of the Geneva Convention itself. Moreover, it will result in confusion over the interpretation of Article 21 of the Uniform Code of Military Justice, 10 U.S.C. § 801 et. seq. which this Court observed incorporated by reference the common law of war including the four Geneva Conventions. *Hamdan*, 126 S.Ct. at 2780. Indeed, it could be said that the Geneva Conventions are so woven into the fabric of the law of war, that to cast them out would be to return the law to

where it stood when Sherman marched on Atlanta. There is no evidence that Congress intended that.[1] At best, the statutory scheme is ambiguous, and under the doctrine of lenity, such ambiguity must be construed in favor of General Noriega. *United States v. Santos*, __ U.S. __,128 S.Ct 2020 (2008).

Ultimately, the Eleventh Circuit's decision herein encroaches upon the powers of the Executive and Legislative branches. Its interpretation of Section 5 (MCA) threatens our Nation's commitment to international humanitarian law. Its interpretation of Section 5 undermines protections that apply not only to prisoners of war of the United States but to our own men and woman who find themselves prisoners of war of other nations. As the Committee on Foreign Relations observed in 1955:

> We should not be dissuaded by the possibility that at some later date a contracting party may invoke specious reason to evade compliance with the obligations of decent treatment which it has freely assumed in these instruments. Its conduct can now be

1. Although the Court relied upon legislative history to support its interpretation of Section 5 (MCA)(Pet. App. 13a – 14a) that history does not contain a definition the word "rights." The closest it comes to supporting the Eleventh Circuit's interpretation is Senator McCain's statement that this provision would bar a private right of action against U.S. personnel. But nothing in any of the Geneva Conventions purports to create any such remedies to begin with. Thus Senator McCain's observations can not bear the weight of the Eleventh Circuit's reliance upon them.

> measured against their approved standards, and the weight of world opinion cannot but exercise a salutary restraint on otherwise unbridled actions. If the end result is only to obtain for Americans caught in the maelstrom of war a treatment which is 10 percent less vicious than what they would receive without these conventions, if only a few score of lives are preserved because of the efforts at Geneva, then the patience and laborious work of all who contributed to that goal will not have been in vain.

Report of the Committee on Foreign Relations, Exec. Rept. No.9, 84th Cong., 1st Sess, (1955).

II. THE ELEVENTH CIRCUIT COURT OF APPEALS'S INTERPRETATION OF THE GENEVA CONVENTION TO PERMIT THE EXTRADITION OF PRISONERS OF WAR CONFLICTS WITH PREVIOUS DECISIONS OF THIS COURT ON TREATY INTERPRETATION AND STATUTORY CONSTRUCTION

Article 118 of the Geneva Convention Relative to the Treatment of Prisoners of War, (GC III) commands:

> *Prisoners of war shall be released and repatriated without delay after the cessation of hostilities.*

Only in the case of war criminals is a Power permitted to extradite a prisoner of war to another country. Only where a prisoner of war is still serving a sentence for

the commission of a crime, is any delay of repatriation permitted. Because there is no specific authority permitting extradition of prisoners of war, the courts below relied upon Article 12 of the Convention which addresses transfers of prisoners between allies during a time of conflict. This interpretation is contrary to the intent of this provision as demonstrated by a plain reading of its text. The full article states:

> *Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.*
>
> *Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.*
>
> *Nevertheless if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.*

Nothing in Article 12 grants any nation the right to disregard the mandate of Article 118. The first paragraph places ultimate responsibility for the well-being of prisoners of war with the Power, ie nation, that detains them. Responsibility for any harm that befalls the prisoner cannot be avoided by blaming it on the unauthorized actions of individuals or military units. The second paragraph is not a grant of authority. It places restrictions on the practice of transferring prisoners from one Power to another. Transfer is prohibited unless the Detaining Power is satisfied that the Receiving Power is both willing and able to apply the Convention. The third paragraph places upon the Detaining Power the ongoing duty to insure that the prisoner is afforded the protections of the Geneva Convention while in the custody of the Receiving Power.

As in statutory construction, the text of the treaty is central to its interpretation. *Air France v. Saks*, 470 U.S. 392, 397-98 (1995), ("[t]he analysis must begin, however, with the text of the treaty and the context in which the written words are used."). An analysis of the words used in Article 12 demonstrates that it does not constitute a grant of any authority authorizing a Detaining Power to extradite a prisoner of war to another nation. Rather it is a limitation upon whatever other authority exists within the Convention.

Because the Geneva Convention mandates repatriation and does not provide for extradition, the Courts below looked to Article 45 of the Civilian Convention which specifically states that the provisions of this article "'do not constitute an obstacle to the extradition, in pursuance of extradition treaties

concluded before the outbreak of hostilities of protected persons accused of offenses against ordinary criminal law.' Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, art. 45, 12 August 1949, 6 U.S.T. 3516." (Pet. App. 17a). The Court also relied upon the Commentary to Article 45 which states that the term "transfer" may mean "internment in the territory of another Power, repatriation, the returning of protected persons to their country of residence or their extradition." 4 Int'l Committee of Red Cross, Commentary, Geneva Conventions Relative to the Protection of Civilians in Time of War (1960) 266 (hereinafter GCIV Commentary). *Id.*

While the Court below recognized that the purpose of the Fourth Convention is different from the Third, nevertheless it found compelling the fact "that the convening parties expressed an understanding of the term 'transfer' which included extradition." (Pet. App. 17a).

The Court's analysis runs afoul of basic rules of statutory construction. As this Court has explained:

> A familiar principle of statutory construction, relevant both in *Lindh* and here, is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute. See *id.*, at 330, 117 S.Ct. 2059; see also, *e.g.*, Russello v. United States, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (" '[W]here Congress includes particular language in one section of a statute but omits it

> in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion' ")

Hamdan, 548 U.S at 578, 126 S.Ct. at 2765-66.

Nowhere in the text of Article 12 (GCIII) or in its Commentary is the word "extradition" ever used. By contrast, the term "extradition" is explicitly used in both the text and the Commentary to Article 45 (GCIV). This clearly demonstrates that had the drafters intended to sanction extradition proceedings in the Prisoner of War Convention, they knew how to do so. *See, e.g., Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296 (1983)("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"). The fact that the two Conventions were drafted in tandem strengthens this presumption. *Hamdan*, 548 U.S. at 579, 126 S.Ct. at 2766.

Moreover, where the drafters of the four conventions sought to adopt the same principles, they did so by including articles that were common to each convention and were written in nearly identical language. Thus Article 3 of the Prisoner of War Convention, pertaining to CONFLICTS NOT OF AN INTERNATIONAL CHARACTER, is identical to Article 3 of the Civilian Convention (and to the other two Conventions as well). They are known as "Common Articles."

It is significant to note that all four of the Geneva Conventions of 1949 were drafted during the same four month period of time, culminating in the simultaneous signature by seventeen of the delegations to all four conventions on August 12, 1949. 3 Int'l Committee of Red Cross, Commentary, Geneva Conventions Relative to the Treatment of Prisoners of War 9 (1960) (herein after GCIII Commentary). As the Commentary explained:

> The Conference set up four main Committees, which sat simultaneously and considered (a) the revision of the First Geneva Convention and the Hague Agreement of 1899 which adapts that Convention to maritime warfare, (b) the revision of the Prisoner of War Convention, (c) the preparation of a Convention for the protection of civilians in time of war, and (d) provisions common to all four Conventions. Numerous working parties were formed, and there were also a Co-ordination Committee and a Drafting Committee, which met towards the end of the Conference and endeavored to achieve a uniform presentation of the texts.

Id. p. 7. Thus the circumstances involving the drafting and signing of the Convention is further proof that the drafters did not intend for the word transfer as used in Article 12 of the Prisoner of War Convention to include the definition of that term from Article 45 of the Civilian Convention. *Lindh v. Murphy*, 521 U.S. 320, 330 (1997)(holding that certain limitations on the availability of habeas relief imposed by AEDPA applied only to cases

filed after that statute's effective date where Congress' failure to identify the temporal reach of those limitations, which governed noncapital cases, stood in contrast to its express command in the same legislation that new rules governing habeas petitions in capital cases "apply to cases pending on or after the date of enactment.").[2]

In *Hamdan* , this Court relied heavily on the Commentaries to the Geneva Convention in interpreting the scope of Common Article 3. 548 U.S at 631, 126 S.Ct.

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2. The Eleventh Circuit was concerned that Petitioner's interpretation of the Geneva Convention would lead to the anomalous result of civilians being subject to extradition but not prisoners of war. (Pet. App. 17a). But as this Court pointed out in *Santos*:

> When interpreting a criminal statute, we do not play the part of a mind reader. In our seminal rule-of-lenity decision, Chief Justice Marshall rejected the impulse to speculate regarding a dubious congressional intent. "[P]robability is not a guide which a court, in construing a penal statute, can safely take." *United States v. Wiltberger, 5 Wheat. 76, 105, 5 L.Ed. 37 (1820).*

128 S.Ct. 2026. It is not so anomalous a result given the significant differences in treatment afforded prisoners of war and civilians. A prisoner of war may be held for many years in confinement and in conditions significantly different from civilians. The drafters may well have decided it more important to insure that prisoners be returned home without delay believing that in most instances the question of extradition could be addressed between the requesting state and the prisoner's home nation. Finally, the Geneva Convention should not be a shield used by a civilian who is on the run from the Requesting Power. That will not be the case of a prisoner of war who is in the custody of the Detaining Power involuntarily.

at 2796. The Commentary to Article 12 (GC III) explains that this Article addresses the "special case" of prisoners of war transferred from one belligerent Power to another during time of war. GC III Commentary at 128. "This practice, which became increasingly common during the Second World War, raises a problem quite distinct from the question of the accommodation and hospitalization of prisoners of war in a neutral country." *Id.* at 131. The Commentary reported that, "the significance of this question has deepened with the establishment of military organizations for collective defense such as the North Atlantic Treaty Organization and the Warsaw Pact, which place the armed forces of several Powers under a unified command in case of conflict." *Id.* at. 132.

That this Article was designed solely to address the responsibility of nations during the course of an ongoing war is made crystal clear by the statement that "There must be no possibility for a group of States which are fighting together to agree to hand over to one of their members not a party to the Convention all or some of the prisoners whom they have captured jointly, thus evading the application of the Convention." *Id.* at 136.

Moreover, Article 12 is found in Part II of the Convention. Part II is entitled GENERAL PROTECTION OF PRISONERS OF WAR. Other Articles within this part include: *Humane treatment of prisoners* (Article 13); *Respect for the person of prisoners* (Article 14); *Maintenance of prisoners* (Article 15); and *Equality of treatment* (Article 16). By contrast Article 119, para. 5, which permitted the United States to detain General Noriega in the United States

pending completion of his punishment is found in Part IV, TERMINATION OF CAPTIVITY. Paragraph 5 of Article 119 of Geneva III, states:

> *Prisoners of war against whom criminal proceedings for an indictable offense are pending may be detained until the end of such proceedings, and, if necessary until the completion of the punishment. The same shall apply to prisoners of war already convicted of an indictable offense.*

This was the authority that permitted the United States to delay General Noriega's repatriation pending his parole on the criminal conviction. But it provides no authority for any other nation to delay a prisoner's repatriation and it was clearly meant to apply only to prisoners in the custody of a nation due to his or her capture during time of war. This is clear from the first paragraph of Article 119, which states:

> *Repatriation shall be effected in conditions similar to those laid down in Articles 46 to 48 inclusive of the present Convention for the transfer of prisoners of war, having regard to the provisions of Article 118 and to those of the following paragraphs.*

Articles 46 through 48 are found in Part III, entitled CAPITIVITY, Chapter VIII, *Transfer of prisoners of war after their arrival in camp.* Article 46 addresses *Conditions,* Article 47 addresses *Circumstances precluding transfer,* and Article 48 *Procedure for transfer.* The Commentary to each of these Articles

demonstrates that in each instance, the Convention intended to clarify the protections guaranteed to prisoners during time of war. *See, e.g.*, GC III Commentary p. 254, "During the Second Word War, many prisoners-of-war convoys, particularly those transferred by sea, were attacked and heavy losses were caused. The International Committee of the Red Cross therefore appealed to the Detaining Powers to resort to conveyances of prisoners of war by sea only for imperative reasons;" Finally Paragraph 2 of Article 47 states, "*If the combat zone draws closer to a camp, the prisoner of war in said camp shall not be transferred unless the transfer can be carried out in adequate conditions of safety. . . .*"

Plainly, the Prisoner of War Convention requires the immediate return home of prisoners of war at the end of hostilities subject to completion of any sentence imposed for crimes prosecuted by the Detaining Power. Only in the case of war criminals is any exception permitted.

The drafters of the Prisoner of War Convention contemplated one narrow circumstance where it would be necessary for one Power to turn over a prisoner of war to another Power to the Convention—that involving war criminals. Article 129 states in relevant part:

> *Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may*

> *also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.*

Grave breaches are, of course, war crimes. What this Article demonstrates is that had the drafters' of the Geneva Convention wanted to permit transfers from one Power to another for purposes of prosecution for ordinary offenses, they knew how to do so. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n. 9 (2004). *Hamdan, supra, Russello supra.*

CONCLUSION

The petition for certiorari should be granted and General Noriega should be returned to Panama.

Respectfully submitted,

FRANK. A. RUBINO
1001 Brickell Bay Drive
Suite 2206
Miami, FL 33131
(305) 858-5300

JON MAY
Counsel of Record
1001 Brickell Bay Drive
Suite 2206
Miami, FL 33131
(305) 373-3740

Counsel for Petitioner