No. 05-184

In The Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD, United States Secretary of Defense; JOHN D. ALTENBURG, Appointing Authority for Military Commissions, Department of Defense; THOMAS L. HEMINGWAY, Brigadier General, Legal Advisor to the Appointing Authority for Military Commissions; JAY HOOD, Brigadier General, Commander Joint Task Force, Guantanamo, Camp Echo, Guantanamo Bay, Cuba; GEORGE W. BUSH, President of the United States,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE HUMAN RIGHTS INSTITUTE OF THE INTERNATIONAL BAR ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER [GENEVA – COMMON ART. 3]

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TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* AND SOURCE OF AUTHORITY TO FILE 1

INTRODUCTION AND SUMMARY OF ARGUMENT .. 2

ARGUMENT..... 4

I. COMMON ARTICLE 3 PROTECTS PETITIONER AND OTHERS CAPTURED DURING THE CONFLICT IN AFGHANISTAN 4

A. Common Article 3 Of The Geneva Conventions Of 1949..... 5

B. Common Article 3 Applies To The Conflict In Afghanistan 7

II. THE MILITARY COMMISSION CONVENED AGAINST PETITIONER VIOLATES COMMON ARTICLE 3 11

A. The Military Commission Convened To Try Petitioner Is Not A "Regularly Constituted Court" As Required By Common Article 3..... 11

B. Common Article 3 Entitles Petitioner To Basic Judicial Safeguards Recognized In International Law And This Court's Longstanding Precedents 14

1. Right To Be Present At Trial 17

2. Right To Cross-Examine Adverse Witnesses 18

3. Right To Prompt Judicial Proceedings . 19

4. Right To Be Tried By An Independent And Impartial Tribunal 19

TABLE OF CONTENTS – Continued

Page

III. PETITIONER'S RIGHTS UNDER COMMON ARTICLE 3 ARE ENFORCEABLE IN FEDERAL COURT 21

A. This Court Has Consistently Enforced Treaties That Protect Individual Rights And Are Self-Executing 22

B. Common Article 3 Protects Individual Rights And Is Self-Executing 26

C. In The Decision Below, The Court Of Appeals Misread *Eisentrager* 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Application of Yamashita, 327 U.S. 1 (1946) 6, 19, 24, 29

Asakura v. City of Seattle, 265 U.S. 332 (1924) 10, 24, 27

Bacardi Corp. of Am. v. Domenech, 311 U.S. 150 (1940) 10

Brady v. Maryland, 373 U.S. 83 (1963)..... 16

Breard v. Greene, 523 U.S. 371 (1998) 10

Chew Heong v. United States, 112 U.S. 536 (1884) 23, 24, 27

Coy v. Iowa, 487 U.S. 1012 (1988) 17

Crawford v. Washington, 541 U.S. 36 (2004) 15, 18

Doggett v. United States, 505 U.S. 647 (1992) 19

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

Fok Young Yo v. United States, 185 U.S. 296 (1902)..... 28

Foster v. Neilson, 27 U.S. 253 (1829)..... 22, 26

Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004)..... 2, 17, 18

Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005)..... 7, 8, 9, 28

Hauenstein v. Lynham, 100 U.S. 483 (1879)..... 10, 25

Head Money Cases, 112 U.S. 580 (1884) 26, 27

Johnson v. Browne, 205 U.S. 309 (1907)..... 25

Johnson v. Eisentrager, 339 U.S. 763 (1950) 21, 28, 29

TABLE OF AUTHORITIES – Continued

Page

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) 16

Jordan v. Tashiro, 278 U.S. 123 (1928)..... 25

Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995)..... 10

Kolovrat v. Oregon, 366 U.S. 187 (1961) 25

Lewis v. United States, 146 U.S. 370 (1892) 16

Madsen v. Kinsella, 343 U.S. 341 (1952)..... 18, 19

Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002)..... 10

Military and Paramilitary Activities In And Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) 10, 11

Nielsen v. Johnson, 279 U.S. 47 (1929) 10, 25

Prosecutor v. Delalic, Case No. IT-96-21, Judgment (ICTFY Appeals Chamber Feb. 20, 2001) 11

Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment (ICTFY Trial Chamber Dec. 10, 1998).....11

Prosecutor v. Tadic, Case No. IT-94-1, Defence Motion for Interlocutory Appeal on Jurisdiction (ICTFY Appeals Chamber Oct. 2, 1995).....11

Rasul v. Bush, 542 U.S. 466 (2004) 29

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) 28

United States v. Daulton, 45 M.J. 212 (C.A.A.F. 1996)..... 18

United States v. Noriega, 808 F. Supp. 791 (S.D. Fla. 1992) 6

United States v. Percheman, 32 U.S. 51 (1833) 22

TABLE OF AUTHORITIES – Continued

Page

United States v. Rauscher, 119 U.S. 407 (1886)..... 22, 23

United States v. Schooner Peggy, 5 U.S. 103 (1801)..... 22

United States v. Stuart, 489 U.S. 353 (1989)..... 10

Ware v. Hylton, 3 U.S. 199 (1796)..... 25, 27

Whitney v. Robertson, 124 U.S. 190 (1888)..... 22

Windsor v. McVeigh, 93 U.S. 274 (1876)..... 16

STATUTES AND REGULATIONS

10 U.S.C. § 818..... 12

10 U.S.C. § 839(b)..... 18

18 U.S.C. § 2441(c)(3)..... 6, 27

32 C.F.R. § 9..... 12

66 Fed. Reg. 57,833..... 12

66 Fed. Reg. 57,834..... 12, 13

138 Cong. Rec. S4784 (Apr. 2, 1992)..... 28

Army Regulation 190-8, *available at* http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf..... 7

H.R. Con. Res. 1815 (2005) (enacted)..... 20

Military Commission Order No. 1 (Dep't of Def. Aug. 31, 2005).....*passim*

S. Exec. Rep. No. 84-9 (1955)..... 27

U.S. Const. art. VI, cl. 2..... 22

TABLE OF AUTHORITIES – Continued

Page

TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

The European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221 ..... 16, 17, 18, 19

Geneva Convention Relative to the Treatment of Prisoners of War, Jul. 27, 1929, 47 Stat. 2021 25

Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 ..... *passim*

Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 12

International Covenant on Civil and Political Rights, Mar. 23 1976, 999 U.N.T.S. 171 ..... 15, 17, 18, 19

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), June 8, 1977, art. 75, 1125 U.N.T.S. 3 ..... 14, 15, 17, 19

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Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess. 3453d mtg. at 3, U.N. Doc. S/RES/955 (Nov. 8, 1994) 16, 17, 18, 19

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TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

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TABLE OF AUTHORITIES – Continued

Page

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Restatement (Third) of the Foreign Relations Law of the United States § 111 (1987)..... 26, 28

Transcript, Defense Department Briefing (Jan. 22, 2002), http://www.globalsecurity.org/military/library/news/2002/01/mil-020122-usia01.htm..... 21

U.S. Dep't of State Statement on Human Rights, http://www.state.gov/g/drl/hr/ 15

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INTEREST OF *AMICI CURIAE* AND SOURCE OF AUTHORITY TO FILE[1]

The Association of the Bar of the City of New York ("ABCNY") is a professional association of over 22,000 attorneys. Founded in 1870, ABCNY has long been committed to studying, addressing, and promoting the rule of law and, when appropriate, law reform. Through its many standing committees, ABCNY educates the bar and public about legal issues relating to the war on terrorism, the pursuit of suspected terrorists, and the treatment of detainees.

The Human Rights Institute of the International Bar Association ("IBA"), headquartered in London, England, helps to promote, protect and enforce human rights under a just rule of law, and works to preserve the independence of the judiciary and legal profession worldwide. Founded in 1995, the Institute now has more than 7,000 members. The Institute was established by the IBA, which was created in 1947 to support the establishment of law and the administration of justice worldwide, and is composed today of 20,000 individual lawyers and over 195 Bar Associations and Law Societies.

While they embrace the necessity of apprehending and punishing those responsible for terrorist acts and preventing future acts of terrorism, *amici* believe that the Administration's cramped interpretation of the four Geneva Conventions of 1949 ("the Conventions") is incompatible with the United States' treaty obligations. *Amici* submit this brief to present the Court with authority regarding the proper application of Common Article 3 of the Conventions in the context of this case.[2]

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[1] All parties have consented to this filing. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

[2] *Amici* express no view with respect to the merits of petitioner's case, including his alleged membership in al Qaeda and his guilt or innocence on the charges that have been filed against him.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than a half-century, the Geneva Conventions have stood as bulwarks, safeguarding minimum standards of humanity against wartime abuses. Common Article 3, so called because it is common to all four Conventions, establishes minimum protections that must be afforded to all persons captured in a military conflict in a contracting party's territory. Among those protections is the requirement that a detainee may be punished only after a trial before a "regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949 ("Geneva III"), art. 3, 6 U.S.T. 3316 (same text in other three 1949 Conventions).

Strict adherence to Common Article 3 is imperative not only to ensure that the United States government refrains from inflicting unjust punishments on enemy detainees (punishments which can include the death penalty or life imprisonment), but also to protect United States servicemembers from mistreatment when *they* fall into the hands of hostile forces. As the District Court astutely observed, when the government makes novel arguments that the Conventions do not apply to the war on terror, its conduct "can only weaken the United States' own ability to demand application of the Geneva Conventions to Americans captured during armed conflicts abroad." *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 163 (D.D.C. 2004). To reduce the peril faced by our Nation's soldiers and sailors who fall into enemy hands, and to vindicate the rule of law against overreaching by the Executive Branch, we urge this Court to hold that the proposed trial of petitioner before a Military Commission violates Common Article 3. Our argument incorporates three points.

First, as recognized by Judge Williams in his concurring opinion below, the protections of Common Article 3 extend to all persons, including petitioner, who are captured during hostilities in Afghanistan. By its terms, Common Article 3 applies to any "armed conflict not of an international character." Geneva III, art. 3, 6 U.S.T. 3316.

Although the other articles of the Conventions apply, more narrowly, only in *international* conflicts "between two or more of the High Contracting Parties," *see* Geneva III, art. 2, 6 U.S.T. 3316 (same text in other three 1949 Conventions), Common Article 3 was intended as a "gap filler" for all other conflicts. Common Article 3's expansive language thus extends to *all* conflicts on the territory of signatory nations other than those between sovereign nations who have signed the Conventions. Contrary to the conclusion reached by the majority of the D.C. Circuit panel below, there is no "carve-out" for conflicts between signatories and non-state actors such as al Qaeda.

Second, the Military Commission convened to try petitioner violates Common Article 3. Notwithstanding the enormous power that the Military Commission wields – including the power to sentence petitioner to imprisonment for any term up to life or even death – the Commission is not a "regularly constituted court" as required by Common Article 3. It was created by the Executive Branch alone, is part of a regime of "special tribunals" targeted against alleged terrorists, vests extraordinarily broad discretion in the hands of the Commission members and their Executive Branch superiors, and can be changed or abolished at the Executive's whim. In addition, the procedural rules governing Military Commissions fail to afford "all the judicial guarantees which are recognized as indispensable by civilized peoples." Some of the rules are nothing less than shocking to any observer familiar with the justice system in the United States. Under the rules:

- A prisoner can be excluded from the courtroom, during trial, based on anything the presiding officer or the Secretary of Defense deems to be a matter of national security. His assigned military defense counsel is prohibited from sharing with him any evidence that is received in his absence. As a result, a prisoner could be sentenced to prison, or even executed, without knowing on what grounds he had been found guilty.

- A Military Commission may receive anonymous unsworn statements, including statements embodying multiple levels of hearsay, whose sources a defendant cannot confront or impeach.
- Prisoners may be detained indefinitely before being charged or tried.
- The Military Commission's judgment may be finalized only after approval by the President or the Secretary of Defense, both of whom have already made clear their view that the guilt of the Guantanamo detainees is a foregone conclusion.

Third, petitioner may invoke the protections of Common Article 3 in this habeas corpus proceeding. As made clear by this Court's precedents dating back to the late eighteenth century, treaties – which are part of the "supreme Law of the Land" under our Constitution – must be judicially applied as the rule of decision in a case with a proper jurisdictional foundation as long as two conditions are met: (1) the treaty is "self-executing" (*i.e.*, it is judicially enforceable without the need for any implementing legislation); and (2) the treaty protects individual rights. Here, because both conditions are satisfied, petitioner is entitled to judicial enforcement of his rights under Common Article 3.

ARGUMENT

I. COMMON ARTICLE 3 PROTECTS PETITIONER AND OTHERS CAPTURED DURING THE CONFLICT IN AFGHANISTAN

As made clear by the plain language of the Geneva Conventions, the Conventions' overall structure, the authoritative Red Cross drafting history, and relevant decisions from lower courts and international tribunals, Common Article 3 applies to the conflict in Afghanistan. Before discussing the universal applicability of Common Article 3, we provide background on the Geneva Conventions of 1949.

A. Common Article 3 Of The Geneva Conventions Of 1949

In 1949, soon after the horrors of World War II, representatives of 61 nations met in Switzerland to consider revisions to the existing 1929 Geneva Conventions. The delegates drafted four separate treaties guaranteeing protections to (1) wounded and sick soldiers in the field; (2) wounded, sick and shipwrecked sailors; (3) prisoners of war; and (4) civilians. The four 1949 Conventions are commonly referred to by number; *i.e.,* the "First Geneva Convention" and so forth. The United States ratified all four of the 1949 Conventions in 1955. As of December 2005, almost 200 states, including Afghanistan, had ratified the Conventions.

Common Article 3 of the 1949 Conventions provides in relevant part as follows:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> (2) The wounded and sick shall be collected and cared for.

Geneva III, art. 3, 6 U.S.T. 3316.

Common Article 3, which is described in the official Red Cross Commentaries as "one of [the] most important Articles" in the Conventions, *see* International Committee of the Red Cross, *Commentaries to the Convention (I) For the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field* 38 (1949), represented a dramatic innovation over the prior 1929 Conventions. *See id.* (Common Article 3 "marks a new step forward" and is "an almost unhoped for extension" of the prior Conventions).[3] For the first time, Common Article 3 established rules governing the humane treatment of persons captured in non-international conflicts. *See generally id.* at 38-48. Further, in contrast to the 1929 Conventions, which only guaranteed regularized court process before punishment for misconduct occurring while in captivity, *see Application of Yamashita*, 327 U.S. 1, 21-23 (1946), Common Article 3 guarantees adequate legal process before a detainee may be subjected to *any* punishment, including for misconduct occurring before his capture.

In 1997, the terms of Common Article 3 were incorporated into federal criminal law by the War Crimes Act, which makes it a felony for U.S. military personnel or U.S. nationals to engage in conduct "which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949." 18 U.S.C. § 2441(c)(3). Additionally, the Third and Fourth Geneva Conventions (each of

[3] These Commentaries are "widely recognized as a respected authority on interpretation of the Geneva Conventions. The authors of the Commentary were primarily individuals intimately involved with the revision of the Convention of 1929 and the drafting of the present Conventions." *United States v. Noriega*, 808 F. Supp. 791, 795 n.6 (S.D. Fla. 1992).

which includes Common Article 3) were incorporated as required conduct for the Armed Services by Army Regulation 190-8 (and identical regulations for the other Services) adopted on October 1, 1997. That regulation provides in Section 1-5(a)(3) that punishment of detainees "known to have, or suspected of having, committed serious offenses will be administered [in accordance with] GPW [the Third Geneva Convention], GC [the Fourth Geneva Convention], the Uniform Code of Military Justice and the Manual for Courts Martial." Army Regulation 190-8, *available at* http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf, at § 1-5(a)(3) (1997) ("AR 190-8").

B. Common Article 3 Applies To The Conflict In Afghanistan

In the decision below, two judges on the D.C. Circuit panel held that the 1949 Conventions are inapplicable to this case because they do "not apply to al Qaeda and its members." *Hamdan v. Rumsfeld*, 415 F.3d 33, 41 (D.C. Cir. 2005). The panel majority reasoned that the "Convention appears to contemplate only two types of armed conflicts," "international conflicts" (to which the broad panoply of Geneva Convention protections apply) and "civil war[s]" (to which only the more limited protections of Common Article 3 apply). *Id*. Accepting the government's argument that the war against al Qaeda in Afghanistan does not fit within either of these categories, the panel majority concluded that the Geneva Conventions do not apply to petitioner's case. *Id.* at 41-42.

The panel majority's decision departs from the plain language of Common Article 3 and is at odds with that provision's negotiating history and with the way it has been interpreted by lower courts and international tribunals. In addition, as explained by Judge Williams in his separate opinion, the panel majority's interpretation cannot be squared with the structure and purpose of the 1949 Conventions, which make it clear that Common Article 3 was intended to apply to all conflicts "between a

signatory and a non-state actor" such as al Qaeda. *Id.* at 44 (Williams, J., concurring).

As the majority itself acknowledged, the bulk of the Conventions, conferring protections surpassing those of Common Article 3, apply to "international" conflicts. As the majority also recognized, Common Article 2 of the Conventions assigns that term a specific meaning: conflicts "'between two or more of the High Contracting Parties.'" *Id.* at 41 (quoting Conventions at art. 2). Accordingly, as Judge Williams reasoned (and the majority failed to apprehend), the phrase "conflict not of an international character" refers simply to conflicts involving non-signatories to the Conventions.[4] If, as the D.C. Circuit majority concluded, the conflict with al Qaeda is not "international" because it is separate from the conflict with the Taliban in Afghanistan, then it clearly falls within this expansive definition of "conflict[s] not of an international character." *Id.* at 44 (Williams, J., concurring). Any other reading of Common Article 3 would require inexplicably different conceptions of the term "international" in Articles 2 and 3.

This reading is confirmed by the negotiating history of Common Article 3. As its Commentaries explain, the Red Cross initiated consideration of Common Article 3 by submitting draft language that would have extended the full protection of the Conventions to "all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion. . . ." International Committee of the Red Cross, *Commentaries to the Convention (IV) Relative to the Protection of Civilian Persons in Time of War* (hereinafter

[4] The philosopher Jeremy Bentham, credited with coining the term "international," defined it to encompass "mutual transactions between sovereigns as such," meaning that a non-"international" conflict would be any conflict not between sovereign states. Mark Weston Janis, *The American Tradition of International Law: Great Expectations 1789-1914* 13-14 (Oxford University Press 2004) (quoting Jeremy Bentham, *An Introduction to the Principles and Morals of Legislation* 296 (Burns and Hart eds. 1970)).

"ICRC Commentaries (IV)") 30 (1949). There was, however, "almost universal opposition to the application of the Convention, with all its provisions," to non-international conflicts, even when the Conference delegates proposed compromises "limiting the number of cases in which the Convention was to be applicable." *Id.* at 32. A solution was found, however, when the French delegation suggested drafting Common Article 3 so that its substantive protections would be limited, rather than the types of conflicts to which they applied. *Id.* Thus, the deliberations over the Article were based on the understanding that its provisions "were to be equally applicable to civil and to international wars." *Id.* at 33.

Given this text and history, it is clear that Common Article 3 was intended to serve as a baseline for *all* armed conflicts. Since the rest of the Conventions, with their stronger protections, cover international conflicts, all conflicts are governed at a minimum by the protections of this Article. *Id.* at 38 ("Representing, as [Common Article 3] does, the minimum which must be applied in the least determinate of conflicts, its terms must a fortiori be respected in the case of international conflicts proper, when all the provisions of the Convention are applicable").

As Judge Williams recognized in his concurring opinion, the structure of the Conventions does not allow for the gap in coverage envisioned by the D.C. Circuit majority. A non-state actor cannot sign a treaty, and therefore cannot be party to an "international" conflict under Article 2. *Hamdan*, 415 F.3d at 44 (Williams, J., concurring). Common Article 3 was drafted to provide minimal protection for those who had no protection before: stateless combatants. *Id.* "Thus the words 'not of an international character' are sensibly understood to refer to a conflict between a signatory nation and a non-state actor." *Id.* Although a civil war is one example of a conflict involving a non-state actor, it does not follow that Common Article 3 is confined *only* to civil wars, as the panel majority mistakenly concluded. Moreover, even if Common Article 3 is deemed ambiguous in this regard, the panel majority's construction should be rejected under the longstanding canon that treaties must be interpreted liberally to protect

individual rights. *See United States v. Stuart*, 489 U.S. 353, 368 (1989) ("'[e]ven where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred'") (quoting *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 163 (1940) (alteration in original)); *see also Nielsen v. Johnson*, 279 U.S. 47, 52 (1929); *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924); *Hauenstein v. Lynham*, 100 U.S. 483, 487 (1879).

Lower courts have recognized Common Article 3's universal applicability. In *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1351 (N.D. Ga. 2002), a case against a former Bosnian Serb police officer who perpetrated acts of torture during the Yugoslav conflict, the district court found the defendant liable, under the Alien Tort Claims Act, for violating Common Article 3. The court noted that the conflict in the former Yugoslavia had been recognized as international in character, but nevertheless held that the standards of Common Article 3 are broadly applicable "to any armed conflict, whether it is of an internal or international character." *Id.* at 1351 n.39 (internal quotations omitted); *see also Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995) (under Common Article 3, "all 'parties' to a conflict . . . are obliged to adhere to these most fundamental requirements of the law of war").

International tribunals have also embraced the universal application of Common Article 3.[5] In *Military and Paramilitary Activities In And Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) ("*Nicaragua*"), the International Court of Justice considered claims arising from the conflict in Nicaragua. Noting the difficulty of characterizing the underlying conflict as internal (as a Nicaraguan civil war) or

[5] Although international jurisprudence is not binding upon this Court, we respectfully submit that the international decisions in favor of Common Article 3's applicability are persuasive authority, especially in light of this Court's statement that it "should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such." *Breard v. Greene*, 523 U.S. 371, 375 (1998).

international (because of the allegation of U.S. involvement), the I.C.J. concluded that "[b]ecause the minimum rules applicable to international and to non-international conflicts are identical . . . [t]he relevant principles are to be looked for in the provisions of Article 3." *Id.* at ¶ 219. More recently, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("ICTFY") considered whether the Yugoslavian conflict was international or non-international, and concluded, citing *Nicaragua*, that the "character of the conflict is irrelevant" because Common Article 3 reflects "'elementary considerations of humanity' applicable under customary international law to any armed conflict, whether it is of an internal or international character." *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 102 (ICTFY Appeals Chamber Oct. 2, 1995) ("*Tadic*"). The ICTFY subsequently reaffirmed this ruling in *Prosecutor v. Delalic*, Case No. IT-96-21, Judgement, ¶ 140-50 (ICTFY Appeals Chamber Feb. 20, 2001); *see also Prosecutor v. Furundzija*, Case No. IT-95-17/1, Judgement, ¶ 138 (ICTFY Trial Chamber Dec. 10, 1998) (Common Article 3 "is applicable both to international and internal armed conflicts").

II. THE MILITARY COMMISSION CONVENED AGAINST PETITIONER VIOLATES COMMON ARTICLE 3

A. The Military Commission Convened To Try Petitioner Is Not A "Regularly Constituted Court" As Required By Common Article 3

Common Article 3 mandates that prisoners may be punished only after trial by a "regularly constituted court." The Commentaries provide little insight into this provision, stating only that Common Article 3 was intended to ban "'summary' justice" while leaving "intact the right of the State to prosecute, sentence and punish according to the law." ICRC Commentaries (IV) at 39. In a somewhat different context, however, the Commentaries make clear

that the requirement of a "regularly constituted" court "definitely excludes all special tribunals." *Id.* at 340 (discussing Article 66 of the Fourth Convention, which mandates that civilians be punished by "properly constituted, non-political military courts"). Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 66, 6 U.S.T. 3516. The Commentary to Article 66 further states that "it is the ordinary military courts of the Occupying Power which will be competent. Such courts will, of course, be set up in accordance with the recognized principles governing the administration of justice." ICRC Commentaries (IV) at 340.

In this case, the Military Commissions were established pursuant to the President's Military Order dated November 13, 2001 (the "November 13 Order"), *see* 66 Fed. Reg. 57,833, as well as the Defense Department's Military Commission Order No. 1 ("MCO 1"), as amended most recently on August 31, 2005, *see* http://www.defenselink.mil/news/Sep2005/d20050902order.pdf.[6] The November 13 Order makes clear that the Military Commissions are "special tribunals" set up to punish individuals specifically identified by the President. Indeed, § 2(a) of the November 13 Order mandates that an individual may be tried by Military Commission only if the President personally determines that there is reason to believe that the individual is a member of al Qaeda, has participated in terrorism, or has harbored a terrorist. *See* 66 Fed. Reg. 57,834. Because the Military Commissions are thus vested with jurisdiction only in cases that are specially designated on an *ad hoc* basis, they stand in contrast to regularized tribunals, such as general courts-martial, which possess jurisdiction over a broad class of persons, including detainees who are not prisoners of war. *See* 10 U.S.C. § 818 (jurisdiction of general courts-martial).

Further, although the Military Commissions are cloaked in the forms of legality, drawing their authority from orders listed in the Federal Register and the Code of

[6] An earlier version of MCO 1 was codified at 32 C.F.R. § 9.

Federal Regulations, in fact they vest members of the Executive Branch with breathtaking discretion. Under the Military Commission rules, the President and/or his subordinates enjoy power to decide:

- Which individuals should be tried by a Military Commission, *see* 66 Fed. Reg. 57,834 and MCO 1 § 3(A);
- Whether to exclude members of the public, the press, civilian defense counsel, or even the defendant himself from a trial based on "national security interests," MCO 1 § 6(B)(3);
- Whether to receive evidence at trial, provided only that it must be deemed to "have probative value to a reasonable person" in order to be admitted, *id.* at § 6(D)(1);
- Whether to issue protective orders that preclude the defendant and civilian defense counsel from seeing certain of the prosecution's evidence, *see id.* at § 6(D)(5)(b); and
- What sentence to impose upon conviction, including "death, imprisonment for life or for any lesser term," or other sentences, 66 Fed. Reg. 57,834; MCO 1 §§ 6(G), 6(H)(6).

Further, the rules governing Military Commissions are subject to change at the sole discretion of the Executive Branch either by way of formal amendment, *see, e.g.,* MCO 1 § 11 ("The Secretary of Defense may amend this Order from time to time"), or if the Secretary of Defense exercises an open-ended power to circumvent the rules, *see id.* § 1 ("Unless otherwise directed by the Secretary of Defense . . . the procedures prescribed herein shall and no others shall govern" trials before Military Commissions). Taken together, these provisions amount to a massive and unilateral assertion of authority by the Executive Branch to select, try, and punish prisoners under Military Commissions. As such, the Commissions are not a "regularly

constituted court" and thus fail to satisfy the basic requirement of Common Article 3.[7]

B. Common Article 3 Entitles Petitioner To Basic Judicial Safeguards Recognized In International Law And This Court's Long-standing Precedents

Even if the Military Commissions are deemed "regularly constituted courts," their highly irregular procedural rules fail to afford "all the judicial guarantees which are recognized as indispensable by civilized peoples" as separately required by Common Article 3. This latter provision was inserted with the intention that signatory nations should "surround the administration of justice with safeguards aimed at eliminating the possibility of judicial errors." ICRC Commentaries (IV) at 39. The precise contours of the Common Article 3 safeguards were delineated in Article 75 of Protocol I to the Conventions, which was adopted in 1977 ("Article 75"). Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), June 8, 1977, art. 75, 1125 U.N.T.S. 3; *see also* ICRC, *Commentaries to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* 878 (1977) ("Protocol I Commentaries"). Although the United States did not adopt Protocol I because of objections to other provisions, "it does regard the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled." William H. Taft, IV, *The Law of Armed Conflict After 9/11*, 28 Yale J. Int'l L. 319, 322 (2003); *see also* Conference, *The*

[7] We do not argue that *all* military commissions would fail to satisfy the "regularly constituted court" requirement of Common Article 3. Rather, we argue only that *these* Military Commissions fail to do so because they are focused selectively on cases chosen by the Executive and because the formation, structure, and operation of these Military Commissions rests on such an enormous assertion of authority by the Executive Branch.

Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law, 2 Am. J. Int'l L. & Pol'y 415, 427 (1987) (remarks of U.S. Dep't of State Legal Adviser Michael J. Matheson that the U.S. supports "the fundamental guarantees contained in article 75"). Therefore, to comport with Common Article 3, the Military Commissions must satisfy the provisions of Article 75, which include:

(1) prompt judicial proceedings;

(2) the right to be tried in one's presence;

(3) the right to not be compelled to testify against himself;

(4) the right to cross-examine witnesses against him and to provide witnesses on his behalf; and

(5) release from detention with the minimum delay possible as soon as the circumstances justifying the arrest have ceased to exist.

Article 75 at ¶ 4.[8]

These guarantees are deeply rooted in our own Constitutional traditions. For example, in *Crawford v. Washington*, 541 U.S. 36, 49 (2004), this Court admonished that the rights enshrined in the Sixth Amendment's Confrontation Clause have historically been considered "indispensable conditions" and "founded on natural justice" (internal quotations omitted). Another "principle of natural justice" is the right

[8] The requirements of Article 75 are also embodied in subsequent international covenants respecting human rights, such as Articles 9 and 14 of the International Covenant on Civil and Political Rights ("ICCPR"), Mar. 23, 1976, 999 U.N.T.S. 171. In 1992, the U.S. ratified the ICCPR. In addition to encompassing the specific protections listed in Article 75, the ICCPR incorporates a general guarantee of an "independent and impartial tribunal." *Id.* at art. 14. This last provision echoes Article 10 of the Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. GAOR 3, U.N. Doc. A/810 at 73 (1948) ("UDHR"), which the U.S. government has recognized as a charter of inalienable human rights. *See, e.g.*, U.S. Dep't of State Statement on Human Rights, http://www.state.gov/g/drl/hr/ ("a central goal of U.S. foreign policy has been the promotion of respect for human rights, as embodied in the Universal Declaration of Human Rights").

of the accused to be present at his trial. *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876); *see also Lewis v. United States*, 146 U.S. 370, 372 (1892) (absence of defendant at his own trial is "contrary to the dictates of humanity") (internal quotations omitted). This Court has also declared that keeping evidence, favorable or not, from the eyes of the accused violates fundamental precepts of fairness. *See, e.g.*, *Brady v. Maryland*, 373 U.S. 83, 88 (1963) (withholding of favorable evidence from an accused "does not comport with standards of justice"); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-71 n.17 (1951) ("[t]he plea that evidence of guilt must be secret is abhorrent to free men") (internal quotations omitted).

Because the safeguards demanded by Common Article 3 (as spelled out in Article 75) are universally recognized as bedrock requirements of any civilized justice system, it is hardly surprising that they have been incorporated into the international tribunals established since the passage of Protocol I. These tribunals have tried defendants, including ex-Serbian president Slobodan Milosevic, accused of the most heinous crimes, including genocide. *See generally* Statute of the ICTFY, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 6, U.N. Doc. S/RES/827 (May 25, 1993) ("ICTFY Statute") at art. 20-21; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (Nov. 8, 1994) ("ICTR Statute") at art. 19-20; The European Convention on Human Rights, Nov. 4, 1950, art. 5-6, 213 U.N.T.S. 221 ("ECHR").

MCO 1 fails to meet the requirements of Common Article 3 in four respects: (1) it allows petitioner to be unwillingly excluded from his trial; (2) it permits the tribunal to eviscerate petitioner's ability to cross-examine adverse witnesses; (3) it has permitted petitioner to be detained for years before trial; and (4) it fails to provide an impartial and independent tribunal. We address each of these points in turn.

1. Right To Be Present At Trial

Although the Commission rules nominally recognize petitioner's right to be present at his tribunal, MCO 1 at § 5(K), that right yields if the Commission closes the proceedings to petitioner and his Civilian Defense Counsel based on anything the Presiding Officer or Secretary of Defense deems to be a matter of national security. *Id.* at § 6(B)(3). The Presiding Officer may exclude petitioner upon an *ex parte* presentation by the prosecution. *Id.* This rule violates petitioner's "right to be tried in his presence." Article 75 at ¶ 4(e); *see also* ICCPR art. 14 at ¶ 3(d); ICTFY Statute art. 21 at ¶ 4(d); ICTR Statute art. 20 at ¶ 4(d). Petitioner's exclusion also neutralizes his right to cross-examine witnesses by preventing him from observing them and conferring with his counsel. Article 75 at ¶ 4(g); *see also* ICCPR art. 14 at ¶ 3(e); ICTFY Statute art. 21 at ¶ 4(e); ICTR Statute art. 20 at ¶ 4(e); ECHR art. 6 at ¶ 3(d).

Compounding this violation is the Commission's ability to offer evidence, under the rubric of "Protected Information," against petitioner without his ever knowing about it. *See* MCO 1 at § 6(D)(5). Although any admitted evidence must be seen by Detailed Defense Counsel, *id.* at § 6(D)(5)(b)(iii), Detailed Defense Counsel is not permitted to share the content of that evidence with petitioner or Civilian Defense Counsel. "Thus, for example, testimony may be received from a confidential informant, and petitioner will not be permitted to hear the testimony, see the witness's face, or learn his name." *Hamdan*, 344 F. Supp. 2d at 168. The consequences of such secret evidence are dire: petitioner could be sentenced to a lengthy prison term, or even executed, without ever knowing on what grounds he has been found guilty.

The fact that Detailed Defense Counsel can be present at all stages of the trial does not cure the problem of petitioner's exclusion. "The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it." *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988). The District Court's ruling adhered to this principle, noting the need for counsel to be able to

turn to his client and ask, "Did that really happen? Is that what happened?" *Hamdan*, 344 F. Supp. 2d at 168 (internal quotations omitted). *See also* Protocol I Commentaries at 883 ("the important thing is that the defendant is present at the sessions where the prosecution puts its case, when oral arguments are heard, etc. In addition, the defendant must be able to hear the witnesses and experts [and] to ask questions himself"). The government has not provided a single instance of a past tribunal, whether court proceeding or military commission, that has allowed for the involuntary exclusion of a defendant for any reason other than disruption of proceedings. The Uniform Code of Military Justice does not allow for such measures. 10 U.S.C. § 839(b); *United States v. Daulton*, 45 M.J. 212, 219 (C.A.A.F. 1996).

2. Right To Cross-Examine Adverse Witnesses

The Commissions' rules compromise petitioner's confrontation and cross-examination rights beyond excluding him unwillingly from the courtroom. *See* Article 75 at ¶ 4(g); *see also* ICCPR art. 14 at ¶ 3(e); ICTFY Statute art. 21 at ¶ 4(e); ICTR Statute art. 20 at ¶ 4(e); ECHR art. 6 at ¶ 3(d). The Commission is allowed to consider any evidence it deems probative "including, but not limited to, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports." MCO 1 at § 6(D)(3). Thus, even if petitioner is present, the Commission may receive anonymous unsworn statements whose sources petitioner cannot confront or impeach. This is exactly the situation this Court found an affront to historical concepts of natural justice in *Crawford*, 541 U.S. at 49. Furthermore, the military commissions in *Madsen v. Kinsella*, 343 U.S. 341 (1952), on which the government has often relied, explicitly guaranteed the defendant the rights to be present at her proceeding and to cross-examine adverse witnesses without qualification. *Id.* at 358 n.24.

3. Right To Prompt Judicial Proceedings

Petitioner has endured an unconscionably lengthy pre-trial detention. He was brought to Guantanamo in June 2002, and the decision to try him by military commission was made over a year later in July 2003, but he was not charged until after another full year, in July 2004. Common Article 3's promptness requirement does not countenance such delays. Indeed, the Protocol I Commentaries establish a *10 day* time limit for being informed of charges. Protocol I Commentaries at 876-77.

International law entitles the accused to be "promptly informed of any charges against him" and "to trial within a reasonable time." ICCPR art. 9 at ¶ 2, 3; *see also* Article 75 at ¶ 3, 4(a); ICTFY Statute art. 21 at ¶ 4(a), 4(c); ICTR Statute art. 20 at ¶ 4(a), 4(c); ECHR art. 6 at ¶ 1, 3(a). As this Court has emphasized, unreasonable delay in proceedings not only subjects an accused to the harm of a lengthy pretrial confinement, but impairs the accused's defense "by dimming memories and loss of exculpatory evidence." *Doggett v. United States*, 505 U.S. 647, 654 (1992). None of the military tribunals previously encountered by this Court involved detention as prolonged as petitioner's. *Madsen*, 343 U.S. at 343-44 (defendant charged a day after arrest and tried six months later); *Yamashita*, 327 U.S. at 5 (defendant charged within a month of capture and tried two weeks later); *Ex parte Quirin*, 317 U.S. 1, 7-8 (1942) (defendants charged within three weeks of capture and tried less than a week later).

4. Right To Be Tried By An Independent And Impartial Tribunal

Finally, the Commissions are not an "independent and impartial tribunal" as required by Common Article 3. ICCPR art. 14 at ¶ 1; UDHR art. 10; ECHR art. 6 at ¶ 1. The Commission members are appointed by the Secretary of Defense, and can be removed at any time for "good cause." MCO 1 at § 4(A)(1)-(3). Once the Commission renders a decision, the case passes automatically to a Review Panel, which either recommends a disposition to

the Secretary of Defense or remands the case to the Commission for further proceedings. *Id.* at § 6(H)(4). The Secretary of Defense, in turn, either forwards the case to the President with a recommended disposition or remands the case to the Commission for further proceedings. *Id.* at § 6(H)(5). The President may approve or disapprove the recommendation; change the conviction to one of a lesser included offense; mitigate, commute, defer or suspend the sentence imposed; or delegate his final authority to the Secretary of Defense. *Id.* at § 6(H)(6). Although the President or Secretary of Defense cannot change a "Not Guilty" finding to "Guilty," a "Not Guilty" disposition will not take effect until it is finalized by the President or Secretary of Defense. *Id.* at § 6(H)(2).[9]

As the foregoing structure makes clear, the Commissions are under the control of the President and Secretary of Defense. But these two individuals have already asserted that the Guantanamo detainees are guilty. For example, the President has unequivocally said of the Guantanamo detainees: "these are killers." Press Release, President Meets with Afghan Interim Authority Chairman (Jan. 28, 2002), http://www.whitehouse.gov/news/releases/

[9] On December 31, 2005, shortly before the deadline for filing this brief, the President signed into law the National Defense Authorization Act for Fiscal Year 2006, H.R. Con. Res. 1815 (2005) (enacted) ("NDAA"). Section 1092 of the NDAA establishes limited jurisdiction in the D.C. Circuit to review final decisions of Military Commissions. *See id.* at § 1092(d)(3). The practical effect of this new statute is uncertain. It is unknown, for example, what standards the D.C. Circuit will employ in choosing to exercise its discretionary jurisdiction in cases in which the defendant has been sentenced to a term of imprisonment of less than 10 years, *see id.* at § 1092(d)(3)(B)(ii), or what standard of review will be used in cases where the D.C. Circuit does exercise jurisdiction. Given the government's consistent effort to "push the envelope" by asserting Executive authority as aggressively as possible, we anticipate that the government will seek to resist substantive judicial review of Military Commission decisions under the new statute. In any case no judicial review is triggered until the Executive gives final approval to the Commission's judgment, meaning that the timing of review is ultimately at the discretion of the Executive.

2002/01/20020128-13.html. The Secretary of Defense, meanwhile, has called the Guantanamo detainees "among the most dangerous, best-trained, vicious killers on the face of the Earth." Jess Bravin, Jackie Calmes & Carla Anne Robbins, *Status of Guantanamo Bay Detainees Is Focus of Bush Security Team's Meeting*, Wall St. J., Jan. 28, 2002, at A16; *see also* Transcript, Defense Department Briefing (Jan. 22, 2002), http://www.globalsecurity.org/military/library/news/2002/01/mil-020122-usia01.htm (quoting Secretary of Defense as calling Guantanamo detainees "committed terrorists" who "have been found to be engaging on behalf of the al Qaeda"). The government can offer no precedent for a military tribunal operating under such an overt bias. To the contrary, the later German saboteur tribunals in World War II were modified so that they would be *more* independent than earlier tribunals had been. *See* Louis Fisher, *Nazi Saboteurs on Trial* 140-43 (Univ. Press of Kansas 2003).

III. PETITIONER'S RIGHTS UNDER COMMON ARTICLE 3 ARE ENFORCEABLE IN FEDERAL COURT

In the decision below, the Court of Appeals erroneously concluded that petitioner's rights under the Geneva Conventions cannot be enforced in federal court. The Court of Appeals reached this decision based largely upon its reading of this Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In doing so, the Court of Appeals mistakenly conflated two distinct questions: (1) whether the Conventions provide a private right of action (*i.e.*, whether a private litigant can gain federal jurisdiction solely by claiming a violation of the Conventions), and (2) whether the rights guaranteed by the Conventions are judicially enforceable (*i.e.*, whether a litigant can invoke the Conventions as the rule of decision in a case with an independent jurisdictional foundation). The first of these questions, which was addressed in *Eisentrager*, is not relevant here. Petitioner does not rely on the Conventions for a "private right of action," as he has independently gained

access to the federal courts by way of his habeas petition. The answer to the second question, informed by numerous decisions of this Court dating back to the 1700s, is plainly "yes." Because Common Article 3 protects individual rights and is self-executing (*i.e.*, it is judicially enforceable without the need for any implementing legislation), it can and should supply the rule of decision in petitioner's case.

A. This Court Has Consistently Enforced Treaties That Protect Individual Rights And Are Self-Executing

As the Supremacy Clause of the Constitution declares in relevant part, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. In the early days of our nation's history, Chief Justice Marshall proclaimed that "where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress." *United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801). He later explained, in *Foster v. Neilson*, 27 U.S. 253, 314 (1829), *overruled in part by United States v. Percheman*, 32 U.S. 51 (1833), that this tenet of American law enshrined "a different principle" than that followed in Great Britain. In Britain, a treaty was considered "*not* a legislative act," and was therefore "carried into execution by the sovereign power of the respective parties to the instrument." *Foster*, 27 U.S. at 314 (emphasis added). In the United States, in contrast, a treaty is "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." *Id.*; *accord United States v. Rauscher*, 119 U.S. 407, 417-18 (1886). Over the years, this Court has enforced treaty provisions if those provisions require no implementing legislation to make them effective, and has used the term "self-executing" to describe such provisions. *See, e.g.*, *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("If the treaty contains stipulations which are self-executing, that is, require no legislation to make them

operative, to that extent they have the force and effect of a legislative enactment").

This Court has a long history of finding treaty provisions self-executing, and therefore judicially enforceable in favor of individual litigants, when those provisions confer rights upon individuals. For example, in *Chew Heong v. United States*, 112 U.S. 536, 538 (1884), a Chinese laborer was detained by the Executive Branch when he attempted to re-enter the U.S. after traveling to Hawaii. The alien in *Chew Heong* (who accessed the federal courts by means of a habeas petition) argued that his detention violated an 1880 treaty between China and the United States declaring that "Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord." *Id.* at 538, 542. The Court observed that the 1880 treaty "operate[d] of itself without the aid of legislation," and therefore "while in force constitute[d] a part of the supreme law of the land." *Id.* at 540. Accordingly, the Court enforced the alien's "right to go from and return to the United States at pleasure" as "secured by [the] treaty." *Id.* at 539-40.

Two years later, this Court similarly enforced a treaty as providing the rule of decision in *Rauscher*. There, the United States prosecuted a defendant on a charge of "cruel and unusual punishment" after extraditing him from Great Britain on a murder charge. 119 U.S. at 409. The defendant appealed on the grounds that the governing extradition treaty required that he be tried only for the crime for which he was extradited. *Id.* The *Rauscher* Court noted that the Constitution had departed from the British norm of exclusive diplomatic enforcement of treaties. *Id.* at 417-18. The Court then concluded that because the extradition treaty was "the supreme law of the land," the Court was "bound to take judicial notice, and to enforce in any appropriate proceeding the rights of persons growing out of that treaty." *Id.* at 419. Based on this reasoning, the Court held that the treaty conferred upon the defendant the right to be tried only for the charge underlying his extradition. *Id.* at 433.

The turn of the century brought no change to the Court's view on judicial enforcement of treaty provisions protecting individual rights. In *Asakura*, 265 U.S. at 339-40, a Japanese national challenged a city ordinance restricting pawn-brokering to U.S. citizens, relying on a 1911 treaty between Japan and the U.S. guaranteeing each country's citizens the "liberty to enter, travel and reside in the territories of the other to carry on trade . . . upon the same terms as native citizens and subjects." The Court unanimously held that the 1911 treaty "operates of itself without the aid of any legislation, state or national," and would therefore "be applied and given authoritative effect by the courts." *Id.* at 341. After interpreting the term "trade" to encompass pawn-brokering, the Court vindicated the petitioner's rights under the treaty and enjoined the city from enforcing the ordinance against him. *Id.* at 343-44.

Shortly after World War II, in a decision that is highly probative here, this Court treated the 1949 Conventions' predecessors, the 1929 Geneva Conventions, as judicially enforceable. In *Yamashita*, which arose out of the trial of a top Japanese general by a military commission following the Japanese surrender, the defendant challenged the tribunal's procedural rules, which permitted it to receive into evidence depositions, affidavits, hearsay, and opinion evidence in a manner that would not be permitted in a criminal trial in a U.S. court. *See* 327 U.S. at 6. Although the Court rejected the defendant's argument on the merits, it gave full consideration to his contention that the procedures used by the military commission were impermissible under the 1929 Geneva Conventions. *See id.* at 23.[10]

[10] On the merits, finding that the 1929 Conventions only regulated procedures before imposing punishment for offenses committed during a prisoner's period of captivity, the Court concluded that the receipt of hearsay and opinion evidence at Yamashita's trial did not violate the treaty. *Id.* at 23. *Yamashita*'s holding on the merits became obsolete with the passage of the 1949 Conventions, which as noted above extended procedural protections far beyond the now-defunct 1929 Conventions. In particular, in contrast to the 1929 Conventions, Common Article 3 regulates the procedures that must be observed before a prisoner may be

(Continued on following page)

The foregoing decisions stand alongside many other precedents in which this Court has enforced the treaty rights of private litigants. None of these precedents dealt with treaties containing specific language regarding self-execution or judicial enforcement, and all of them belie the contention that enforcement of treaties is exclusively a matter for sovereign negotiation. *See, e.g.*, *Ware v. Hylton*, 3 U.S. 199, 239 (1796) (enforcing British citizens' right to collect a debt under peace treaty provision stating that "creditors, on either [the American or British] side . . . shall meet with no lawful impediment to the recovery of the full value . . . of all bona fide debts, heretofore contracted"); *Hauenstein*, 100 U.S. at 486 (enforcing Swiss national's right to proceeds from property of Virginian decedent under treaty provision giving Swiss nationals the right to sell inherited property and "the liberty at all times to withdraw and export the proceeds thereof"); *Johnson v. Browne*, 205 U.S. 309, 319 n.† (1907) (granting writ of habeas corpus to prisoner extradited from Canada for different crime than the one he was sentenced for, because extradition treaty stated that no extradited defendant "shall be triable or be tried for any crime or offense . . . other than the offense for which he was surrendered"); *Jordan v. Tashiro*, 278 U.S. 123, 126 n.1 (1928) (enforcing Japanese national's right to set up corporation under same treaty provisions as in *Asakura*); *Nielsen*, 279 U.S. at 50 (enforcing Danish national's right to succeed to property without paying inheritance tax imposed on nonresident aliens under treaty provision guaranteeing that a Danish person's property within the U.S. would be taxed no more heavily than if it were owned by an American citizen); *Kolovrat v. Oregon*, 366 U.S. 187, 191 n.6 (1961) (enforcing Yugoslavian national's right to inherit from American decedent under treaty provision

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punished for *any* offense, not merely for offenses committed during the time of captivity. *Compare, e.g.*, Geneva III, art. 3, 6 U.S.T. 3316 *with* Geneva Convention Relative to the Treatment of Prisoners of War, Jul. 27, 1929, 47 Stat. 2021.

giving Serbian citizens the right to acquire property in the U.S. as if they were American citizens).

In each of these cases, the Court enforced treaty provisions in order to vindicate the individual rights conferred by the respective treaties. Additionally, in each case, those individual rights were conferred in terms that could be given effect without additional legislative action (*i.e.*, in "self-executing" provisions). In the *Head Money Cases*, 112 U.S. 580 (1884), this Court recognized that treaties bearing both of these characteristics should be judicially enforced. Specifically, the Court noted 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. . . . A treaty, then, is a law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. 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.

112 U.S. at 598-99; *see also Foster*, 27 U.S. at 307 (observing that the judiciary should not resolve disputes purely between sovereigns, but that "its duty commonly is to decide upon individual rights"); Restatement (Third) of the Foreign Relations Law of the United States § 111, Rep. n.5 (1987) ("Restatement") ("agreements that can be readily given effect by executive or judicial bodies, federal or State, without further legislation, are deemed self-executing, unless a contrary intention is manifest").

B. Common Article 3 Protects Individual Rights And Is Self-Executing

In this case, Common Article 3 bears both characteristics that were identified in the *Head Money Cases* as the

criteria for judicial enforcement: it protects individual rights and is capable of stand-alone implementation by a court.

First, by its own terms Common Article 3 explicitly confers rights upon individuals, including prohibitions against discrimination based on "race, colour, religion or faith, birth or wealth, or any other similar criteria"; against "murder of all kinds, mutilation, cruel treatment and torture"; and, most relevant here, "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Common Article 3 at cl. 1, 1(a), 1(d). Common Article 3 employs mandatory language, stipulating that detainees "*shall* in all instances be treated humanely" and mandating that signatory nations "*shall be prohibited*" from engaging in specified types of misconduct. *Id.* at cl. 1 (emphasis added). This Court has repeatedly enforced treaties with this sort of mandatory language. *See, e.g.*, *Ware*, 3 U.S. at 239; *Chew Heong*, 112 U.S. at 538; *Asakura*, 265 U.S. at 340.

Second, the rights conferred by Common Article 3 are judicially enforceable without additional legislation. As an initial matter, courts plainly are competent to enforce Common Article 3. Congress recognized this proposition as recently as 1997, when it incorporated Common Article 3 into federal criminal law in the War Crimes Act. *See* 18 U.S.C. § 2441(c)(3) (making it unlawful for U.S. nationals to engage in conduct "which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949"). Furthermore, the ratification process compellingly demonstrates that Common Article 3 is capable of enforcement without implementing legislation.

The Senate Report accompanying the ratification of the Conventions in 1955 stated broadly that "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 [Geneva] conventions." S. Exec. Rep. No. 84-9, at 30-31 (1955). The Senate Report selected a handful of articles from the Conventions – Common Article 3 not among them – and

designated those articles in need of implementing legislation. *Id.* As the Restatement of Foreign Relations makes clear, the Senate's conclusion is powerful evidence that the provision is self-executing. *See* Restatement at § 111 Rep. n.5 ("[I]f the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the courts. (This is especially so if some time has elapsed since the treaty has come into force.)"). Indeed, if the Senate had wished to render the Conventions non-self-executing, it would have done so explicitly, as it did with the more recently enacted ICCPR. *See* 138 Cong. Rec. S4784 (Apr. 2, 1992) (ratifying the ICCPR subject to the declaration that "the provisions of Articles 1 through 27 of the Covenant are not self-executing"); *accord Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004). Furthermore, the fact that a scant minority of the provisions in the 1949 Conventions were viewed as non-self-executing can hardly support an argument that the Conventions are non-self-executing *in toto*, especially when the Senate took affirmative steps to enact implementing legislation for the 1949 Conventions where it understood such legislation to be required. *See* Restatement at § 111 cmt. h ("[s]ome provisions of an international agreement may be self-executing and others non-self-executing"); *see also Fok Young Yo v. United States*, 185 U.S. 296, 303 (1902) (finding one provision of 1880 treaty between China and the U.S. to be self-executing and another provision non-self-executing).

C. In The Decision Below, The Court Of Appeals Misread *Eisentrager*

In holding that the Geneva Conventions are not judicially enforceable, the D.C. Circuit misread this Court's decision in *Eisentrager*. *See Hamdan*, 415 F.3d at 39-40 (discussing *Eisentrager*). *Eisentrager* was a putative habeas corpus action brought by German partisans who were captured during hostilities in China, convicted by a military commission in China, and repatriated to Germany to serve their sentences. *See* 339 U.S. at 765-67.

Noting the lack of any precedent for a habeas petition brought by an alien enemy who was not present, at any relevant time, on United States territory, the Court held that the petitioners could not bring an action in federal court. *Id.* at 790-91.

Toward the end of *Eisentrager*, the Court addressed the prisoners' arguments that their convictions by the military commission in China were invalid under the 1929 Geneva Conventions. On the merits, the Court rejected the argument. *Id.* at 789-90.[11] In footnote 14, the Court noted that the prisoners did retain "right[s] which the military authorities are bound to respect" under the 1929 Conventions; *i.e.*, proper treatment as captives, but stated that the prisoners lacked the ability to enforce their treaty rights in federal court because "responsibility for observance and enforcement of these rights is upon political and military authorities." *Id.* at 789 n.14. In the decision below, the Court of Appeals placed great reliance on footnote 14, holding that it "leads to the conclusion that the 1949 Geneva Convention cannot be judicially enforced." *Hamdan*, 415 F.3d at 39.

But the Court of Appeals failed to recognize that footnote 14 followed inexorably from the holding in *Eisentrager* that the prisoners lacked the ability to *bring any challenge* in U.S. courts to their trial or punishment. With no independent right of action to justify their presence in federal court, the *Eisentrager* petitioners were not permitted to rely on the treaty as their sole basis for filing suit. This holding has no application here, where petitioner has an independent basis for filing his claim in federal court: his statutory right, recognized in *Rasul v. Bush*, 542 U.S. 466 (2004), to seek a petition for a writ of habeas corpus. Far more germane than the *Eisentrager* footnote is *Yamashita*, which the Court of Appeals did not discuss or even cite in its discussion of treaty enforceability. As *Yamashita*

[11] As was the case in *Yamashita*, *Eisentrager* applied the now-obsolete 1929 Geneva Conventions, so the Court's substantive analysis is not relevant to the instant case. *See supra* n.10.

makes clear, and as this Court's treaty jurisprudence establishes, the Geneva Conventions can and should serve as the rule of decision in a properly filed habeas corpus action such as this one. *See supra* at 21-28.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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