No. 03-6696

IN THE
Supreme Court of the United States

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
As Next Friend of YASER ESAM HAMDI,
Petitioners,

v.

DONALD H. RUMSFELD, W.R. PAULETTE, Commander,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* GLOBAL RIGHTS IN SUPPORT OF PETITIONER

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INTERESTS OF AMICUS CURIAE[1]

Global Rights respectfully submits this brief in support of petitioners, Yaser Esam Hamdi and Esam Fouad Hamdi, as Next Friend of Yaser Esam Hamdi. Both parties have consented to the filing of this brief.

Global Rights is a non-profit public interest legal organization with projects in 22 countries engaged in training, technical assistance, advocacy, and litigation around the world. Founded in 1978 as the International Human Rights Law Group, Global Rights provides legal assistance and information in the field of international human rights law and maintains consultative status with the Economic and Social Council of the United Nations. Global Rights' goals include the development and promotion of international legal norms, and its advocates work closely with individuals and organizations worldwide to expand the scope of human rights protections for men and women. Global Rights has represented individuals and organizations before national and international tribunals and has appeared as amicus curiae in numerous cases in the United States. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003).

SUMMARY OF ARGUMENT

Since the Allied victory in the Second World War, the United States has played a central role in the shaping of international human rights and humanitarian law. Nevertheless, the Government is violating its obligations under the Geneva Conventions of 1949 and the International Covenant on Civil and Political Rights, as well as customary international law, by arbitrarily detaining Yaser Esam Hamdi. The Executive's detention of Mr. Hamdi is arbitrary under international law, which is binding on the United States. *First*, Mr. Hamdi is being held outside the imprimatur of law and thus his detention is arbitrary *per se*. *Second*, the Executive has denied Mr. Hamdi access to a competent tribunal within which to challenge the basis of his detention, depriving him of the process he is due.

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[1] This brief was not authored, in whole or in part, by counsel for either party. No person or entity other than the *amicus curiae*, their members, and their counsel contributed monetarily to the preparation or submission of the brief. The parties consented to the filing of the brief and copies of their letters of consent have been lodged with the Clerk of the Court.

The Court of Appeals for the Fourth Circuit incorrectly upheld the complete denial of process to Mr. Hamdi on the basis of the Executive's detention powers under Article II of the United States Constitution and Congress's Authorization for Use of Military Force ("Joint Resolution"). This Court has long considered international law when defining the scope of the Executive's detention powers during periods of conflict, when examining the breadth of an individual right, and when interpreting ambiguity in congressional acts. Read within the context of international law, neither Article II nor the Joint Resolution can support Mr. Hamdi's arbitrary detention. This case should therefore be remanded in order to provide Mr. Hamdi with a meaningful opportunity to challenge the basis of his detention.

ARGUMENT

I. INTRODUCTION

Speaking of his aspirations for Afghanistan, the President announced: "America will always stand firm for the non-negotiable demands of human dignity [including] the rule of law . . ." State of the Union Address, *at* http://www.whitehouse.gov/news/releases/2002/01/print/20020129-11.html (Jan. 29, 2002) ("2002 State of the Union Address"). But by arbitrarily detaining Mr. Hamdi, the Executive has reneged upon this vital and longstanding national commitment.

The Second World War triggered a watershed in the advancement and recognition of basic human rights by nations and by the international community. Out of the horrible experiences of war came a deep distrust of any claim by a nation of absolute and unreviewable power. The international community, including the United States, came together to ensure that even in times of war the rule of law is observed. Stated another way, there are some

basic human rights that simply must be respected and indeed protected by all nations in all circumstances.[2]

In this case, the President, as Executive and Commander-in-Chief, has asserted virtually absolute power over Mr. Hamdi with disregard for those basic human rights that the United States has been instrumental in developing and defending around the world. The Executive has claimed the power to deprive Mr. Hamdi of his liberty indefinitely, of any and all right to counsel, of the right to know the charges against him, of the right to a meaningful opportunity to challenge the basis of his detention, and even of the right to be charged. Added to this deprivation of procedural rights is the fact that until only December 2003, Mr. Hamdi has been held largely incommunicado at a secret location, unable to communicate with nearly *anyone*, not just counsel, in conditions that are still unknown, and for a purpose that remains secret.[3] This assertion of power could not be more inconsistent with the structure of international human rights and humanitarian law that the United States has

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[2] The protection of these basic rights is not unique to international law, but instead is consistent with the traditional American system of checks and balances underpinning our own constitutional structure, ensuring the protection of individual liberties. *See Duncan v. Kahanamoku*, 327 U.S. 304, 322-23 (1946) ("[T]he founders . . . were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws. Their philosophy has been the people's throughout our history. For that reason we have maintained legislatures chosen by citizens or their representatives and courts and juries to try those who violate legislative enactments."); *United States v. Robel*, 389 U.S. 258, 264 (1967) ("Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart.").

[3] *See* News Release, Department of Defense, DOD Announces Detainee Allowed Access to Lawyer, *at* http://www.defenselink.mil/releases/2003/nr20031202-0717.html (Dec. 2, 2003).

helped to create and promulgate, in the name of liberty and justice, to the rest of the world.[4]

Notwithstanding the fortitude of these laws, the United States Government now challenges their applicability to today's wartime detainees. Since the Second World War, the United States maintained the good fortune of not sustaining a major attack on its mainland. Military and economic strength, combined with an arsenal of foreign policy tools, kept our enemies in check. Among those policy tools have been the promotion of democracy, the rule of law, and the protection of human rights, combined with a keen awareness of reciprocity.[5] But the attacks on the United States in 2001 apparently have prompted the Government to disregard the requirements of the Geneva Conventions, the International Covenant on Civil and Political Rights, and customary international law regarding the laws of detention and, in the

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[4] The Ninth Circuit remarked that denying detainees at Guantanamo Bay access to the federal courts "is at odds with the United States' longtime role as a leader in international efforts to codify and safeguard the rights of prisoners in wartime." *Gherebi v. Bush*, 352 F.3d 1278, 1283 n.7 (9th Cir. 2003) (stating that the Government's position "is also at odds with one of the most important achievements of these efforts - the 1949 Geneva Conventions, which require that a competent tribunal determine the status of captured prisoners"); *see Robel*, 389 U.S. at 264 ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."). For example, the United States played a significant role in forming the GPW. *See, e.g.*, Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims (Geneva, April 14-26, 1947) 4 (Int'l Comm. of the Red Cross 1947) ("Conference Report"). Representatives from the United States, along with representatives from fifteen other countries, attended the "Conference of Government Experts for the Study of the Conventions for the Protection of War Victims" in Geneva. Those countries participating "had detained or lost large numbers of prisoners of war and civilian internees, and thus had first-hand knowledge of the matters under discussion." *Id*.; Jean S. Pictet, *The New Geneva Conventions for the Protection of War Victims*, 45 Am. J. Int'l L. 462, 466 (1951). The product of the Conference was the Conference Report that, after several revisions by the United States and other participants, became the GPW. *See* Pictet, *supra*, at 466-68. By February of 1950, sixty-one states, including the United States, China, France, Great Britain, and the U.S.S.R, had signed the final version. *Id*. at 468.

[5] *See* Thomas Paine, *Dissertation on First Principles of Government*, *in* 2 *The Complete Writings Of Thomas Paine* 588 (Philip S. Foner ed., 1945) ("He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.").

Government's haste to act, have dangerously undermined the fundamental foreign policies that have been the foundation of our relations with the world community. Global Rights urges the critical importance of our country steadfastly adhering to the rule of law – rather than accepting arbitrary justice and the vagaries of Executive whim.[6]

II. THE GOVERNMENT'S DETENTION OF MR. HAMDI IS ARBITRARY UNDER INTERNATIONAL LAW.

The Government's detention of Mr. Hamdi is arbitrary under international law because the Government (1) is holding him outside the imprimatur of law and (2) has never provided him with a competent tribunal within which to challenge the basis of his detention.

A. The Government Cannot Detain Mr. Hamdi Outside the Imprimatur of Law.

By detaining Mr. Hamdi under an invented classification, the Government has violated the well-settled principle of customary international law that "[e]very person in enemy hands must have some status under international law." International Committee of the Red Cross, *Commentary Vol. IV: Geneva Convention Relative to the Protection of Civilian Persons in*

[6] Following the Government's argument that it should be permitted to indefinitely hold the Guantanamo Bay detainees, the Court of Appeals for the Ninth Circuit considered whether the Government was also free to torture or summarily execute the detainees. *See Gherebi*, 352 F.3d at 1299-1300. The Court stated that "the government advised [ ] that its position would be the same even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees." *Id*. ("To our knowledge . . . the U.S. government has never before asserted such a grave and startling proposition.").

Time of War, at 51 (1958) ("There is no intermediate status; nobody in enemy hands can fall outside the law.").[7]

1. International Law Does Not Recognize the Executive's Invented "Enemy Combatant" Classification.

The Government's contrived classification of Mr. Hamdi as a so-called "enemy combatant" is flawed because "enemy combatant" is not a "status under international law." The Third and Fourth Geneva Conventions, ratified and thus binding on the United States,[8] create protected legal status for certain detainees, but do not establish a classification of "enemy combatants."

First, the Third Geneva Convention presumes that persons captured on the field of battle – as was Mr. Hamdi – should be protected under the GPW as prisoners of war ("POW"). *See* Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, arts. 4-5, 75 U.N.T.S. 135 (entered into force with respect to the United

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[7] The International Criminal Tribunal for the Former Yugoslavia, charged with prosecuting war crimes and crimes against humanity, has explicitly affirmed this principle in a 1998 judgment, stating that: "[T]here is no gap between the Third and Fourth Geneva Conventions. If an individual is not entitled to the protection of the Third Convention as a prisoner of war . . . he or she necessarily falls within the ambit of [the Fourth Convention], provided that its article 4 requirements [defining a protected person] are satisfied." *Prosecutor v. Zejnil Delali*, No. IT-96-21-T, para. 271 (I.C.T.Y. 1998), *available at* http://www.un.org/icty/celebici/trialc2/judgement/cel-tj981116e.pdf.

[8] After ratification and deposit of the treaty instrument, the GPW and Fourth Geneva Convention took effect with regard to the United States on Feb. 2, 1956. Treaties, such as the GPW, are agreements among sovereign powers that, once ratified by the United States, are the supreme law of the land. U.S. Const. art. II, § 2, art. VI, cl. 2; *see Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) (stating that "a treaty ratified by the United States is . . . the law of this land, see U.S. Const., Art. II, § 2"); Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. J. Int'l L. & Pol. 35, 42 (1997) (stating that "domestic courts should faithfully recognize the obligations imposed by international law. The Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations.").

States Feb. 2, 1956) ("GPW").[9] Should there be any doubt as to that presumption, then the detaining power shall establish a competent tribunal to review the detainee's status to determine whether he should be protected under the GPW. *See* GPW art. 5. Those determined not to be POWs are not protected under the GPW.[10]

Second, the Fourth Geneva Convention protects civilians who were either captured on the field of battle or held by an occupying force. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force with respect to the United States Feb. 2, 1956) ("Fourth Geneva Convention"). The Fourth Geneva Convention expressly eliminates

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[9] Questions of whether the Geneva Conventions are self-executing should be put to rest. When treaties are "self-executing," they create a private right of action "without the aid of any legislation." *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924). When a ratified treaty is not self-executing, separate legislation is required to create a right of action. In Mr. Hamdi's case, the habeas statute creates a right of action, personal to him, to challenge his detention, because he is held in custody "in violation of the Constitution or laws or *treaties of the United States*." 28 U.S.C. § 2241(c)(3) (2000) (emphasis added). Thus, regardless of whether the Geneva Conventions or other treaties are self-executing, Mr. Hamdi may lawfully allege in federal court that the Government's detention of him violates those treaties' requirements.

[10] Although the United States has not adopted the Additional Protocol I to the Geneva Conventions of 1977, the Protocol would protect "[a]ny combatant, as defined in Article 43, who falls into the power of an adverse Party" as a POW. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 44(1), Jan. 23, 1979, 1125 U.N.T.S. 3 ("Additional Protocol I"). According to the Protocol, a "combatant" retains this status as a POW even if he violates the laws of war so long as the combatant carries arms openly during military operations. *Id.* art. 44(2)-(3). Even if a combatant fails to maintain protection because he or she fails to openly carry arms while engaged in military activities, the Protocol requires that the combatant be given the protections "equivalent in all respects to those accorded to prisoners of war by the [GPW] and by this Protocol." *Id.* art. 44(4). Lastly, Additional Protocol I includes a fundamental guarantee of fair treatment for anyone that does not benefit from more favorable treatment. *Id.* art. 75(1). This guarantee provides that "[a]ny person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist." *Id.* art. 75(3).

from its protection persons not citizens of the Detaining Power when: (1) such persons are "definitely suspected of or engaged in activities hostile to the security of the State," and (2) allowing such persons to exercise their rights under the Fourth Convention would "be prejudicial to the security of the State." Fourth Geneva Convention art. 5. The Fourth Convention also expressly eliminates from its protections civilians held by an occupying force upon a showing that: (1) such civilians are either "detained as a spy or saboteur" or are "under definite suspicion of activity hostile to the security of the Occupying Power," and (2) "absolute military security so requires" the elimination of their protection. *Id.* Significantly, neither the GPW nor the Fourth Convention uses the term "enemy combatant."

Persons not protected under either the GPW or the Fourth Geneva Convention are nevertheless protected from arbitrary detention under the International Covenant on Civil and Political Rights ("ICCPR"),[11] ratified and thus binding on the United States,[12] and under customary international law. Even if those persons not protected by the Geneva Conventions are later prosecuted for offenses of war under domestic or international law as

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[11] International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 ("ICCPR"). The U.S. ratified the ICCPR on June 8, 1992. *See* Multilateral Treaties Deposited with the Secretary General: Status as of Dec. 31, 2002, U.N. Doc. ST/LEG/SER.E/22 (2002); ICCPR art. 48, para. 2; *see also* 138 Cong. Rec. 8069 (1992) (statement of Sen. Pell) ("The Covenant is part of the international community's early efforts to give the full force of international law to the principles of human rights embodied in the Universal Declaration of Human Rights and the United Nations Charter. The [ICCPR] is rooted in western legal and ethical values. The rights guaranteed by the Covenant are similar to those guaranteed by the U.S. Constitution and the Bill of Rights.").

[12] ICCPR art. 9(1) (providing that "[n]o one shall be subjected to arbitrary arrest or detention"). As with the GPW, *see supra*, note 9, the self-executing nature of the ICCPR is not an impediment to the ICCPR's application. Article 9 contemplates *habeas* review, and Mr. Hamdi is availing himself of the habeas statute, which expressly provides relief to any person held in "custody in violation of the . . . treaties of the United States . . . ," 28 U.S.C. § 2241(c)(3). Section 2241 therefore executes Article 9 of the ICCPR for purposes of Mr. Hamdi's petition.

"unlawful combatants,"[13] the ICCPR and customary international law prohibit their arbitrary detention. Arbitrary detention is expressly prohibited under the ICCPR, which provides the basic human rights of liberty and security. *See* ICCPR art. 9(1). Specifically, the treaty provides that "[n]o one shall be subjected to arbitrary arrest or detention." *Id.*[14] Other sources of customary

[13] The term "unlawful combatant" was defined by this Court. *Ex parte Quirin*, 317 U.S. 1, 30-31 (1942) ("By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.") (footnote omitted).

[14] In interpreting the treaty, the Court should consider the intent of the parties to the treaty and their post-ratification understanding of the treaty. *See Cook v. United States*, 288 U.S. 102, 112 (1933) (consulting both treaty language and its history in construing the parties intent as to the limits of the treaty's operation.); *Air France v. Saks*, 470 U.S. 392, 399 (1985) (stating that the Court has the "responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties"); *Zicherman*, 516 U.S. at 226 (stating that the Court has "traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and the postratification understanding of the contracting parties"). The post-ratification understanding of the term "arbitrary detention" is informed, in part, by foreign court decisions discussing the ICCPR or other conventions using the term. For example, the Court of Appeals for the Ninth Circuit found that indefinite detention of removable aliens could violate ICCPR art. 9. *See Ma v. Reno*, 208 F.3d 815, 829-30 (9th Cir. 2000) (recognizing indefinite detention of removable aliens could violate ICCPR art. 9), *vacated and remanded on other grounds sub nom Zadvydas v. Davis*, 533 U.S. 678 (2001).

international law[15] also prohibit arbitrary detention. *See* Restatement (Third) of the Foreign Relations Law of the United States § 702 cmt. h ("Restatement (Third)") (providing that detention is arbitrary if it "is not accompanied by notice of charges"); American Convention on Human Rights, *adopted* Nov. 22, 1969, 1144 U.N.T.S. 123, art. 7(3) ("No one shall be subject to arbitrary arrest or imprisonment."); *Alvarez-Machain v. United States*, 331 F.3d 604, 621 (9th Cir. 2003) (stating that detention is "arbitrary" and an abridgement of human rights when "it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person") (citations omitted).

Neither the ICCPR nor customary international law creates an exception from this prohibition on arbitrary detention for the Executive's

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[15] "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) § 102. It is "comprised of those practices and customs that States view as obligatory and that are engaged in or otherwise acceded to by a preponderance of States in a uniform and consistent fashion." *United States v. Yousef*, 327 F.3d 56, 91 n.24 (2d Cir. 2003), *cert. denied*, 123 S. Ct. 353 (2003) (citing Ian Brownlie, *Principles of Public International Law* 5-7 (5th ed. 1999)). The body of customary international law is not static, but evolves to include those offenses that the international community of nations universally prohibit. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (stating that "it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today . . . The requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one."); *Maria v. McElroy*, 68 F. Supp. 2d 206, 233 (E.D.N.Y. 1999) (stating that "[c]ustomary international law is not static but fluid and evolving."). U.S. courts historically have determined its content by examining the practices of nations, as evidenced by treaties, U.N. declarations, court decisions, and scholarly writings. *See Filartiga*, 630 F.2d at 880 (2d Cir. 1980) ("The law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'") (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820) (examining scholarly writings to determine content of the "law of nations")); *see also Aquamar, S.A. v. Del Monte Fresh Produce N.A.*, 179 F.3d 1279, 1295 (11th Cir. 1999) ("We look to a number of sources to ascertain principles of international law, including international conventions, international customs, treatises, and judicial decisions rendered in this and other countries."); *Rodriguez Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Kan. 1980) ("Principles of customary international law may be discerned from an overview of express international conventions, the teachings of legal scholars, the general customs and practice of nations and relevant judicial decisions.").

invented "enemy combatant" classification – a label apparently contrived as a rationalization to deny detainees any rights due under the law. Under clear precedent, individual countries must make sure not to detain arbitrarily even those persons not protected under the Geneva Conventions by establishing clear and lawful procedures for their detention, such as the Due Process Clause Federal Rules of Criminal Procedure, and the Uniform Code of Military Justice ("UCMJ") as implemented by the Manual for Courts-Martial ("MCM").[16] Thus, the President cannot declare through Executive fiat that a certain class of detainees is immune to the prohibition on arbitrary detention imposed by the ICCPR and customary international law. Stated another way, the Executive cannot hold Mr. Hamdi as an "enemy combatant" and thus outside the imprimatur of the law.

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[16] The MCM contains, *inter alia*, the Rules for Courts-Martial ("R.C.M.") that specify the pre-trial procedures for courts-martial under the UCMJ. *See* 10 U.S.C. § 836(a), art. 36(a). For example, if charged in a courts-martial under the UCMJ, the Government would promptly inform Mr. Hamdi of the charges against him and would provide him with the right to be represented by counsel, *see* 10 U.S.C. § 830(b), art. 30(b), as well as the right to obtain witnesses and evidence in his defense during the pretrial investigation before charges are brought. *See* 10 U.S.C. § 846, art. 46. If subject to general courts-martial, Mr. Hamdi would be afforded the right against self-incrimination, *see* 10 U.S.C. § 831, art. 31, the right to representation by military counsel, *see* 10 U.S.C. §§ 827, 838, arts. 27, 38, the right against double jeopardy, *see* 10 U.S.C. § 844(a), art. 44(a), and the presumption of innocence until proven guilty beyond a reasonable doubt, *see* 10 U.S.C. § 851(c), art. 51(c). Though the Government may detain individuals suspected of committing a crime punishable by courts-martial, 10 U.S.C. § 810, art. 10, once the Government places an individual in pretrial confinement, it must inform the individual of the charges against him, provide him access to counsel, and provide him military counsel upon request. *See* R.C.M. 305. The MCM guarantees detainees a more "rigorous" right to a speedy trial than does the Sixth Amendment. *United States v. Nelson*, 5 M.J. 189, 190 (C.M.A. 1978); *see* R.C.M. 707(a)(2) (implementing the speedy trial requirement by providing that the Government must try detainees within 120 days of confinement); *see also United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993) (considering the speedy trial required by 10 U.S.C. § 810, art. 10).

2. By Not Defining "Enemy Combatant," the Executive Has Deprived Mr. Hamdi of His Right to Be Notified of the Legal Basis of His Detention.

The Executive's contrived "enemy combatant" classification[17] does not exist at law; beyond that it is undefined. This predicament puts Mr. Hamdi in an impossible legal position: Even if he were afforded the opportunity to challenge the basis of his detention, he could not do so in the absence of a standard defining "enemy combatant."

The fact that the Government borrowed the term "enemy combatant" from a passing reference in a Supreme Court decision that pre-dates the Geneva Conventions does not provide Mr. Hamdi with sufficient notice of the legal standard purportedly supporting the basis of his detention. The Government incorrectly relies on the Supreme Court's decision in *Ex parte Quirin* to support the detention of Mr. Hamdi as an "enemy combatant." Br. in Opp'n to Pet. for Cert. at 14-15, 19; *see Ex parte Quirin*, 317 U.S. 1 (1942). Although the Court used the term "enemy combatant" in its discussion of wartime detainees, the Court never defined it. Instead, the Court invoked the term to elaborate upon the phrase "offender[ ] against the law of war."[18] Thus, neither *Quirin* nor any other source of law – U.S. or international – appears to provide Mr. Hamdi or this Court with any definition of "enemy combatant."

The Executive's failure to provide Mr. Hamdi with notice of the legal basis for his detention is arbitrary and unlawful under the ICCPR and customary international law. At least one U.S. appellate court has found that

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[17] *See* Br. for the Resp'ts in Opp'n to the Pet. for Writ of Cert. at 3-4 ("Br. in Opp'n to Pet. for Cert.") (explaining that the Government is holding Mr. Hamdi as a so-called "enemy combatant").

[18] An offender against the law of war is, inter alia, "an *enemy combatant* who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property." *Quirin*, 317 U.S. at 31 (emphasis added). Furthermore, the *Quirin* case is factually inapposite to Mr. Hamdi's detention because the petitioners in *Quirin* were Nazi saboteurs and spies, who actually wore their uniforms to the U.S. shore and then removed them. *Id.* at 21. Detaining powers are not required to protect spies and saboteurs under the Geneva Conventions, *see* Fourth Geneva Convention art. 5; *see generally* GPW art. 4. Notably, the Government has never accused Mr. Hamdi of being either a spy or a saboteur.

detention is arbitrary in the absence of providing an adequate explanation of the legal basis for the detention. *See Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998) (stating that "[d]etention is arbitrary if 'it is not accompanied by notice of charges,'" among other things) (quoting Restatement (Third) § 702 cmt. h and ICCPR art. 9). In addition, the European Court of Human Rights stated that Article 5(2) of the European Convention on Human Rights "contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty." *Fox, Campbell & Hartley v. United Kingdom*, 13 Eur. Ct. H.R. (ser. A) at 170 (1990). Further, the European Court stated that "any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4" of Article 5. *Id*.[19]

By stripping Mr. Hamdi of any recognized status under international law and by depriving him of the right under customary international law to notice of the legal basis of his detention, the Executive is arbitrarily detaining Mr. Hamdi under international law.

B. The Government's Detention of Mr. Hamdi Is Arbitrary under International Law Because the Government Has Deprived Him of a Meaningful Opportunity to Challenge the Basis of His Detention.

In addition to detaining Mr. Hamdi arbitrarily by classifying him with a status not authorized or defined by international law, the Government also has arbitrarily detained Mr. Hamdi by not providing him with a meaningful opportunity to challenge the basis of his detention. Such a requirement is

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[19] The European Court of Human Rights also has required judges presiding over bond determination hearings to make sure that individuals are detained only upon a careful review of the legal standard for detention. *See TW v. Malta*, 29 Eur. H.R. Rep. 185, 189, para. 41 (2000) (requiring the judge to review the circumstances of detention by referring to legal criteria whether there are reasons to justify detention and to order the release if there are no such reasons).

required not only by the GPW, but also by the ICCPR and customary international law.

1. Article 5 of the GPW Requires That Mr. Hamdi Be Provided With The Opportunity to Challenge the Basis of His Detention before a Competent Tribunal.

The denial of process violates Article 5 of the GPW. Where there is doubt as to whether an enemy belligerent deserves POW status, the GPW provides for determination of that status by a "competent tribunal," not by Executive fiat. *See* GPW art. 5 ("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.*") (emphasis added).[20] During the 1991 Gulf War, for instance, the U.S. Government held over a thousand hearings to determine the status of Iraqi belligerents captured on the field of battle. *See* Final Report to Congress, Conduct of the Persian Gulf War, Pursuant to Title V of the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991 (Public Law 102-25), April 1992, at 663 (stating that 1,196 tribunals were held during the Gulf War).

2. The "Process" Afforded to Mr. Hamdi Was Not Competent.

The process required for determining a detainee's status under the GPW far exceeds the process that the Court of Appeals for the Fourth Circuit thought to have been adequate. *Cf. Hamdi v. Rumsfeld*, 316 F.3d 450, 473

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[20] Incorporating Article 5 nearly verbatim into its corresponding regulations, the U.S. Army leaves no doubt as to how it should treat those captured in battle. *See* Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Oct. 1, 1997, 2, 3 (hereinafter "AR 190-8") (App. 91-128) ("All persons taken into custody by U.S. forces will be provided with the protections of the [GPW] until some other legal status is determined by competent authority.") (referring to GPW art. 5). *See Gherebi*, 352 F.3d at 1283 n.7 (stating that the Geneva Conventions require "that a competent tribunal determine the status of captured prisoners"); *In re Territo*, 156 F.2d 142, 142-148 (9th Cir. 1996).

(4th Cir. 2003). According to the U.S. military's interpretation of the requirements for an Article 5 tribunal, Mr. Hamdi would be afforded the following procedural safeguards at his status-determination hearing, including the rights to:

> an open proceeding except for the deliberation and voting period or during presentation of evidence that "would compromise security;"
>
> be advised of his rights at the beginning of the tribunal;
>
> attend all open sessions and be provided with an interpreter;
>
> call witnesses and question those presented against him;
>
> testify or present his views to the tribunal;
>
> be protected against self-incrimination as to his status; and
>
> a determination of his status by majority vote under a preponderance of evidence standard.

AR 190-8 at 2, 3 (App. 96-97).[21] *See, e.g., Morgan v. United States*, 304 U.S. 1, 18 (1938) (stating that the right to a "'full hearing'-a fair and open hearing . . . embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them").

The review of Mr. Hamdi's status by the Court of Appeals for the Fourth Circuit panel is woefully inadequate when compared to the tribunal and procedures to which Mr. Hamdi is entitled under Article 5 of the GPW. The Court accepted, as sufficient process, the Government's unchallenged and unverifiable presentation of a two-page declaration of a Department of Defense official with no personal knowledge of Mr. Hamdi's detention. *See Hamdi*, 316 F.3d at 473; Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, July 24, 2002 ("Mobbs Declaration") (App. 61-62). The Government precluded Mr. Hamdi from attending the Government's *ex parte* presentation of the Mobbs Declaration to the court, from enjoying any meaningful assistance from counsel, from presenting any testimony or other evidence, from questioning the facts alleged

[21] AR 190-8 is a multi-service regulation binding the Army, Navy, Air Force and Marine Corps, and their reserve components. AR 190-8, at i (App. 93).

in the Mobbs Declaration, and from cross-examining Mr. Mobbs.[22] This is simply insufficient process for determining Mr. Hamdi's status in accordance with the Government's obligation to provide him with a competent tribunal under the GPW.

By denying Mr. Hamdi a meaningful opportunity to challenge his detention, the Government violated his rights under Article 9(4) of the ICCPR. That provision of the ICCPR provides: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR art. 9(4).[23] Mr. Hamdi's detention for nearly two years without the opportunity to challenge the Government's characterization of his status deprives him of the fundamental right to liberty and security embodied in Article 9(4).[24] In direct contravention of its obligations under Article 9(4), the Government has denied Mr. Hamdi "proceedings before a court" by precluding any testimony in refutation of his detention and by depriving him of the notice of the legal basis of his detention. This lack of process constitutes procedural arbitrariness under the ICCPR and must be remedied, if the United States is to comply with its obligations under the ICCPR.

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[22] These aspects of process denied Mr. Hamdi constitute the fundamental features of process due to United States citizens. *See Mathews v. Eldridge*, 424 U.S. 319, 345-46 (1976).

[23] The Ninth Circuit recently noted that Article 9(4) of the ICCPR requires the United States to subject Executive detention to judicial review. *See Gherebi*, 352 F.3d at 1283 n.7 (quoting ICCPR art. 9(4)).

[24] The European Court of Human Rights has frequently held that detention is arbitrary, if the detainee is not permitted to present testimony in refutation of the basis for his detention. *See Caballero v. United Kingdom*, 30 Eur .H.R. Rep. 643, 652 paras. 42-44 (2000) (finding automatic denial of bail arbitrary, in part, because, the judge failed, having heard the accused himself, to examine all the facts relating to the existence of a genuine public interest justifying denial); *TW v. Malta*, 29 Eur .H.R. Rep. 185, 186, 196, paras. 30 & 34 (2000) (stating that the judicial officer must hear the detained person before determining whether detention should continue).

3. The Government's Denial of a Competent Tribunal Cannot Be Justified without Formally Derogating from the ICCPR.

Although the ICCPR provides procedures for derogation from its prohibition on arbitrary detention, the Government has ignored those procedures by detaining Mr. Hamdi without providing him with a meaningful opportunity to challenge the basis of his detention. To derogate from the ICCPR, the derogating government must officially proclaim that the life of its nation is threatened. *See* ICCPR art. 4(1). Derogation is permitted only when it is "strictly required by the exigencies of the situation," and only when derogation does not involve discrimination and is consistent with the derogating government's other obligations under international law. *See id.*[25] The derogating power must also notify the other ICCPR parties through the Secretary General of the United Nations. *See* ICCPR art. 4(3). States historically have followed derogation procedures under emergency without adverse consequence.[26] By contrast, having not formally derogated from the ICCPR, the U.S. Government must adhere to it. *See Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, para. 25 (Jul. 8) ("The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the

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[25] Parties to the ICCPR may not derogate from certain of its articles. *See* ICCPR art. 4(2). However, Article 9, prohibiting arbitrary detention, is not among them. *See id.* Nevertheless, the United Nations Human Rights Committee, a panel of experts established to monitor ICCPR implementation, has stated that "[i]n order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant." U.N. Human Rights Comm., General Comment No. 29, para. 16 U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) ("General Comment No. 29").

[26] The British government recently derogated from the ICCPR to pass the Anti-Terrorism, Crime and Security Act of 2001. *See* United Nations Economic and Social Council, U.N. Doc. E/CN.4/Sub.2/2003/39 (2003). In addition, Algeria, Argentina, Colombia, Ecuador, Egypt, Ghana, Guatemala, Indonesia, Israel, Liberia, Nepal, Pakistan, Peru, Serbia and Montenegro, Sierra Leone, Sri Lanka, Syrian Arab Republic, Sudan, and Turkey all have formally derogated from the ICCPR. *See id.*

Covenant whereby certain provisions may be derogated from in a time of national emergency.").[27]

4. Any Attempt to Derogate from the ICCPR to Deprive Mr. Hamdi of a Competent Tribunal Would Fail Because the Exigencies of the Situation Do Not "Strictly Require" Derogation.

Even if the Government were to adhere to the ICCPR's formal derogation procedures, in this instance the Government would be unable to justify derogation. Here, the Government cannot show that the denial of a competent tribunal to Mr. Hamdi is "strictly required by the exigencies of the situation," does not discriminate, and is consistent with the derogating power's other obligations under international law. *See* ICCPR art. 4(1).[28]

It is not enough that summary detention without review is within the reasonable range of responses to the situation; the situation must make derogation imperative. *See* General Comment No. 29, para. 5 (stating that derogating parties must show not only that the exigencies "justify" derogation, but that they "require" it). Rather, such a denial of process must survive at least the rigorous review recognized by U.S. due process, *see Mathews v. Eldridge*, 424 U.S. 319, 345-46 (1976), and the law of other states, *see, e.g.*, *Tan Te Lam v. Superintendent of Tai A Chau Detention Centre*, A.C. 97, 111 (P.C. 1996) (stating that "the courts should construe strictly any statutory provision purporting to allow the deprivation of individual liberty by

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[27] European and American courts agree. *See Winterwerp v. The Netherlands*, 33 Eur. Ct. H.R. (ser. A) para. 39 (1979) ("In a democratic society subscribing to the rule of law . . . no detention that is arbitrary can ever be regarded as lawful.") (footnote omitted) (citing European Convention for the Protection of Human Rights and Fundamental Freedoms art. 5(3)); *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995) (stating that arbitrary detention violates the laws of war).

[28] The European Convention for the Protection of Human Rights and Fundamental Freedoms employs the same standard for derogating from its obligations, including the protection of the right to be free from arbitrary detention under Article 5(3). *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, art. 15 ("ECHR") (requiring derogation only when it is strictly required by the exigencies of the situation).

administrative detention and should be slow to hold that statutory provisions authorize administrative detention for unreasonable periods or in unreasonable circumstances").

The Government cannot demonstrate that exigencies require the denial of a competent tribunal to provide Mr. Hamdi with a meaningful opportunity to challenge the basis of his detention. *First*, affording Mr. Hamdi the opportunity to present testimony would not, as the Court of Appeals for the Court of Appeals for the Fourth Circuit suggests, "require an excavation of facts buried under the rubble of war." *Hamdi*, 316 F.3d at 471.[29] Instead, it would require a competent tribunal to review that testimony, likely in one sitting. *Second*, permitting a competent tribunal to determine Mr. Hamdi's status, as opposed to detaining him for over two years and possibly indefinitely without status under international law, runs no risk for the Government, whose "major combat activities" in Afghanistan have ended. *Rumsfeld Declares Major Combat Over in Afghanistan*, FoxNews.com, (May 1, 2003), *at* http://www.foxnews.com/ story/0,2933,85688, 00.html.[30] And even if the Government had shown that at one time the exigencies of the

[29] For example, U.S. allies in the European Parliament have called for proper GPW Article 5 tribunals to determine the status of the detainees being held by the United States Government at Guantanamo Bay, Cuba. *See Euro MPs Seek Tribunals to Determine Cuba Prisoners' Status*, Agency France Press (Feb. 17, 2002), *available at* 2002 WL 2335140.

[30] The Government's recent prosecution of John Walker Lindh also casts doubt on the strategic necessity of denying Mr. Hamdi an opportunity to challenge the basis of his detention. The circumstances surrounding the capture of Mr. Hamdi and Lindh are strikingly similar: both are United States citizens who were seized by Northern Alliance forces in the Fall of 2001 while taking up arms on behalf of the Taliban. *See Hamdi*, 316 F.3d at 460; *United States v. Lindh*, 227 F. Supp. 2d 565, 567-69 (E.D. Va. 2002). But unlike Mr. Hamdi, Lindh attended a terrorist training camp associated with, and funded by, al Qaeda, and he personally met with Usama bin Laden. *See Lindh*, 227 F. Supp. 2d at 567-68. The fact that the Government began prosecuting Lindh in an Article III court while major combat activities continued in Afghanistan severely undercuts any potential argument that the "exigencies of the situation" have justified the Government's disregard of international law with respect to Mr. Hamdi's rights for over the past two years.

situation strictly required Mr. Hamdi's arbitrary detention, that detention now has exceeded its permissible length.[31]

III. THE GOVERNMENT'S ASSERTION THAT IT CAN DISREGARD MANDATES OF INTERNATIONAL LAW CONFLICTS WITH THE COURT'S TRADITIONAL RELIANCE ON SUCH LAW WHEN DEFINING THE SCOPE OF THE GOVERNMENT'S WARTIME DETENTION POWERS AND INDIVIDUAL RIGHTS.

Based on the Court's traditional consideration of international law, when interpreting the scope of Executive detention powers and individual rights, the Government cannot ignore international law's requirements regarding Mr. Hamdi's detention. Yet the Government's reliance on Executive branch powers under Article II of the Constitution and Congress's Authorization for Use of Military Force ("Joint Resolution")[32] to support Mr. Hamdi's arbitrary detention is inconsistent with both U.S. and international law. *See* Br. in Opp'n to Pet. for Cert. at 14-17.

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[31] The ICCPR makes clear that states derogating from it must only do so temporarily. *See* General Comment No. 29, para. 1 ("[Article 4] . . . allows for a State party unilaterally to derogate temporarily from a part of its obligations under the Covenant. On the other hand, article 4 subjects both this very measure of derogation, as well as its material consequences, to a specific regime of safeguards. The restoration of a state of normalcy where full respect for the Covenant can be secured must be the predominant objective of a State party derogating from the Covenant."). General Comment No. 29 further clarifies that derogation and its practical consequences must be strictly required by the emergency situation. *See id.* para. 4 ("This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency."); Robert Kogod Goldman, *POWs or Unlawful Combatants? September 11 and Its Aftermath*, Crimes of War Project, Expert Analysis (Jan. 2002), *at* http://www.crimesofwar. org/expert/pow-goldman.html (arguing that Taliban are the armed force of Afghanistan and therefore protected under Article 4(1) of the GPW).

[32] Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) ("Joint Resolution"). The Joint Resolution provides in pertinent part:

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

In determining the scope of the Government's constitutional powers as well as the scope of individual rights, this Court frequently has looked to international law. "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction." *The Paquete Habana*, 175 U.S. 677, 700 (1900).[33]

Reviewing the scope of wartime detention powers granted to the Executive by Article II, this Court referred to international law for help in determining what procedural protections must be afforded to those captured and held as "enemy belligerents." *Ex parte Quirin*, 317 U.S. at 31. When considering whether the acts charged constituted an offense against the law of war, this Court consulted various sources of domestic *and* international law to determine the scope of the Executive's detention powers. *Id.* at 35-36 ("This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.") (citing and quoting foreign military manuals and other texts).[34]

Likewise, in *Ex parte Milligan*, the Court cited the practices of foreign governments in support of its holding that the Executive lacked constitutional power to subject civilians to military courts-martial where the civil administration was not deposed and its courts were open. 71 U.S. (4 Wall.) 2, 38-40 (1866) (discussing power of English and French monarchs to impose

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[33] Customary international law has long been embedded into American common law. *See Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.") (Wilson, J., seriatim); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 159-61 (1795) ("This is so palpable a violation of our own law … of which the law of nations is a part, as it subsisted either before the act of Congress on the subject, or since … ").

[34] Similarly, in determining whether a German national convicted by a U.S. military commission could pursue habeas relief, the Court extensively reviewed the then-relevant rules of international law to ensure that they would not be violated by its decision. *See Johnson v. Eisentrager*, 339 U.S. 763, 785-88 (1950); *id.* at 785 (noting "[t]he practice of every modern government"); *id.* at 786 (citing treaty law); *id.* at 787-88 (citing Hague Regulations and secondary sources on international law).

courts-martial upon subjects). In turning its back on the demands of international law, the Government is violating the clear precepts of American jurisprudence enunciated by the Court.[35]

Similarly, the Government must enforce the Joint Resolution consistently with international law and avoid a construction of the Joint Resolution, or any other congressional act, that would violate international law "if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Accordingly, courts will not interpret a statute to supercede international law absent a clear showing that Congress intended for the statute to do so. *See* Restatement (Third) § 114 (1987).

The Joint Resolution generally empowers the Executive to use "all necessary and appropriate force" against those nations, organizations, or persons responsible for the September 11th terrorist attacks, or those persons that harbored such organizations or persons, in order to prevent future terrorist attacks against the United States. However, it never expressly authorizes the Executive to detain Mr. Hamdi (or others) as an "enemy combatant" without the opportunity to challenge the basis of his detention. Therefore, to the extent that Mr. Hamdi's detention is inconsistent with international law, the Joint Resolution cannot be interpreted to authorize his detention without a meaningful opportunity to challenge the basis of his detention.[36]

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[35] During the Vietnam War, the U.S. Military Court of Appeals ruled that, exceeding his orders, a U.S. Marines lance corporal's forced entry into a Vietnamese home with the intent to summarily execute its inhabitants "is unjustifiable under the laws of this nation, the principles of international law, or the laws of land warfare." *United States v. Schultz*, 39 C.M.R. 133, 136 (C.M.A. 1969).

[36] Because the Government cannot interpret the Joint Resolution to authorize the detention of Mr. Hamdi expressly or implicitly, the authority of the President, when detaining Mr. Hamdi, is not "at its maximum." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (stating that the Executive's authority is "at its maximum," when he acts "pursuant to an express or implied authorization of Congress").

Moreover, when interpreting the scope of certain constitutional rights, this Court also has considered foreign precedent and treaty law.[37] Specifically, the Court has considered foreign precedent when discussing the right to engage in sodomy in the privacy of one's home,[38] the history of assisted-suicide law,[39] the application of the Eighth Amendment to the death penalty,[40]

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[37] The U.S. Supreme Court has "long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances." *Knight v. Florida*, 528 U.S. 990 (1999) (Breyer, J. dissenting). Federal appellate courts have shown a similar tendency to draw support from international sources. *See, e.g., Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996) (citing opinions of courts from Canada and the United Kingdom, both of which were signatories to the Hague Convention, to support its restrictive reading of the Hague Convention's implementing legislation); *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 377 (8th Cir. 1995) (same) ("We should give considerable weight to these well-reasoned opinions of other Convention signatories.").

[38] In *Lawrence v. Texas*, the Court recently considered the constitutionality of a Texas statute criminalizing certain intimate sexual conduct between two persons of the same sex. 123 S. Ct. 2472 (2003). Finding that the statute violated the Due Process Clause of the Fourteenth Amendment, the Court overruled its earlier holding in *Bowers v. Hardwick*, 478 U.S. 186 (1986). The Court cited foreign precedent, including opinions from the European Court of Human Rights and a report from an advisory committee to the British Parliament, to undermine the finding in *Bowers* that the right to consensual sodomy in the privacy of one's home is "insubstantial in our Western civilization." 123 S. Ct. at 2481 (citing The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution (1963) and *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at para. 52 (1981)).

[39] In *Washington v. Glucksberg*, petitioners sought a declaratory judgment that a Washington state statute banning assisted suicide violated the Due Process Clause of the Fourteenth Amendment. 521 U.S. 702 (1997). In holding that the statute was Constitutional, the Court supported its opinion by tracing the history of assisted-suicide law in the U.S. *and* abroad. *Id*. at 718 n.16 (citing and discussing recent cases and reports from Canada, the United Kingdom, New Zealand, Australia, and Colombia).

and the conflict between campaign finance laws and the First Amendment.[41] Last term, Justices Breyer and Ginsburg also discussed the International Convention on the Elimination of All Forms of Racial Discrimination, a treaty ratified by the U.S., as support for the Court's observation that affirmative action programs "must have a logical end point." *Grutter*, 539 U.S. at 306 (Ginsburg, J., concurring) (framing the extent to which admissions programs

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(footnote continued from previous page)

[40] Reliance on the practices of foreign governments is particularly recurrent in cases interpreting the Eighth Amendment. *See, e.g.*, *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (Stevens, J.) (considering practices of Anglo-American nations regarding executing juveniles); *Enmund v. Florida*, 458 U.S. 782, 796-97 & n.22 (1982) (noting that the doctrine of felony murder has been eliminated or restricted in England, India, Canada, and a "number of other Commonwealth countries"); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (observing that only three of sixty nations surveyed in 1965 retained the death penalty for rape); *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958) (noting that only two of eighty-four countries surveyed imposed denationalization as a penalty for desertion); *see also Stanford v. Kentucky*, 492 U.S. 361, 389-90 (1989) (Brennan, J., dissenting) (finding that "three leading human rights treaties ratified or signed by the United States explicitly prohibit juvenile death penalties"). Justice Breyer has relied on foreign precedent to interpret the Eighth Amendment. *See Knight*, 528 U.S. 990 (Breyer, J., dissenting) (citing and discussing precedent from India, Zimbabwe, Canada, and the European Court of Human Rights) ("A growing number of courts outside the United States—*courts that accept or assume the lawfulness of the death penalty*—have held that the lengthy delay in administering a *lawful* death penalty renders ultimate execution inhuman, degrading, or unusually cruel.") (citing *Pratt v. Attorney Gen. for Jamaica*, [1994] 2 A.C.U.K. 1, 18, 4 All E.R. 769, 773, 1993 WL 963003 (P.C. 1993)); *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J., dissenting) ("British jurists have suggested that the Bill of Rights of 1689, a document relevant to the interpretation of our own Constitution, may forbid, as cruel and unusual, significantly lesser delays.") (citing *Riley v. Attorney Gen. of Jamaica*, [1983] 1 App. Cas. 719, 734-735 (P.C. 1982) (Lord Scarman, dissenting)).

[41] In *Nixon v. Shrink Missouri Government PAC*, Justice Breyer cited foreign precedent to support the majority's decision to not adopt a "strict scrutiny" standard when ruling on whether campaign finance laws violate the First Amendment. 528 U.S. 377, 403 (2000) (Breyer, J., concurring). After detailing the Court's historical practice of deferring to "empirical legislative judgments" where the "legislature has significantly greater institutional expertise" and the statute in question "significantly implicates competing constitutionally protected interests in complex ways," Justice Breyer cited opinions from Canadian and U.K. courts as further support. *Id*. at 402-3 ("The approach taken by these cases is consistent with that of other constitutional courts facing similarly complex constitutional problems.").

at the University of Michigan may consider race, in part, by observing the "international understanding of the office of affirmative action").[42]

IV. THE GOVERNMENT'S DETENTION OF MR. HAMDI IS INCONSISTENT WITH ITS STRONG CONDEMNATION OF ARBITRARY DETENTION AND PROMOTION OF THE RULE OF LAW WORLDWIDE.

The rule of law is only as strong as a government's adherence to it. The rule of law depends not only upon the independence of a judiciary, but also upon the Executive branch's commitment to law enforcement and the principles that the enforcement of those laws is aimed to preserve. Thus, in

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[42] The United Nations Human Rights Committee and several international legal scholars have noted that detentions justified under domestic law nevertheless may be arbitrary and unlawful under international law. *See* U.N. Human Rights Committee, Comm. No. 560/1993, *A v. Australia*, UN Doc. CCPR/C/59/D/560/1993 (1997) (stating that ICCPR Art. 9(5) prescribes payment of compensation for detentions that are permissible under domestic law but contrary to the ICCPR); Sarah Joseph et al., *The International Covenant On Civil and Political Rights: Cases, Materials, and Commentary* 241 (2000) (noting that ICCPR sanctions "lawful yet arbitrary detentions"). Similarly, the United Nations as well as the Universal Declaration on Human Rights and the Restatement (Third) have stated that detentions pursuant to procedures established by domestic law do not foreclose a determination that such detention is "arbitrary." *See* United Nations, Study of The Right of Everyone To Be Free From Arbitrary Arrest, Detention and Exile, U.N. Doc. E/CN.4/826/Rev.1, at 7 (1964) ("An arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person."). Article 9 of the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948), provides that "[n]o one shall be subjected to arbitrary arrest, detention or exile." During the drafting of the Universal Declaration, a delegate from the United Kingdom emphasized the importance of adding "arbitrary" to Article 9 stating that "[t]he article would lose greatly if that word were deleted. There might be certain countries where arbitrary arrest was permitted. The object of the article was to show that the United Nations disapproved of such practices. National legislation should be brought into line with the standards of the United Nations. Rights should not derive from law, but law from rights." U.N. 3 GAOR, Pt. I, 3rd Comm. 247, 248 (1948); Restatement (Third) § 702 cmt. h (stating that detention is arbitrary "if it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person") (internal quotations and citation omitted). Thus, if the existing U.S. law (*e.g.*, Article II and the Joint Resolution) that purportedly authorizes Mr. Hamdi's detention were arbitrary under international law, that detention may nevertheless be characterized as unjust.

the context of international and domestic human rights and humanitarian law, the Government must enforce not only the law but also the principles of human dignity.[43]

By detaining Mr. Hamdi outside the law for over two years without either the opportunity to present testimony to refute the basis of his detention or meaningful access to counsel, the Government is engaging in the very practice of arbitrary detention that it has condemned worldwide for decades. In statements to Congress and to the United Nations, United States government officials recently and repeatedly have singled out the practice of arbitrary detention by other countries, such as Afghanistan,[44] Cuba,[45] the Democratic Republic of Congo,[46] Iran,[47] Iraq,[48] Russia,[49] and Sudan[50] for their

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[43] *See* Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained without Trial*, 44 Harv. Int'l L.J. 503, 531 (2003) ("Destruction of American values, overreaction, the weakening of real bases of strength of our democratic institutions, and lawless law enforcement can fulfill terrorist ambitions and are ultimately more threatening than actual terrorist attacks. Judges in a democracy committed to law and human dignity cannot countenance such a result.").

[44] Secretary of Defense Donald Rumsfeld testified before Congress in 2002 on the positive impact that U.S. intervention has had on Afghanistan. Quoting from an Amnesty International report, Secretary Rumsfeld stated that in 2001 "Afghans suffered pervasive 'human rights abuses, including arbitrary detention . . . .'" Hearing to Review Testimony on Operation Enduring Freedom Before the Senate Comm. on Armed Services, 107th Cong. (July 31, 2002) (statement of Hon. Donald Rumsfeld, Sec. of Defense), *available at* http://www.senate.gov/~armed_services/statemnt/2002/July/Rumsfeld2.pdf.

[45] *See, e.g.*, Hearing Regarding U.S.-Cuba Economic Relations Before Senate Comm. of Finance, 107th Cong. (Sept. 4, 2003) (statement of Alan Larson, Under Secretary of State for Economic, Business, and Agricultural Affairs, before the Senate Finance Committee), *available at* http://finance.senate.gov/hearings/testimony/2003test/090403altest.pdf.

[46] Statement of Harold Hongju Koh, U.S. Assistant Secretary of State, Democracy, Human Rights & Labor, Before the U.N. Commission on Human Rights (Mar. 30, 2000) (stating that "in the Democratic Republic of Congo . . . government and anti-government forces - as well as troops of the governments supporting each side - have committed . . . arbitrary detentions"), *available at* http://usinfo.state.gov/regional/ea/uschina/koh330.htm.

[47] Statement of Ambassador Madeleine K. Albright, United States Permanent Representative to the United Nations, on Human Rights Situations and Reports before U.N. General Assembly, Third Comm. (Social, Humanitarian and Cultural) (Nov. 28, 1995), *available at* http://dosfan.lib.uic.edu/ERC/intlorg/ press_releases/951128.html.

practice of arbitrary detention. Also, the House and Senate have passed resolutions urging the People's Republic of China to release Wang Bingzhang and Dr. Yang Jianli, who have been arbitrarily detained. *See* S. Res. 184, 108th Cong. (2003) (resolving that Dr. Jianli's detention violates Article 9 of the International Covenant on Civil and Political Rights and Article 9 of the Universal Declaration of Human Rights); H. Con. Res. 326, 108th Cong. (2003); Press Release, Senator Jon Kyl, Senate Passes Kyl-Mikulski Resolution to Free U.S. Resident Held in China Since 2002 Dr. Yang Jianli Detained in China for Pro-Democracy Views (July 30, 2003), *available at* 2003 WL 11710378. The force of this position is severely diluted when the United States denies fundamental aspects of due process to its own wartime detainees.[51]

As an unjustified violation of international law, the Government's arbitrary detention of Mr. Hamdi also has compromised the United States' concerted effort to promote democracy and the rule of law abroad. Despite the

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(footnote continued from previous page)

[48] While U.S. soldiers were marching to Baghdad, Secretary of State Colin Powell, referring to the State Department's 2002 Iraq Country Report, decried the fact that Iraqi "authorities routinely used arbitrary arrest and detention, prolonged detention, and incommunicado detention, and continued to deny citizens the basic right to due process." U.S. Department of State's Annual Human Rights Report (Mar. 31, 2003), in U.S. Department of State Press Release, State Department Report Outlines Human Rights Abuses in Iraq-Powell Cites Saddam's Regime as Great Threat to Global Peace, Stability, *available at* 2003 WL 2047088.

[49] Statement of Lorne W. Craner, Assistant Secretary of State for Democracy, Human Rights, and Labor, Before a Helsinki Commission hearing on Sept. 9, 2003, in U.S. Department of State Press Release, Lorne Craner Testimony at Sept. 9 Helsinki Commission Hearing, *available at* 2003 WL 2050164 (Sept. 10, 2003).

[50] Statement of Lorne W. Craner, Assistant Secretary of State for Democracy, Human Rights, and Labor, Hearing on a Review of the State Department Country Reports on Human Rights Practices, Before the House Subcomm. on Terrorism, Nonproliferation and Human Rights, of the House Comm. on Int'l Relations, *available at* 2003 WL 1998849 (Apr. 30, 2003).

[51] For instance, Russia's arbitrary detentions continue in the face of what Russia has deemed to be terrorist threats from Chechen forces, despite statements from U.S. officials condemning such detentions. *See* Craner Statement, *supra* note 49 (stating that Russia's arbitrary detentions "are not consistent with international humanitarian law or Russia's OSCE and international human rights commitments").

Government's blatant disregard for international law here, the Executive has repeated the case to the American people that the objective of establishing a rule of law in Afghanistan and Iraq underlies the U.S. military – and now nation-building – exercises there. At his first State of the Union Address, President Bush emphasized that "no nation is exempt from" the defense of liberty and justice. 2002 State of the Union Address.[52] The President enunciated similar objectives for the invasion of Iraq last year: "As we press on to liberate every corner of Iraq, . . . [w]e'll help the Iraqi people to establish a just and representative government, which respects human rights and adheres to the rule of law." President George W. Bush, Remarks on Iraq from the Rose Garden (Apr. 15, 2003), *available at* http://www.whitehouse.gov/news/release/2003/04/print/20030415-10.html.[53] Enforcing and practicing those policy objectives have secured the fair treatment of our own men and women captured on the field of battle and have paved the way for a more stable and humane world.

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[52] Punctuated by applause from both sides of the House chamber, the President further stated: "America will always stand firm for the non-negotiable demands of human dignity: the rule of law; limits on the power of the state; respect for women; private property; free speech; equal justice; and religious tolerance." 2002 State of the Union Address ("[W]e have a greater objective than eliminating threats and containing resentment. We seek a just and peaceful world beyond the war on terror.").

[53] "Our support for human rights policy in a positive way to create better human rights conditions around the world, our honest and forthright human rights reports: all of these things have continued. And they've continued alongside as part of our policy on terrorism." State Department Spokesman Richard Boucher, *in* U.S. Department of State Press Release, *Transcript: State Department Noon Briefing, May 29, 2003*, *available at* 2003 WL 2048222 (May 29, 2003).

CONCLUSION

Amicus, Global Rights, respectfully urges the Court to reverse the decision below to hold not only the United States to its commitments under international law, but to preserve the long-standing regime of human rights law that has protected scores of individuals from arbitrary caprice and Executive whim.

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