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Nos. 06-1195 and 06-1196

IN THE
SUPREME COURT OF THE UNITED STATES

LAKHDAR BOUMEDIENE, et al., *Petitioners*,
v.
GEORGE W. BUSH, et al., *Respondents*,

KHALED A.F. AL ODAH, et al., *Petitioners,*
v.
UNITED STATES OF AMERICA, et al., *Respondents.*

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE OF COURT TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS IN THE ABOVE CAPTIONED CASES

Movant, the American Center for Law and Justice (ACLJ), respectfully moves this Court for leave to file a Brief *Amicus Curiae* in support of the United States Government Respondents in the above-captioned cases.

ARGUMENT AND INTEREST OF AMICUS

In support of this Motion, the ACLJ avers as follows:

(1) The ACLJ is a not-for-profit public interest law firm committed to the constitutional separation of powers.

(2) The proper resolution of this case is a matter of substantial concern to the ACLJ because it will significantly impact the ability of the executive and legislative branches to conduct foreign policy and carry out wartime duties.

(3) Pursuant to Sup. Ct. Rule 37.3(a), the ACLJ has obtained consent from every counsel of record in this matter, save one, to file its Brief *Amicus Curiae* in support of U.S. Government Respondents. The consent letters will be filed with the Court.

(4) The ACLJ recently discovered that consent was not obtained from Respondent Khadr's counsel of record. It was the ACLJ's understanding that Respondent Khadr had been represented by counsel of record for

Petitioners Al Odah, et. al., and that due consent had already been provided.

(5) The ACLJ has attempted to contact Respondent Khadr's counsel of record by phone and electronic mail, but to no avail.

(6) Because the ACLJ desires to file its Brief *Amicus Curiae* on the same day that Respondents must file their brief, October 9, 2007, it is now impossible for the ACLJ to meet the 10-day notice requirement set forth in the new rule changes, or to disclose that all counsels of record have given consent.

(7) As such, to comply with Sup. Ct. Rule 37.3(b), the ACLJ files this Motion seeking leave of Court to file its Brief *Amicus Curiae*.

(8) Moreover, the ACLJ believes that the analysis in its Brief *Amicus Curiae* will assist this Court in properly resolving this issue.

CONCLUSION

FOR THE FOREGOING REASONS, The American Center for Law and Justice respectfully requests that this Court grant the ACLJ leave to file its Brief *Amicus C*uriae in support of the United States Government Respondents in the above-captioned cases.

October 9, 2007 Respectfully submitted,

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ABBREVIATIONS

GC II cmt.	Commentary II Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
GC III	Geneva Convention (III) Relative to the Treatment of Prisoners of War
GC III cmt.	Commentary III Geneva Convention Relative to the Treatment of Prisoners of War
GC IV cmt.	Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War
ICRC	International Committee of the Red Cross

INTEREST OF *AMICUS*[1]

Amicus curiae The American Center for Law and Justice (ACLJ) is a not-for-profit public interest law firm committed to upholding the integrity of our constitutional system of government based on separation of powers. Jay Alan Sekulow, ACLJ Chief Counsel, has argued and participated as counsel of record in numerous cases involving constitutional issues before this Court as well as before lower federal and state courts. The ACLJ is very concerned about Petitioners' attempt to subvert the well-established authority of the Executive and Legislative Branches to deal with the exigencies of war in all their facets and to transfer such authority to the Judiciary. The ACLJ urges this Court to uphold the validity of the Military Commissions Act

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[1]This Brief is filed with the consent of all the parties, save one. The consent letters of the U.S. Government, Respondent Khalid, and Petitioners Boumediene, et. al., are filed herewith. Blanket consent letters from Petitioners El-Banna, et. al., and Al Odah, et. al., were filed with this Court on August 14 and September 4, 2007, respectively. Pursuant to Rule 37.6, *amicus* ACLJ discloses that no counsel for any party in this case authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation of the submission of this Brief. Counsel of record for all parties, except for Respondent Khadr, received notice at least 10 days prior to the due date, of the *amicus* ACLJ's intention to file this Brief. Because Respondent Omar Khadr's counsel could not be reached, the ACLJ was unable to comply with this provision and obtain his permission to file this Brief. As a result, the ACLJ has filed a Motion for Leave of Court to file its Brief *Amicus Curiae* in this matter.

and to allow military commissions to proceed unhindered and as directed by the Congress.

SUMMARY OF THE ARGUMENT

In enacting the Military Commissions Act of 2006, Congress acted lawfully pursuant to its constitutional authority to remove from this Court's jurisdiction the ability to entertain Petitioners' requests for writs of habeas corpus. As such, this Court must dismiss Petitioners' causes. If this Court were to conclude instead that Petitioners are entitled to some type of disinterested hearing regarding their detention, an adequate alternative forum—the Combatant Status Review Tribunal ("CSRT")—already exists to answer the question whether Petitioners are being properly detained by the Executive. Hence, there is no violation of the Suspension Clause, and this Court should dismiss Petitioners' requests. To the extent that this Court considers relevant what British courts would do in similar circumstances, the Great Writ has historically been denied by British courts to persons interned during hostilities. Hence, there is no historical basis in British law to sanction the issuing of writs of habeas corpus to those interned as enemy aliens at Guantanamo Bay. Finally, much confusion surrounding how to treat the Guantanamo detainees results from this Court's misinterpretation of the meaning and reach of Common Article 3 of the 1949 Geneva Conventions. A proper reading of what transpired at Geneva in 1949 shows that delegates in Geneva never intended Common Article 3 to reach persons like Petitioners. Hence, permitting them

access to United States courts on the basis of Common Article 3 is clearly erroneous and should be reversed.

ARGUMENT

I. ENACTMENT OF THE MILITARY COMMISSIONS ACT LAWFULLY REMOVED FROM THIS COURT ITS AUTHORITY TO ISSUE WRITS OF HABEAS CORPUS TO GUANTANAMO BAY DETAINEES

On June 28, 2004, in *Rasul v. Bush*, 542 U.S. 466 (2004), this Court ruled that detainees held at the Guantanamo Bay Naval Base in Cuba could seek writs of habeas corpus in United States District Courts to challenge their detention. *Id.* at 484. This Court based its conclusion on statutory grounds, *id.* at 479, and hence declined to disturb its prior ruling in *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In *Eisentrager*, this Court had concluded, based on Constitutional grounds, that detainees incarcerated by the United States overseas who had never been in the United States could not challenge their detention before United States courts. *Id.* at 777-78. In fact, this Court concluded under the circumstances in *Eisentrager*, that no United States court had jurisdiction to issue a writ of habeas corpus on behalf of petitioners. *Id.* at 778, 781. In *Rasul*, on the other hand, this Court ruled that, because federal statutes had changed, Guantanamo Bay detainees are now able to seek writs of habeas corpus. *Rasul*, 542 U.S. at 478-79. Because the Court was able to decide the

case on statutory grounds, without disturbing the *Eisentrager* decision, it explicitly did so. *Id.* at 479.

The *Rasul* decision proved to be highly controversial. In the wake of that decision, Congress, pursuant to its Constitutional authority to delimit the appellate jurisdiction of this Court, *see* U.S. Const. art. III, § 2, cl. 2, enacted the Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, 119 Stat. 2680, in an attempt to overrule by statute what this Court had decided in *Rasul*. The DTA was challenged by Petitioners in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), and this Court ruled that the DTA did not remove the Court's jurisdiction with respect to habeas petitions pending at the time of the DTA's enactment. *Id.* at 2762-69. That decision also proved to be highly controversial. Congress responded by enacting the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600, to make clear to this Court and all other federal courts that they no longer had jurisdiction to issue writs of habeas corpus to any Guantanamo Bay detainee, irrespective of when a detainee might have filed suit seeking such relief. MCA §§ 7(a)-(b), 120 Stat. at 2636. Now, the MCA is being challenged before this Court.

A. Congress Has Constitutional Authority to Limit This Court's Jurisdiction, Even to Cases Which Have Been Argued Before, But Not Yet Decided By, The Court

Congress has the authority to remove petitions for writs of habeas corpus from the jurisdiction of all federal courts, including this Court. Likewise,

Congress may divest this Court of any appellate review over original petitions for writs of habeas corpus. The Constitution provides this Court with original jurisdiction in a few enumerated cases and then explains: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make*." U.S. Const. art. III, § 2, cl. 2 (emphasis added). The source of jurisdiction for this Court, therefore, is the Constitution, but it has long been settled that Congress has the authority to limit and regulate such jurisdiction. *See*, *e.g.*, *Felker v. Turpin*, 518 U.S. 651, 661 (1996) (citing *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810)); *Ex parte McCardle*, 74 U.S. (1 Wall.) 506, 512-14 (1868).

Regarding writs of habeas corpus, this Court has "long recognized that 'the power to award the writ by *any* of the courts of the United States, must be given *by written law*.'" *Felker*, 518 U.S. at 663-64 (emphasis added) (quoting *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807)). What Congress enacts, however, it may also rescind. And, in such an instance, this Court is "not at liberty to inquire into the motives of the legislature. [The Court] can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given *by express words*." *Ex parte McCardle*, 74 U.S. at 514 (emphasis added) (referencing U.S. Const. art. III, § 2, cl. 2).

Ex parte McCardle established the necessary legal principles controlling this issue. In *McCardle*, the Court was in the process of deciding a habeas

petition on appeal, pursuant to jurisdiction granted by an act of Congress in March 1867. 74 U.S. at 512. After the Court had heard oral arguments but before a final opinion issued, Congress repealed the Act relied upon by the petitioner. Congress did not repeal the "whole appellate power of the court, in cases of habeas corpus," but only review of "appeals from Circuit Courts under the act of 1867." *Id.* at 515. When Congress repealed the statute, the Court lacked jurisdiction and had to dismiss McCardle's cause. The Court aptly noted that "judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer." *Id.* at 514-15.

Regarding unlawful enemy combatants detained overseas who have never entered the United States, this Court recognized no constitutional basis granting U.S. courts jurisdiction to hear their petitions for writs of habeas corpus. *Eisentrager*, 339 U.S. at 777-78. In *Rasul*, this Court concluded that U.S. courts have statutory authority to hear such requests. *Rasul*, 542 U.S. at 484. Yet now, by means of the MCA, Congress has deliberately, expressly, and plainly removed any such statutory grant. As in *McCardle*, the MCA does not remove the whole appellate power of the Court, but "a plain[] instance of positive exception" is made by the MCA's terms regarding Guantanamo Bay detainees. *See McCardle*, 74 U.S. at 514.

Congress has authority to set statutory limits on this Court's jurisdiction. *See, e.g.*, U.S. Const. art. III, § 2, cl. 2; *Felker,* 518 U.S. at 661. Congress has explicitly exercised such authority. *See* MCA §§ 7(a)-(b), 120 Stat. at 2636. As such, this Court—and

every other United States court—lacks jurisdiction to hear Petitioners' habeas claims and must dismiss for want of jurisdiction.

B. Even if This Court Were to Determine That Some Type of Hearing is Required for Petitioners, An Adequate Alternative to Habeas Already Exists

The purpose of the Great Writ is to allow a person detained by the Executive to challenge the legal basis of his detention before an impartial adjudicative body. *Peyton v. Rowe*, 391 U.S. 54, 58 (1968). Under United States law, the existence of an adequate alternative remedy suffices to extinguish one's right to the Great Writ. *Swain v. Pressley*, 430 U.S. 372, 381 (1977) (noting that "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus"). Whenever possible, judicial prudence instructs courts to avoid far-reaching and unpredictable constitutional implications. *See, e.g.*, *United States v. Hayman*, 342 U.S. 205, 223 (1952) ("This Court will not pass upon the constitutionality of an act of Congress where the question is properly presented unless such adjudication is unavoidable ****"). Thus, Congress may explicitly deny access to writs of habeas corpus, regardless of *where the Great Writ might otherwise apply*, and avoid conflict with the Suspension Clause so long as Congress provides an adequate and effective alternative to habeas. The MCA passes that test.

A substitution to habeas relief avoids Suspension Clause questions if it is adequate and effective "to test the legality of a person's detention." *Swain*, 430 U.S. at 381; *Hayman*, 342 U.S. at 223. In *Swain*, Congress enacted D.C. Code § 23-110 (1970), which directed a prisoner under the sentence of a D.C. Superior Court to seek habeas type relief in the District of Columbia's courts instead of Article III courts. *Swain,* 430 U.S. at 374. A prisoner challenged the statute as an unconstitutional suspension of the writ of habeas corpus. *Id.* at 379. The prisoner argued that any substitution remedy "not '*exactly commensurate*' with habeas relief available in a [federal] district court is a suspension of the writ," and, since judges in the D.C. Superior Courts do not enjoy life tenure and salary protection as federal district court judges enjoy, the prisoner argued that § 23-110 was not exactly commensurate. *Id.*

The Court rejected an "*exactly commensurate*" standard in testing the adequacy of § 23-110. Instead, the fact that D.C. Superior Court judges do not have life tenure or salary protection was no problem because, as the Court emphasized, state court judges are still presumed to be competent officials. *Id.* at 382-83 & n.18. In the instant matter, Congress has deemed military judges overseeing the Combatant Status Review Tribunals ("CSRTs") to be competent to test the legality of Petitioners' detention.[2] Yet, in any event, the MCA

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[2]The CSRTs are working. According to a recent release, "[a]ll detainees at Guantanamo Bay have been through the CSRT process, and dozens have been found to [no] longer be enemy combatants and released or transferred to their home

allows for review of CSRT determinations in an Article III court—the United States Circuit Court of Appeals for the District of Columbia Circuit. *See* MCA § 950(g), 120 Stat. at 2622.

The adequacy of an alternative to habeas is also a matter of scope. *See Swain*, 430 U.S. at 381-82. A key error in Judge Rogers' dissenting opinion below on this issue is that she misunderstood the proper scope of habeas corpus review of military tribunal decisions. *See Boumediene v. Bush*, 476 F.3d 981, 1004-06 (D.C. Circuit 2007), *cert. granted*, 127 S. Ct. 3078 (June 29, 2007) (No. 06-1195) (Rogers, J., dissenting). She characterized the scope of habeas review as being broad, a "careful consideration and plenary processing of their claims." *Id.* at 1005 (quoting *Harris v. Nelson*, 394 U.S. 286, 298 (1969)). Quite the opposite is true. The historic scope of habeas review *of military tribunals* "is of most *limited scope*," inquiring "only whether the military tribunal was legally constituted, and whether it had jurisdiction to impose punishment for the conduct charged." *Eisentrager*, 339 U.S. at 797 (Black, J., dissenting) (emphasis added) (relying on *In re Yamashita*, 327 U.S. 1 (1946)); *see also Ex Parte Quirin*, 317 U.S. 1, 25 (1942). Despite the limited scope required of habeas review of military tribunals in the past, the DTA and MCA significantly expand the scope of review for detainees at Guantanamo. *See* DTA §§ 1005(a), (e)(2), 119 Stat. at 2740-42 (providing, for example, annual reviews of detention,

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countries." Press Release, Fred W. Baker III, Am. Forces Press Serv., Dep't Releases Audio Recording of 9/11 Mastermind's Tribunal (Sept. 13, 2007), *available at* http://www.defenselink.mil/news/newsarticle.aspx?id=47437.

periodic examination for any new relevant evidence, and review by the United States Court of Appeals for the D.C. Circuit). As such, Petitioners have little to complain about in that regard.

Congress has provided an adequate and effective alternative to habeas in the DTA and MCA. And, affirming this alternative avoids deciding unnecessary and problematic constitutional issues. The Court should dispose of Petitioners' claims accordingly.

II. EVEN BRITISH COURTS WOULD NOT ISSUE THE GREAT WRIT TO ENEMY ALIENS INTERNED IN WARTIME

In the Judiciary Act of 1789, Congress authorized federal courts to issue writs of habeas corpus. As such, this Court has concluded that the Suspension Clause protects the writ "as it existed in 1789." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). For an understanding of the common law writ, British sources have been discussed at length. *See, e.g.*, *Rasul*, 542 U.S. at 481-82; *id.* at 502-04 (Scalia, J., dissenting). The *Amicus* Brief submitted by the Commonwealth Lawyers Association in support of Petitioners in this matter cites to a number of sources which actually buttress rather than harm Respondents' case. *See* Br. for the Commonwealth Lawyers Ass'n as *Amicus Curiae* in Support of the Pet'rs at 8 n.19, *Boumediene v. Bush*, No. 06-1195, *cert. granted*, 127 S. Ct. 3078 (June 29, 2007) [hereafter Commonwealth Brief]. Among the sources relied upon by the Commonwealth Lawyers Association is a book by Sir Arnold Duncan McNair.

Id. (citing Sir Arnold Duncan McNair, *International Law Opinions* [hereafter *Opinions*] (The University Press 1956)). The McNair book notes the following concerning British law: "[A] prisoner of war is not entitled to this writ [i.e., a writ of habeas corpus]." McNair, *Opinions* at 106. That observation, in turn, cites to another book by Lord McNair. *See* McNair, *Legal Effects of War* [hereafter *War*] 54-60 (2d ed. 1944). In this latter source, Lord McNair cites English cases in the 18th and 19th centuries for the proposition that *detained prisoners of war* are "not entitled to a writ of habeas corpus." *Id.* at 56. He continues: "Although internment *** does not destroy the alien enemy's normal procedural capacity, *there is one remedy previously referred to which is denied to an alien enemy when interned, namely, the writ of habeas corpus*." *Id.* at 59 (emphasis added). Lord McNair also notes "that persons, of whatever nationality and wherever they may be, who are in the military *or civilian employment of the enemy* would be debarred from suing in an English court." *Id.* at 61 (emphasis added).

Since Lord McNair is drawing on such early sources, he uses the phrase "prisoner of war" in its common historical understanding, i.e., a person taken captive and detained pursuant to armed hostilities, rather than in the more technical, narrow understanding from the Third Geneva Convention of 1949. *See* GC III art. 4. Notably, Lord McNair cites the case of *R. v. Schiever*, 2 Burr. 765 (1759). *See* McNair, *War* at 56. In *Schiever*, "the writ was denied to the subject of a neutral State captured upon an enemy ship and then held as a prisoner of

war, *though he contended that he had been forced to serve on the enemy ship*." *Id.* Many of the detainees at Guantanamo Bay make similar claims about being innocent bystanders or being impressed against their will into some service. Nevertheless, according to Lord McNair's usage of the phrase, the detainees at Guantanamo Bay—*person*s *detained and incarcerated pursuant to hostilities directed against the armed forces of the United States*—would surely qualify as prisoners of war under such a definition. As such, they, too, as war *internees*, would be denied the writ of habeas corpus *under British law*. Even the Commonwealth Lawyers' brief seems to understand this. *See* Commonwealth Brief at 10, n.21 (qualifying its conclusion that the Great Writ would issue in a British court on the assumption that petitioners are *not* "enemy aliens"[3]). Further, the fact that the United States Government refers to the captives at Guantanamo Bay as "detainees" instead of as prisoners of war results from a conscious decision by United States officials to use the definition of Prisoners of War as defined in Article 4 of the Third Geneva Convention of 1949.

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[3]The issue regarding enemy aliens is important, since petitioners are nationals of countries at peace with the United States. Yet, the common presumption that nationals of friendly countries are friendly is, at most, a rebuttable presumption. When a foreign national's actions constitute hostile acts directed against the United States, surely the United States is no longer bound by the legal presumption that such persons are "friendly." Their hostile acts belie such presumed friendship. To expect otherwise is to elevate form over substance. Petitioners' nationalities are irrelevant when their actions are hostile—it is their actions which define them as enemy aliens, irrespective of their nationalities.

As such, any differences between American and British law on this matter concerning the Guantanamo Bay detainees seem to rest on semantics. The Guantanamo Bay detainees fully qualify as "prisoners of war" under Lord McNair's definition even as they fail to do so under the narrower definition laid out in Article 4 of the Third Geneva Convention. Yet, as Lord McNair points out, historically, it is the more general definition that British courts would have applied when disallowing the Great Writ.

The term Prisoners of War in the Third Geneva Convention is very specific and is to be used to determine which combatants may avail themselves of the many protections laid out in the Third Convention. *The term was never meant to determine that combatants failing to meet the standards of conduct expected by the Conventions could, as a result of their greater lawlessness, thereby qualify for greater legal rights and privileges than those who did comply.* Even to suggest such a thing is patently absurd. Those who do not meet the Article 4 criteria are not entitled to the Third Convention's protections. That does not mean, however, that those same persons, when interned, are not prisoners of war in the sense described by Lord McNair and, hence, precluded under British law from seeking a writ of habeas corpus in a British court. They should also be denied access to the Great Writ by American courts in such circumstances.

III. IN ITS *HAMDAN* DECISION, THIS COURT ERRED IN CONCLUDING THAT THE GENEVA CONFERENCE OF 1949 INTENDED COMMON ARTICLE 3 TO APPLY TO PERSONS LIKE PETITIONERS

In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), this Court concluded that Common Article 3 of the 1949 Geneva Conventions applies to detainees currently held at Guantanamo Bay, Cuba. *Id.* at 2796. The Court based its conclusion on the "literal meaning" of the phrase "not of an international character," *id.* at 2795-96, and the statement in the ICRC Commentary that "the scope of the Article must be as wide as possible," *id.* at 2796.

The Court's conclusion seriously misinterprets what the High Contracting Parties actually agreed to when negotiating Common Article 3. *See generally* The Diplomatic Conference of Geneva of 1949, Geneva, Switz., April 26-Aug. 12, 1949, *2B Final Record* [hereafter Final Record] at 9-16, 26, 27, 34, 35, 36-37, 38, 40-50, 76-79, 82-84, 90, 93-95, 97-104, 107, 120-127, 129, 157, 165, 171, 189, 325-339 (2004) (discussing the issues surrounding the adoption of Common Article 3); *see also* Robert W. Ash, *Square Pegs and Round Holes: Al-Qaeda Detainees and Common Article 3*, __ Ind. Int'l & Comp. L. Rev. __, __ (2007) (forthcoming) (summarizing how Common Article 3 was adopted, what the High Contracting Parties intended Article 3 to accomplish, and how Article 3 is currently being misapplied); G.I.A.D. Draper, *The Status of Combatants and the Question of Guerilla Warfare*, 45 Brit. Y.B. Int'l L. 173, 210 (1971) (noting that,

because Article 3 "was a pioneer provision in a multilateral convention restricting States in their manner of *quelling internal rebellion*," "it was accepted with difficulty *and considerable caution*" (emphasis added)).

Further, the Court's reliance on the ICRC quote about Article 3's "wide scope" is misplaced and fails to take into account the following: (1) that the ICRC is an advocacy organization with its own views and agenda, *see*, *e.g.*, GC III cmt. at 36 ("Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfill any of the above conditions? *We [i.e., ICRC] do not subscribe to that view. We [i.e., ICRC] think, on the contrary, that the scope of application of the Article must be as wide as possible*." (emphasis added)); GC IV cmt. at 23 ("*That may not be a strictly legal interpretation; it does not altogether follow the text itself; but it is in our [i.e., ICRC's] opinion the only honourable and reasonable solution*." (emphasis added)); GC IV cmt. at 27 (noting that the ICRC encounters obstacles "*as always* when endeavoring to go a step *beyond the text of the Conventions*" (emphasis added)); *see also* Derek Jinks, *September 11 and the Laws of War*, 28 Yale J. Int'l L. 1, 24 (2003) (noting that ICRC Commentaries' "interpretive propositions are themselves fraught with ambiguities"); (2) that the ICRC, as a non-State actor, was not—and, indeed, could not be—a High Contracting Party to the 1949 Conventions and, as such, could not, and did not, vote on the wording or meaning of any provision of the 1949 Conventions, *see* 2B Final Record at 336 (ICRC representative admitted that the meaning and reach of Article 3 fell

"within the exclusive competence of governments"); and (3) that the ICRC admits that questions of interpretation of individual articles of the Conventions must be answered by the respective High Contracting Parties, not the ICRC, *see*, *e.g.*, GC III cmt. foreword ("The Committee, moreover, whenever called upon for an opinion of a provision of an international Convention, always takes care to emphasize that *only the participant States are qualified, through consultation between themselves, to give an official and, as it were, authentic interpretation of an intergovernmental treaty*." (emphasis added)).

The implications of this Court's erroneous interpretation of Article 3 are far-reaching. This Court's *Hamdan* decision has wrongly required the United States Government to assume international *treaty* obligations to which the United States had never agreed at Geneva in 1949. Further, by its decision, this Court has, in effect, compelled the Government to cede sovereign rights and prerogatives concerning treatment of unlawful combatants which the political branches had meant to retain. Since decisions which cede sovereign rights and prerogatives are political decisions, this Court improperly arrogated to itself authority reserved in the Constitution to the political branches, thereby violating separation of powers. *Powell v. McCormack*, 395 U.S. 486, 518 (1969) ("It is well established that the federal courts will not adjudicate political questions."); *Baker v. Carr*, 369 U.S. 186, 210 (1962) (The "nonjusticiability of a political question is primarily a function of the separation of powers."). As such, this Court should

reverse its prior decision regarding the meaning and reach of Article 3.

A. Separation of Powers Requires that Courts Proceed Cautiously in Interpreting Treaties to Avoid Interfering with Powers Accorded by the Constitution Solely to the Political Branches and to Avoid Inadvertently Ceding Sovereign Rights and Prerogatives

Consistent with the principle of separation of powers, the Constitution of the United States distributes to each of the three branches of the federal government authority regarding treaties. The Constitution accords to the Executive Branch the authority to negotiate treaties on behalf of the United States. U.S. Const. art. II, § 2, cl. 2. The Constitution accords to the United States Senate the responsibility to give its advice and consent to treaties submitted to it by the President for ratification. *Id.* The Judiciary, in turn, has the responsibility to interpret such treaties, once ratified. *See*, *e.g.*, *Sullivan v. Kidd*, 254 U.S. 433, 442 (1921) (noting that "construction of treaties is judicial in its nature").

One must keep in mind that treaties—as agreements between and among sovereign powers—implicate the sovereign rights of the High Contracting Parties thereto. As such, in order to avoid inadvertently ceding sovereign rights and prerogatives meant to be protected and retained, any United States court interpreting the meaning and reach of a treaty must diligently endeavor to discover specifically what the United States and its

treaty partners actually sought to achieve as well as what they actually agreed to be bound by. That is especially true when the treaty concerns matters relating to war and national security. *See*, *e.g.*, *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citing *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 (1964) (noting as "obvious and unarguable" that there is no governmental interest more compelling than security of the Nation)). *See also Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (noting that "*[w]here *** the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility for war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs*." (emphasis added)). Surely, negotiating the terms of a convention on how to modify the law of war is such an instance.

Moreover, as with domestic legislation, a treaty's terms result from the give-and-take of the parties involved in negotiating them. Hence, despite the noblest of goals and intentions, parties to a treaty may be forced to pursue their ultimate goals by means of a series of small steps rather than by one giant step. Such was the case with Common Article 3. *See*, *e.g.*, 2B Final Record at 335 ("On the one hand *** we are told that [Article 3] does not go far enough, while on the other *** it is said it goes much too far. These two criticisms compensate each other. And *to those who complain that the suggested solution does not go far enough, there is a pertinent reply: Half a loaf is better than no bread*." (emphasis added)); *id.* (describing Article 3 as a "comparatively

modest" achievement); Jinks, *September 11*, 28 Yale J. Int'l L. at 20 (noting that evidence exists "suggest[ing] that Common Article 3 applies only to civil wars" and that "textual ambiguity in the provision raises some questions about whether [Article 3] applies to transnational armed conflict").

Because of the stakes involved (e.g., issues of national sovereignty and considerations of national reputation for good faith adherence to international agreements), when interpreting a treaty, a court should employ additional safeguards to ensure that the treaty's terms are carried out in good faith. *Good faith implementation, however, does not require that a nation go beyond the terms it has agreed to*, and no United States court has legitimate authority to compel such a result.

B. Judicial Standard for Interpreting Treaties

The judicial standard for interpreting treaties is well-settled in the United States. This Court noted in *Air France v. Saks*, 470 U.S. 392 (1985), that United States courts have a responsibility to read a treaty in a manner "consistent with the shared *expectations of the contracting parties*." *Id.* at 399 (emphasis added) (citing *Reed v. Wiser*, 555 F.2d 1079, 1090 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977)); *see also Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) (noting that in interpreting a treaty a court's "role is limited to giving effect to the intent of the treaty parties"); *Chew Heong v. United States*, 112 U.S. 536, 540 (1884) (noting that treaties are to be interpreted "according to the intention of the contracting

parties"). Determining the intent of treaty partners and ensuring that treaties are faithfully implemented require judicial diligence and a look beyond the text to the drafting history of the treaty (to the so-called *travaux preparatoires*). Yet, determining the parties' intent and ensuring faithful implementation necessarily exclude judicial *alteration* of a treaty's terms and reach:

> [T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. *Neither can this Court supply a casus omissus in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.*

Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 135 (1989) (alteration in original) (emphasis added) (quoting *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821)).

Going beyond the four corners of the treaty is key. "Because a treaty ratified by the United States is not only the law of this land *** but also an agreement among sovereign powers, *we have traditionally considered as aids to its interpretation the negotiating and drafting history* ****" *El Al Isr.*

Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 167 (1999) (emphasis added) (quoting *Zicherman v. Korean Airlines, Ltd.*, 516 U.S. 217, 226 (1996)). That should be especially true of Common Article 3 where multiple understandings of its terms are possible. *See*, *e.g.*, GC III cmt. at 35 (admitting that the phrase "armed conflict not of an international character" is "vague"); Jinks, *September 11*, 28 Yale J. Int'l L. at 38-41 (noting three plausible understandings of the phrase "armed conflict not of an international character"); Nathan A. Canestaro, *"Small Wars" and the Law: Options for Prosecuting the Insurgents in Iraq*, 43 Colum. J. Transnat'l L. 73, 94 (2004) (noting that the "precise meaning" of "'armed conflict not of an international character' is unclear"); Tom Farer, *Humanitarian Law and Armed Conflicts: Toward the Definition of "International Armed Conflict,"* 71 Colum. L. Rev. 37, 43 (1971) ("One of the most assured things *** about the words 'armed conflict not of an international character' is that no one can say with assurance precisely what meaning they were intended to convey.").

Additionally, treaties are negotiated by diplomats speaking different languages. This periodically leads to misunderstandings. Even speaking a common language is no guarantee that misunderstandings will not occur. As George Bernard Shaw famously quipped: "England and America are two countries separated by a common language."[4] *See Oxford*

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[4]Winston Churchill cited an historical example to corroborate Shaw's famous quip. Churchill related the following concerning an incident between the British and American Chiefs of Staff during World War II:

Dictionary of Political Quotations 337 (Antony Jay ed., 1996). One can multiply the chances for misunderstanding when non-native speakers begin considering English terms for treaties, just as one can safely assume the same in reverse when non-native speakers of other languages attempt to express themselves in those languages. Hence, confining one's analysis to the four corners of the treaty can lead to erroneous interpretations—as occurred here. Reviewing the treaty's text in its context by examining the treaty's drafting history (the *travaux preparatoires*) is essential to ferret out what was actually agreed to. That did not occur in the *Hamdan* case and helps explain why the Court erred in its interpretation of the meaning and reach of Common Article 3.

> The enjoyment of a common language was of course a supreme advantage in all British and American discussions. The delays and often partial misunderstandings which occur when interpreters are used were avoided. There were however differences of expression, which in the early days led to an amusing incident. The British Staff prepared a paper which they wished to raise as a matter of urgency, and informed their American colleagues that they wished to "table it." To the American Staff "tabling" a paper meant putting it away in a drawer and forgetting it. A long and even acrimonious argument ensued before both parties realised [sic] that they were agreed on the merits and wanted the same thing.

Winston S. Churchill, *The Grand Alliance* 688 (1951).

C. Even a Cursory Review of the Final Record of the Geneva Conference of 1949 Clearly Demonstrates that the Majority of Delegations Intended Common Article 3 to Apply to Serious Internal Conflicts Like Civil Wars and to Nothing Else

At the 1949 Geneva Conference, the ICRC presented the following text (known as the "Stockholm Draft") to the delegates for their consideration:

> *In all cases of armed conflict which are not of an international character*, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties ****

GC III cmt. at 31 (emphasis added). The proposed text proved to be very controversial:

> From the very outset, divergences of views became apparent. A considerable number of delegations were opposed, if not to any and every provision *in regard to civil war*, at any rate to the unqualified application of the Convention to such conflicts**** It was said that [the proposal] would cover all forms of insurrections, rebellion, and the break-up of States, and even plain brigandage**** To compel the Government of a State *in the throes of internal conflict* to apply to such a conflict the whole of the provisions of a Convention expressly concluded to cover the

> case of war would mean giving its enemies, who might be no more than a handful of rebels or common brigands, the status of belligerents, and possibly even a certain degree of legal recognition.

Id. at 32 (emphasis added). At the Plenary Meeting on April 26, 1949, the articles common to all four conventions (which included Article 3[5]) were referred to the committee known as the "Joint Committee." 2B Final Record at 128. At the very first meeting of the Joint Committee to consider extending legal protections to victims of non-international conflicts, the Stockholm Draft's call for applying the Conventions' provisions to "*all* cases of armed conflict which are not of an international character" elicited a number of concerns. *See*, *e.g.*, *id.* at 10 (noting that applying international protections "to *civil war* would strike at the root of national sovereignty and endanger national security ****" (emphasis added)). Ultimately, because the language was so controversial, a separate, Special Committee was formed to deal specifically with Article 3.

Because of delegates' concerns about the breadth of the Stockholm proposal, the *Special Committee decided to abandon the Stockholm language*—to wit, that the Convention would apply "in *all cases* of armed conflict which are not of an international character," *see* GC III cmt. at 31 (emphasis added)—and to define more clearly to which cases of armed

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[5]Note that Common Article 3 was initially paragraph 4 of Article 2. 2A Final Record at 128. It then was redesignated as Article 2A, *id.* at 129, before ultimately becoming Article 3.

conflict not of an international character the Conventions should apply.

Throughout their discussions, the concerns of the various delegations centered solely on civil wars and other significant *internal* conflicts, such as insurgencies and rebellions. *See*, *e.g.*, 2B Final Record at 10, 13. No delegation anticipated any type of conflict like the ongoing Global War on Terror (GWOT). As a result, all discussions centered on civil wars and similar internal conflicts. It stretches credulity to the breaking point to conclude that delegates knowingly agreed that Article 3 was to apply to situations which they *neither anticipated nor discussed*. The language in the Joint Committee report to the Plenary Committee confirms this view.

Following many weeks of meetings and discussion, the Joint Committee delivered its report to the Plenary Committee for consideration by all delegations to the Conference. The portion of its report concerning Common Article 3 read, in pertinent part, as follows:

> In the Stockholm Draft, the fourth paragraph of Article 2 [what ultimately became Common Article 3][6] stipulated that, in *all* cases of armed conflict not of an international character, each of the Parties to the conflict should be bound to implement the provisions of the Conventions.
>
> At the present Conference, the question immediately arose of deciding what was to be understood by "armed conflict not of an international character which may occur in

[6]*See supra* note 5.

> the territory of one of the High Contracting Parties." *It was clear that this referred to civil war*, and not to a mere riot or disturbances caused by bandits. States could not be obliged as soon as *rebellion arose within their frontiers*, to consider the rebels as regular belligerents to whose benefit the Conventions had to be applied. But *at what point should the suppression of the rising be regarded as a civil war*? ****

2B Final Record at 129 (emphasis added). Nowhere in the Final Record is there any indication that any other types of conflict were considered other than serious *domestic* conflicts. Moreover, the delegates had consciously and intentionally removed the term "all" from the phrase proposed at Stockholm, "In *all* cases of armed conflict which are not of an international character ****" *See id.* at 45. They adopted the following phrasing instead:

> In the case of an 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 ****

See, e.g., GC III art. 3. Moreover, throughout the process, the majority of delegates to the 1949 Conference sought to narrow the reach of Article 3, not expand it. *See*, *e.g.*, GC III cmt. at 30 (noting even before the Geneva Conference began that "[t]here was reason to fear that there might be objections to the idea of imposing international

obligations on States in connection with their *internal affairs* ****" (emphasis added)); *id.* at 31 (noting that the proposal of the Government Experts in 1947 "fell a long way short of that of the Red Cross Societies"); 2B Final Record at 335-36 (noting that the ICRC "was aware from the outset *** that the original text *** had no chance whatsoever of being adopted by Governments ****"). Hence, the issue of Article 3's alleged "wide scope" merely reflects the aspirations of the ICRC, a non-party to the Conference. As a non-party, the ICRC had no authority to decide either the text or the meaning of any single article in any of the four Geneva Conventions adopted in 1949. Relying on the ICRC comment that Article 3 was meant to be applied broadly, therefore, is like relying on Al Gore's assessment of President Bush's views on global warming—it simply cannot be taken at face value.

Civil wars, insurrections, rebellions, and the like are serious armed conflicts occurring within one country. This concept fully comports with Article 3's current language: "In the case of armed conflict not of an international character *occurring in the territory of one of the High Contracting Parties* ****" *See, e.g.*, GC III art. 3 (emphasis added); *see also* GC II cmt. at 33 (noting that Article 3 applies to conflicts "similar to international war, but [which] take place within the confines *of a single country*" (emphasis added)). Hence, it is fully reasonable that the language adopted by the High Contracting Parties in Geneva was meant to limit Article 3's reach to civil wars and the like and to exclude any type of conflict similar to today's conflict with al-Qaeda and other global terrorist groups. To conclude that Article 3

was meant to apply to such broader conflicts contradicts both the language and the negotiating history of Article 3 and is clearly erroneous. Thus, this Court should revisit this matter and correct its error by reversing its decision in *Hamdan* that Common Article 3 applies to detainees at Guantanamo Bay Naval Base in Cuba.

CONCLUSION

In light of the foregoing, *Amicus Curiae* The American Center for Law and Justice respectfully urges this Court to uphold the validity of the Military Commissions Act, to allow military commissions to proceed unhindered and as directed by the Congress, and to reverse its erroneous interpretation of Common Article 3.

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