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 Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICI CURIAE* FORMER PRISONERS OF WAR AND EXPERTS ON THE LAW OF WAR IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are former U.S. soldier prisoners of war whose lives have been deeply affected by our enemies' compliance, or failure to comply, with the mandates of the Geneva Conventions, as well as experts on international human rights and humanitarian law, sometimes referred to as the law of war.[1]

Amici take no position on whether petitioner Hamdi has committed acts that warrant treatment as an enemy combatant.[2] Nevertheless, they file this brief to urge this Court to examine and reverse the Fourth Circuit's refusal to allow a U.S. citizen allegedly detained in a war zone the opportunity to challenge before a competent tribunal his exclusion from the protections of the Geneva Conventions. *Amici* believe that the Fourth Circuit has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.[3]

Douglas "Pete" Peterson served as a fighter pilot and commander in the U.S. Air Force from 1954-1981 and attained the rank of full colonel. In 1966, he was shot down over North Vietnam and spent six and a half years as a prisoner of war. From 1997-2002, Mr. Peterson served as U.S. Ambassador to Vietnam. Prior to his ambassadorship, he served three terms as a U.S. Congressman.

Leslie H. Jackson is the Executive Director of American Ex-Prisoners of War, a non-profit, congressionally chartered veterans organization that represents approximately 50,000 former prisoners of war and their families.

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[1] Letters of consent to the filing of this brief accompany this brief. No counsel for a party authored this brief in whole or in part and no person, other than *Amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* use the term "enemy combatant" to mean a member of the armed forces of a nation with which the United States is at war.

[3] In short, *Amici* offer reasons why this Court should review the "treaty" element of Petitioner's second question presented.

When his B-17 bomber crashed on April 24, 1944, Mr. Jackson was captured by the German Army and transferred to a converted concentration camp. While the experience was harsh, Mr. Jackson's German captors treated him in accord with the Geneva Conventions of 1929. Mr. Jackson believes that his survival and health while in captivity are the result of the German Army's adherence to the 1929 Geneva Conventions.

The experiences of Edward Jackfert, Paul Reuter, and Neal Harrington present a sharp contrast. Mr. Jackfert is former National Commander of American Defenders for Bataan & Corregidor, Inc. ("American Defenders"), an organization providing support for POWs held by the Japanese during World War II. Mr. Reuter is the National Adjutant and Legislative Officer for the American Defenders. In 1942, all three men were taken prisoner by Japan, which did not purport to follow the 1929 Geneva Conventions. Without the protection of the Conventions, all three men were forced to take part in the horrific Bataan Death March and forced into slave labor. During their years of captivity, they saw their compatriots starved, beaten, and killed.

Mary Robinson served as U.N. High Commissioner for Human Rights from 1997-2002. She previously served seven years as President of the Republic of Ireland, and 20 years as Senator.

Judge Patricia McGowan Wald served as a judge on the U.S. Court of Appeals for the D.C. Circuit from 1979-1999, and as Chief Judge from 1986 to 1991. She served from 1999-2001 as a Justice on the International Criminal Tribunal for the Former Yugoslavia, a court with jurisdiction over grave breaches of the Geneva Conventions and other law of war violations.

Payam Akhavan served as Legal Advisor to the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia.

Mary Cheh is professor of law at George Washington Law School, a Director of the National Institute of Military Justice, and a Member of the Rules Advisory Committee of the U.S. Court of Appeals for the Armed Forces.

Stephen Saltzburg is General Counsel for the National Institute of Military Justice and a professor of law at George Washington Law School.

Marco Sassoli is a professor of international law at the University of Quebec and served as deputy head of legal division of the International Committee of the Red Cross, the international body charged with implementing the Geneva Conventions.

Minna Schrag is a former senior trial attorney in the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia.

INTRODUCTION AND SUMMARY OF ARGUMENT

Faced with the torture and inhumane treatment of soldiers captured during the two world wars, nearly half a century ago, nations throughout the world ratified the four Geneva Conventions. The third of these, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Convention or GPW], confers upon captured soldiers substantive and procedural protections designed to check a detaining power's basest impulses. Central to these protections is a detainee's right to be treated as a prisoner of war [hereinafter POW], unless and until his status – or even his innocence – has been determined by a "competent tribunal."

The United States has ratified all four Geneva Conventions, making them the supreme law of the land. U.S. Const. art. VI. It has also directly incorporated language from the Convention into binding military regulations. Finally, it has faithfully adhered to the requirements of the GPW in every conflict since World War II. The United States' compliance has been based on both legal obligation and enlightened self-interest: the nation's recognition that its commitment to the Conventions is central to the protection of U.S. soldiers abroad.

The United States' treatment of Petitioner radically departs from this settled law and history. Yaser Hamdi is alleged to have been a soldier serving with Afghan government forces and captured on a battlefield by Northern

Alliance troops, then transferred to U.S. custody. He has been detained indefinitely, incommunicado, without the protections mandated by the Convention. The United States has denied him POW status, but has apparently never brought him before a competent tribunal that has determined him ineligible for such treatment. Nor has Hamdi ever been given the opportunity to question whether he was a combatant at all.

Hamdi now challenges that treatment, asserting in part that the Convention gives him these basic dignities. The Fourth Circuit swept aside the Convention's clear requirement that a captured combatant be treated as a POW unless and until a competent tribunal determines him ineligible for such treatment. Its ruling ignored both military regulations directly incorporating those directives as well as this nation's long and proud tradition of convening tribunals to settle disputes over a prisoner's status. That was a grave error, which calls for correction under this Court's plenary jurisdiction.

This Court should grant certiorari to affirm the clear text of the Convention, which under the Supremacy Clause constitutes the supreme law of the land. The Court should reaffirm that the writ of habeas corpus is the proper mechanism by which the legality of detention may be challenged. By so doing, this Court would improve the chances that U.S. servicemen and women captured abroad will be treated as the drafters and U.S. ratifiers of the Convention intended.

I. THE FOURTH CIRCUIT RADICALLY DEPARTED FROM THE SETTLED UNDERSTANDING AND APPLICATION OF THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR.

The United States has consistently recognized as legally binding the unambiguous directives of the Convention. The Convention requires all contracting parties, including the United States, to treat those captured in the course of armed conflict as POWs "from the time they fall

into the power of the enemy and until their final release and repatriation." Convention, art. 5, 6 U.S.T. 3316, 3322, 75 U.N.T.S. 135, 140 [hereinafter Article 5]. There is one – and only one – exception to that requirement:

> 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 [deserving of POW status], such persons shall enjoy the protection of the present Convention *until such time as their status has been determined by a competent tribunal*.

Id. at 3324 (emphasis added).

The meaning of this clear language has been undisputed by the United States since its ratification of the Convention in 1955. Every department of the United States military has incorporated the language of the Convention directly into its binding regulations regarding the treatment of wartime detainees:

> In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention *until such time as their status has been determined by a competent tribunal*.

Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* § 1-6(a) (1997) (emphasis added) [hereinafter AR 190-8].[4] The same authoritative source directs that a "competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status . . . who asserts that he or she is entitled to treatment as a prisoner of war . . . " AR 190-8, §1-6(b). Furthermore, U.S. Navy regulations

[4] This regulation was jointly promulgated by the Headquarters of the Departments of the Army, Navy, Air Force, and Marine Corps, Washington, D.C., October 1, 1997.

advise naval officers that "individuals captured as spies or as illegal combatants *have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and to have the question adjudicated.*" Dep't of the Navy, NWP 1-14M: *The Commander's Handbook on the Law of Naval Operations* 11-3 (1995) (emphasis added).[5]

Indeed, these sources explicitly provide detainees the opportunity to assert not only POW status, but also *innocence*. The multi-force regulation, for instance, authorizes a competent tribunal to determine whether a detainee is in fact an "innocent civilian," AR 190-8, §1-6(e)(10), i.e., to assess the sort of claim that Hamdi (through his father) makes here.[6]

These military regulations accord with the practices faithfully adhered to by the U.S. military in every major conflict since World War II. During the Korean War, the United States military treated captured North Korean and Chinese soldiers as POWs under the Convention, even though neither the United States nor the United Nations

[5] The U.S. Marine Corps instructs its future officers to adhere to the GPW in their treatment of enemy prisoners – even if the enemy itself has violated the GPW – for two reasons: "a. This country is a law-abiding nation. It abides by international law and expects its individual citizens, especially servicemen, who are official representatives, to do likewise. The damage to our national interest and the adverse reaction of world public opinion as a result of non-adherence to the Geneva Convention by Americans would be serious[; and] b. A treaty such as the Geneva Convention of 1949, once ratified by the Senate, becomes part of the 'Law of Land Warfare'. Thus, violation of the Geneva Convention would be equal to violating a federal law." United States Marine Corps, *Lesson 9: Code of Conduct*, LESSON PLAN FOR NAVAL SCIENCE 313: MARINE CORPS LEADERSHIP THEORY AND TECHNIQUES 9 (2003), *available at* https://navy.rotc.psu.edu under "Naval Science Classes."

[6] It is impossible to know whether Hamdi has himself claimed entitlement to POW status, as he has been held incommunicado without any access whatsoever to a lawyer or his father. Given that Respondent has prevented Hamdi from having access to his counsel or next friend, we assume that Hamdi himself would claim status as either a privileged (lawful) belligerent or an innocent civilian mistakenly caught up in hostilities.

recognized either communist government. Human Rights Watch, *Background Paper on Geneva Conventions and Persons Held by U.S. Forces* (2002), *available at* http://www.hrw.org/backgrounder/usa/pow-bck.htm. During the Vietnam War, the United States military directed that all combatants captured during military operations were to be accorded prisoner-of-war status, irrespective of the type of unit to which they belonged. U.S. Military Assistance Command for Vietnam (MACV), Directive No. 381-46, Annex A (Dec. 27, 1967), *reprinted in Contemporary Practice of the United States Relating to International Law*, 62 Am. J. Int'l L. 754, 766-67 (1968). Another directive reiterated that "Article 5 [of the GPW] requires that the protections of the Convention be extended to a person who has committed a belligerent act and whose entitlement to [Prisoner of War] status is in doubt *until such time as his status has been determined by a competent tribunal*." U.S. Military Assistance Command for Vietnam (MACV), Directive No. 20-5 § 2(a) (Mar. 15, 1968), *reprinted in Contemporary Practice*, 62 Am. J. Int'l L. at 768 (emphasis added). The Vietnam directive explicitly identifies the Convention as "applicable law," *id.* at 771, and proclaims that "[n]o person may be deprived of his status as a prisoner of war without having had an opportunity to present his case with the assistance of a qualified advocate or counsel." *Id.*

The United States continued this tradition of compliance during the 1991 Persian Gulf War. The U.S. Army convened 1,196 tribunals to determine the status of detained enemy combatants during Operation Desert Storm. Dep't of Defense, CONDUCT OF PERSIAN GULF WAR: FINAL REPORT TO CONGRESS app. L at 577 (Apr. 1992) [hereinafter CONDUCT OF PERSIAN GULF WAR]. Dep't of the Army, LAW OF WAR WORKSHOP DESKBOOK 79 (Brian J. Bill ed., 2000) [hereinafter LAW OF WAR WORKSHOP DESKBOOK]. As a result, 310 individuals were granted POW status. All other detainees who came before the tribunals "were determined to be displaced *civilians* and were treated as refugees." CONDUCT OF THE PERSIAN GULF WAR at 663 (emphasis added).

Petitioner Hamdi is accused of having committed a belligerent act before falling into the hands of the Northern

Alliance. Straightforward application of these legal mandates, supported by unwavering military practice, demands that Hamdi be considered a POW unless and until a competent tribunal determines otherwise. In violation of the Convention and half a century of consistent military practice, Petitioner has been stripped of prisoner-of-war protections, denied a hearing by a competent tribunal under Article 5 of the GPW, and detained incommunicado and interrogated in a military brig for more than sixteen months.

II. THE FOURTH CIRCUIT'S REFUSAL TO FOLLOW ARTICLE 5 IGNORES THE TEXT, STRUCTURE AND HISTORY OF THE TREATY AND VIOLATES THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION.

The lower court dismissed Petitioner's reliance on the Convention, with the startling conclusion that the Convention poses "no purely legal barrier to Hamdi's detention." *Hamdi v. Rumsfeld*, 316 F.3d 450, 469 (4th Cir. 2003) [hereinafter *Hamdi III*]. In fact, a treaty's constitutional standing as supreme law of the land is well established – and the GPW's text and history make clear that a captured combatant must be treated as a POW unless and until a competent tribunal determines that he is not entitled to such treatment. The Fourth Circuit's dismissal of Hamdi's petition effectively denies the GPW its legal status under the Supremacy Clause. It also ignores the federal statute on which he bases his petition, which plainly states that the writ of habeas corpus may be granted to a person who is "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).

A. The Supremacy Clause Requires That Hamdi Be Treated As A POW Unless And Until A Competent Tribunal Determines He Is Not Entitled To That Status.

The Supremacy Clause declares:

> This Constitution, and the Laws of the United States made in Pursuance thereof; and all Treaties

> made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. In parallel language, Article III explicitly confers on federal courts jurisdiction over cases involving treaties: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2, cl. 1. The Convention, ratified by the United States nearly fifty years ago, *see* 6 U.S.T. 3316, 75 U.N.T.S. 135, 242, 246, is indisputably the "supreme Law of the Land," and federal "judicial Power" may employ it as a rule of decision.

The Fourth Circuit avoided these constitutional provisions, which would have required recognition of Petitioner's claim to a competent tribunal, by invoking the doctrine of "self-execution" of treaties. The Court concluded that Article 5 of the Convention does not "evidence[ ] an intent to provide a private right of action." *Hamdi III*, 316 F.3d at 468.[7] By so saying, the Fourth Circuit conflated two very different questions: whether the GPW provides a *private right of action* for a civil damages suit and whether it is a binding treaty that a U.S. court may enforce in a federal habeas proceeding. Here, the federal habeas corpus statute *expressly* provides Hamdi with a cause of action. The statute gives federal courts the power to grant the writ of habeas corpus to a person held

[7] A self-executing treaty is one that operates as law without requiring implementing legislation. *See Restatement (Third) of the Foreign Relations Law of the United States* § 111 (1987) ("An international agreement of the United States is 'non-self-executing' (a) if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation, (b) if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or (c) if implementing legislation is constitutionally required.").

in "custody in violation of the . . . *treaties* of the United States. . . . " 28 U.S.C. § 2241(c)(3) (emphasis added). As the U.S. Military has itself long recognized, the Convention – as a "law . . . of the United States" – provides the legal rule by which this habeas petition – brought on a statutory cause of action – must be judged. *See* LAW OF WAR WORKSHOP DESKBOOK, ch. 5, § IV(E)(3), at 85 (prisoners of war "have standing to file a Habeas Corpus action . . . to seek enforcement of their GPW rights").[8]

The Fourth Circuit's "self-executing" analysis becomes relevant only if one concludes (improperly) that the habeas statute does not allow a petition premised on "custody in violation of the . . . *treaties* of the United States." 28 U.S.C. § 2241(c)(3) (emphasis added). Yet this Court's most recent consideration of the issue instructs simply that a treaty is self-executing when "no domestic legislation is required to give the Convention the force of law in the United States," *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984).[9]

As the Convention's text and history make clear, *see infra*, section II.B, Article 5 plainly "prescribe[s] a rule by which the rights of the private citizen or subject may be determined," *Edye v. Robertson*, 112 U.S. 580, 598 (1884), Under this Court's precedents, then, Article 5 of the treaty is "binding alike [on] National and state courts, and is

[8] The Fourth Circuit thought it odd that if the habeas statute provided a cause of action, a habeas court using a rule of decision from the Convention might constitute "a mechanism of enforceability that might not find an analogue in any other nation." *Hamdi III*, 316 F.3d at 469. Aside from being speculative, the observation ignores the obvious fact that it is the very nature of a *domestic* statute that it "might not find an analogue in any other nation." *Id.*

[9] As *Edye v. Robertson*, 112 U.S. 580 (1884), noted, a ratified treaty "is a law of the land as an act of Congress is, whenever its provisions prescribe *a rule by which the rights of the private citizen or subject may be determined*. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for *a rule of decision* for the case before it as it would to a statute." *Id.* at 598-99 (emphasis added).

capable of enforcement, and must be enforced." *Maiorano v. Baltimore & Ohio R.R. Co*., 213 U.S. 268, 273 (1909).

These precedents reflect the Framers' intent, as evidenced by the Constitutional text itself. As Justice O'Connor has explained, "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." Sandra Day O'Connor, *Federalism of Free Nations*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 13, 18 (T. Franck & G. Fox eds., 1996).[10]

While the precise facts surrounding Hamdi's capture remain in dispute,[11] no one disputes that the U.S. government has denied him GPW protections without convening a competent tribunal to determine his status, as required by Article 5. That denial violates the GPW, the constitutional provisions making that Convention the supreme law of the United States, and this Court's precedents. Accordingly, the Fourth Circuit's conclusion that "there is no purely legal barrier to Hamdi's detention," *Hamdi III*, 316 F.3d at

[10] *See also Padilla v. Bush*, 233 F. Supp. 2d 564, 590 (S.D.N.Y. 2002) (declaring that the GPW "under the Supremacy Clause has the force of domestic law"); *United States v. Lindh*, 212 F. Supp. 2d 541, 553-554 (E.D. Va. 2002) ("[T]the GPW, insofar as it is pertinent here, is a self-executing treaty to which the United States is a signatory. It follows from this that the GPW provisions in issue here are a part of U.S. law and thus binding in federal courts under the Supremacy Clause.") (footnotes omitted); *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992) ("It is inconsistent with both the language and spirit of [the GPW] and with our professed support of its purpose to find that the rights established therein cannot be enforced by individual POWs in a court of law. . . . ").

[11] *See*, *e.g.*, *Hamdi v. Rumsfeld*, 337 F.3d 335, 360 (4th Cir. 2003) (Luttig, J., dissenting from denial of rehearing en banc) [hereinafter *Hamdi IV*] ("[I]t simply is not 'undisputed' that Hamdi was seized in a foreign combat zone.").

469, constitutes an error of constitutional magnitude that can be corrected only by this Court.

B. The Fourth Circuit's Reading Of The Convention Is Incompatible With The Text, History And Structure Of The Convention.

The Fourth Circuit did not deny that officials of the United States must abide by the Convention or that the clear text of Article 5 of the Convention requires treating a person captured in battle as a POW unless and until a competent tribunal finds he is not entitled to such treatment. Rather, it concluded that the GPW was "not self-executing" because it created only "diplomatically-focused rights." *Hamdi III*, 316 F.3d at 469. But as one court has recognized, "the ultimate goal of Geneva III [GPW] is to ensure humane treatment of POWs – not to create some amorphous, unenforceable code of honor among the signatory nations," *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992). While the Convention recognizes diplomatic means for resolving differences, its Article 5 "prescribe[s] a rule by which the rights of the private citizen or subject may be determined," *Edye,* 112 U.S. at 598-599, and thus "no domestic legislation is required to give the Convention the force of law in the United States." *Trans World Airlines*, 466 U.S. at 252 (analyzing Warsaw Convention). As a self-executing treaty provision, Article 5 of the GPW provides a cause of action even if the habeas statute does not.

Whatever the source of the cause of action, the *text* of the Convention makes clear that a captured soldier may invoke his rights. Article 6 states clearly that no agreement among States "shall adversely affect the situation of prisoners of war, as defined by the present Convention, nor restrict the *rights* that it confers upon *them*." Convention, art. 6 (emphasis added). The Convention expressly secures rights to "persons . . . who have fallen into the power of the enemy." Convention, art. 4. The GPW repeatedly refers to "*persons* protected by the present Convention," *id.*, art. 10 (emphasis added), and to "protected persons," *id.*, art. 11. Article 7 provides that "[p]risoners of war may in no

circumstances renounce in part or in entirety the *rights secured to them* by the present Convention." *Id.*, art. 7. Ignoring this text, the Fourth Circuit simply asserted that a Convention replete with the language of individual rights should be read to rely *only* on diplomatic enforcement. Moreover, Article 7 of the Convention would nonsensically forbid prisoners of war to renounce "rights" which, under the Fourth Circuit's interpretation, they do not possess.[12]

[12] Similarly, the *history* and *structure* of the treaty make clear that the Convention is self-executing. In 1949, states parties negotiated a substantially revised version of a prior international convention. The predecessor convention required signatory states merely to "respect[ ]" the convention. 1929 Convention Relative to the Treatment of Prisoners of War, art. 82(1), July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343 [hereinafter 1929 Convention] ("The provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances."). In 1949, the drafters crafted a new provision that requires states parties not only "to *respect*" the Convention, but also "to *ensure* respect for the present Convention in all circumstances." Convention, art. 1 (emphasis added). The treaty makers underscored the significance of this change by moving this language from the rear of the document, Article 82, to the front, Article 1. The additional language and the restructuring worked a fundamental change. By ratifying the Convention, each party necessarily undertook to treat it as binding law within its own legal system. As the official Commentary to the Convention explains:

> By undertaking this obligation at the very outset, the Contracting Parties drew attention to the fact that it is not merely an engagement concluded on a basis of reciprocity. . . . It is rather a series of *unilateral engagements* solemnly contracted before the world as represented by the other Contracting Parties.

Jean de Preux et al., GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR: COMMENTARY 17-18 (1960) [hereinafter OFFICIAL COMMENTARY] (emphasis added).

To "ensure respect" for the Convention, the drafters introduced Article 5 as a key innovation in the 1949 Convention. By requiring status determinations by a competent tribunal, the Convention created a new check on executive power that was absent from the predecessor 1929 Convention. *Compare* Convention, art. 5, *with* 1929 Convention. The drafters of Article 5 recognized "that decisions which might have the gravest consequences should not be left to a single person . . . [but] *taken to a court*." OFFICIAL COMMENTARY at 77 (emphasis added). The

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The lower court's claim that diplomacy, not Article 5, provides the *sole* mechanism to vindicate the rights of the captured runs squarely contrary not only to text, but also to logic. The Convention was designed to have force in cases of armed conflict, i.e., precisely when normal diplomatic channels are most ineffective or unavailable and unilateral respect for humanitarian law by States Parties is most crucial. *See* OFFICIAL COMMENTARY at 18.[13] The Fourth Circuit's anomalous conclusion that Convention rights may be enforced only by diplomatic means would leave the Convention's application at the mercy of the detaining country. The U.S. government could unilaterally withdraw Convention protections from Afghan prisoners just as

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drafters considered and expressly rejected a formulation of the new article that would have simply left status determination to a "responsible authority," instead insisting in Article 5 that the determination of a detainee's status should be made by a "competent tribunal." *Id.*

[13] The Third Geneva Convention does not have a nationality requirement for POW status. Significantly, this omission contrasts with the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention), which expressly requires diversity of nationality with the detaining power as a precondition for protected status. Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 4, 6 U.S.T. 3516, 3520, 75 U.N.T.S. 287, 290. The International Committee of the Red Cross has long held that a nation's own citizen captured in a conflict between two States Parties to the Convention is entitled to POW protections, including an Article 5 hearing. *See* R.J. Wilhelm, *Peut-On Modifier Le Statut Des Prisonniers De Guerre?*, 53 Revue Internationale de la Croix-Rouge 516, 685-88 (1953). *See also In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) (finding baseless the contention "that citizenship in the country of either army in collision necessarily affects the status of one captured on the field of battle" under the 1929 Geneva Convention and holding that detention as POW was legal where petitioner objected to classification only on account of American citizenship); Howard S. Levie, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 76 (1977) (concluding that international law requires "that any individual who falls into the power of a belligerent while serving in the enemy armed forces should be entitled to prisoner-of-war status no matter what his nationality may be, if he would be so entitled apart from any question of nationality . . . ") [hereinafter PRISONERS OF WAR].

Germany unilaterally sought to avoid compliance with the 1929 Convention with respect to Polish prisoners – by arguing that the Convention had ceased to apply to Poles once their government had been destroyed. *See* PRISONERS OF WAR at 11-12.

The *legislative history* surrounding the ratification of the Geneva Conventions by the United States likewise reveals a deep understanding that the act of ratification created legally binding domestic obligations. In recommending consent to ratification of the Convention, the Senate Foreign Relations Committee underscored that, with ratification, the United States would make *binding* what had previously been matters of mere policy and practice. The substantive provisions of the Convention would operate not as hortatory principles effective mainly as rhetorical tools in diplomatic negotiations, but as legal *injunctions*:

> Our Nation has everything to gain and nothing to lose by being a party to the conventions now before the Senate, and by encouraging their most widespread adoption. As emphasized in this report, the requirements of the four conventions to a very great degree reflect the actual policies of the United States in World War II. The practices which they *bind* nations to follow impose no burden upon us that we would not voluntarily assume in a future conflict without the *injunctions* of formal treaty obligations.

S. Rep. No. 84-9, at 32 (1955) [hereinafter RATIFYING REPORT] (emphasis added). The Committee urged strict adherence to the Convention, despite "the possibility that at some later date a contracting party may invoke specious reasons to evade compliance with the *obligations* of decent treatment which it has freely assumed in these instruments." *Id.* (emphasis added). The Committee concluded that adoption of these rights was the best way to secure better treatment for U.S. soldiers, based on the experiences of U.S. soldiers captured during the Korean War:

> If it be objected that the treatment of our soldiers captured in Korea by the Communists was in many respects ruthless and below civilized

> norms, it is also true that without the convention, that treatment could have been still worse.

Id. at 31.

To ensure that the Convention would be fully implemented by the United States, the Senate Foreign Relations Committee combed through the provisions of each of the four conventions to determine which provisions, if any, required implementing legislation. Only four were found to require implementing legislation, none of which are applicable here.[14] Aside from these, no further legislation was deemed "required *to give effect* to the provisions contained in the four conventions." *Id.* at 30 (emphasis added). Given the clarity of its textual requirements, Article 5 was not included among those few provisions for which the Committee deemed implementing legislation necessary. *Id.* The Senate's conclusion that some *but not all* provisions required implementing legislation casts serious doubt on the Fourth Circuit conclusion that *all* provisions of the Convention are non-self-executing.[15] *Hamdi III*, 316 F.3d at 468.

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[14] The implementing legislation deemed necessary was as follows: 1. Changes in 18 U.S.C. § 706 relative to restrictions on the use of the Red Cross emblem by commercial enterprises; 2. Legislation to provide workmen's compensation for civilian internees; 3. Legislation to exempt relief shipments from import, customs and other dues; 4. Penal measures to enforce provisions that only prisoner of war camps may be identified by the letters PW, PG or IC. RATIFYING REPORT at 30-31. In contrast, the Committee viewed the requirement under Article 129 that States Parties criminalize "grave breaches" of the Conventions already to have been met by the existing criminal code. *Id.* at 27. When the Senate determined decades later that American obligations under Article 129 were not being fully met by existing criminal statutes, Congress enacted the War Crimes Act, 18 U.S.C. § 2441 (2000), to bring the U.S. *See id.* (stating purpose "[t]o carry out the international obligations of the United States under the Geneva Conventions to provide criminal penalties for certain war crimes.")

[15] The Fourth Circuit relied heavily on the enforcement provision of Article 11 of the Convention for its argument that the Convention's values are to be vindicated by diplomatic means alone. However, Article 11 is not on point, as it concerns the procedure for resolving disputes as

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In sum, by ratifying the Geneva Conventions, the Senate plainly intended legally to bind the United States to policies that it had concluded were in the best interests of U.S. soldiers. Moreover, it intended to bind future Executives even though the Senate anticipated that future enemies might "invoke specious reasons to evade compliance with the obligations . . . freely assumed in these instruments." RATIFYING REPORT at 32. That binding obligation was to endure whether or not a future Executive shared President Eisenhower's concern that the United States "would not want to give [an enemy] the excuse or justification for treating our prisoners more harshly than he was already doing." Dwight D. Eisenhower, CRUSADE IN EUROPE 469 (1948). By ratifying the Convention, the Senate made it "the supreme law of the land, binding alike National and state courts, [which] is capable of enforcement, and must be enforced" to ensure that captured combatants are treated in accord with the Conventions. *Maiorano*, 213 U.S. at 273.[16]

III. THE FOURTH CIRCUIT'S RULING ENDANGERS U.S. TROOPS AND CIVILIANS ABROAD.

Finally, the integrity of the Geneva Conventions is crucial to the safety and security of U.S. troops and civilians abroad. As the ratifiers explained:

> If the end result [of ratification] is only to obtain for Americans caught in the maelstrom of war a treatment which is 10 percent less vicious than what they would receive without these conventions, if only a few score of lives are preserved

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to *meaning*, not as to *compliance* with a settled interpretation, responsibility for which clearly rests with each of the parties under Article 1.

[16] The Fourth Circuit also noted certain "questions" that it had about how Article 5 would work if it were mandated. *Hamdi III*, 316 F.3d 469. But as shown in Part I, *supra*, the United States has a long and proud tradition of convening "competent tribunal[s]" to assess the status of captured combatants.

> because of the efforts at Geneva, then the patience and laborious work of all who contributed to that goal will not have been in vain.

RATIFYING REPORT at 32.

Treating those captured in a war zone according to basic shared standards means that our own captured forces stand a much better chance of surviving captivity unharmed. By ignoring that goal, the Fourth Circuit not only ignores the plain text of the law, but also places Americans around the world at grave risk of the very treatment that the Geneva Conventions aim to prevent.

For more than half a century, the Geneva Conventions have led to better treatment for Americans who fall into the hands of an enemy power. As Senator John McCain, himself a former POW, explained on the fiftieth anniversary of the Geneva Conventions:

> The Geneva Conventions and the Red Cross were created in response to the stark recognition of the true horrors of unbounded war. And I thank God for that. I am thankful for those of us whose dignity, health and lives have been protected by the Conventions. . . . I am certain we all would have been a lot worse off if there had not been the Geneva Conventions around which an international consensus formed about some very basic standards of decency that should apply even amid the cruel excesses of war.[17]

The Fourth Circuit declared that no court can require the Executive to honor its obligation to follow duly ratified treaties of the United States, effectively withdrawing this nation from that legally constituted "international consensus." At bottom, the Fourth Circuit's ruling invites other nations to treat captured U.S. soldiers just as the current U.S. Executive claims it may treat captured soldiers: not

[17] Senator John McCain, Speech to the American Red Cross Promise of Humanity Conference (May 6, 1999), *available at* http://www.senate.gov/~mccain/index.cfm?fuseaction=Newscenter.Viewpressrelease&Content_id= 820.

by law, but by shifting political perceptions of momentary needs. Yet it is the *binding* nature of the Convention that has guaranteed lawful treatment for U.S. soldiers.

Because the Fourth Circuit's decision leaves the Executive free unilaterally to strip captured detainees of POW status without Geneva Convention processes, it also jeopardizes any U.S. *civilians* present in a war zone. According to the Fourth Circuit, the Convention rights of anyone apprehended in a war zone, whether soldier or civilian, may be protected only by diplomatic intervention from the apprehended person's own country – whether or not his country is the detaining power. *Hamdi III*, 316 F.3d at 468-469. As Judge Luttig warned, this interpretation has dire consequences:

> The embedded journalist or even the unwitting tourist could be seized and detained in a foreign combat zone. Indeed, the likelihood that such could occur is far from infinitesimal where the theater is global, not circumscribed, and the engagement is an unconventional war against terrorists, not a conventional war against an identifiable nation state.

Hamdi IV, 337 F.3d at 358 (Luttig, J., dissenting).

Such civilians could find themselves detained indefinitely without a fair determination of their status. As Judge Motz pointed out, the ruling below would mean that "any American citizen seized in a part of the world where American troops are present . . . could be imprisoned indefinitely . . . if the Executive asserted that the area was a zone of active combat." *Id.* at 372 n.3 (Motz, J., dissenting). Deprived by the Fourth Circuit of any individual procedural rights under Article 5 and without recourse to diplomatic protests by the U.S. government, a journalist or aid worker erroneously detained by the United States would lack any means of rectifying the error of her detention. Perversely, then, the Fourth Circuit's ruling leaves U.S. citizens erroneously detained in a war zone by the U.S. government in a *worse* legal position than aliens detained by the United States, who might at least place hope in diplomatic processes.

CONCLUSION

The Fourth Circuit's radical departure from binding law, uniform military practice, and sound policy raises questions of fundamental importance that this Court should address. For the foregoing reasons, *Amici* urge this Court to grant the writ and reverse the judgment of the United States Court of Appeals for the Fourth Circuit.

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