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 *AMICI CURIAE* INTERNATIONAL LAW PROFESSORS LISTED HEREIN IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici are a group of international law professors united in their belief that, in order to uphold basic human rights, the legality of detention by the Executive must be subject to meaningful judicial review.[1] *Amici* are academic international law experts who have devoted significant time and attention to the importance of international human rights law in domestic contexts. They represent a wide range of experiences and backgrounds, including priests and ex-members of Congress. Many *Amici* are international human rights practitioners, who have litigated numerous international human rights cases. *Amici* also have published extensively and lectured on international human rights. *Amici* sign this brief in their individual capacities. Each *Amicus* has demonstrated a strong interest in ensuring respect of international human rights law in domestic courts.

The individual *Amici* are as follows: **William J. Aceves** is Professor of Law and Director of the International Legal Studies Program at California Western School of Law. **Donna E. Arzt** is the Bond, Schoeneck and King Distinguished Professor of Law at Syracuse University College of Law and Co-Director of the school's Center for Global Law and Practice. **M. Cherif Bassiouni** is Professor of Law and President of the International Human Rights Institute at De Paul University. **Karima Bennoune** is Associate Professor of Law at Rutgers University School of Law, Newark. **Richard B. Bilder** is Foley & Lardner - Bascom Emeritus Professor of Law at the University of Wisconsin Law School. **Christopher L. Blakesley** is Professor of Law at the University of Nevada, Las Vegas, School of Law. **Carolyn Patty Blum** is Clinical Professor of

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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.

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SUMMARY OF ARGUMENT

This Court has made clear that international law constitutes an integral part of United States law, both as a matter of this country's treaty obligations and customary law. *See, e.g., The Paquete Habana*, 175 U.S. 677, 700 (1900). Adhering to this principle, this Court's previous deliberations and rulings on matters pertaining to wartime detainee rights have been informed by relevant provisions of international law. Moreover, from its earliest decisions, this Court steadfastly has held that, whenever possible, United States law must be interpreted in accord with international law. Before the Court now is a matter involving constitutional and human rights as applied to a wartime detainee. Thus, as set forth in Section I below, *Amici* respectfully submit that international law should be an essential element of this Court's deliberations in this case.

When it undertakes the requisite international law inquiry, the Court will find that the human rights instruments of civilized nations, and the precedent of the tribunals entrusted to uphold them, uniformly provide that detention of individuals under authority of the executive is subject to meaningful judicial review. Indeed, without exception, human rights law guarantees the right not to be arbitrarily

detained, and the necessarily related right to meaningful judicial review to ensure that any detention is lawful, even in the face of terrorist threats or national emergency. Notably, these widely recognized human rights are not unique to international law; rather, they are entirely consistent with the vital 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); *United States v. Robel*, 389 U.S. 258, 263-64 (1967).

Departing from these principles, the Fourth Circuit's decision below effectively holds that "further judicial inquiry is unwarranted" once the Executive proclaims to a reviewing court that the detainee seeking such review – in this case a United States citizen – is an "enemy combatant." *Hamdi v. Rumsfeld*, 316 F.3d 450, 476 (4th Cir. 2003). Under that ruling, Yaser Esam Hamdi ("Petitioner"), an American citizen, may be detained indefinitely, virtually incommunicado[2] and without meaningful judicial review, subject only to the discretion of the Executive. The implications of placing such enormous, unchecked authority over a citizen's liberty in the hands of the Executive are as grave as they are startling.

As set forth in Section II below, *Amici* maintain that this Court must not sanction such a bold interpretation of essentially absolute Executive power over citizen detainees, even in times of war. *See Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) ("[E]ven the war power

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[2] After detaining Petitioner for nearly two years, incommunicado and without access to counsel, the government permitted Petitioner to meet with a lawyer on December 2, 2003. The United States, however, has not conceded that Petitioner has any "right" to counsel; instead, the government made clear that Petitioner could meet with counsel only "as a matter of discretion and military policy," and that such meeting "should not be treated as precedent." *See* Jerry Markon & Dan Eggen, *U.S. Allows Lawyer For Citizen Held as 'Enemy Combatant'; Reversal Comes on Eve of Court Filing*, Wash. Post, Dec. 3, 2003, at A1.

does not remove constitutional limitations safeguarding essential liberties."). Mindful of international law regarding human rights, this Court should not yield to the Executive unfettered discretion to impair the human rights of an American merely by affixing – without any meaningful judicial review – an "enemy combatant" label to that citizen. For, "[i]t 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." *United States v. Robel*, 389 U.S. 258, 264 (1967). Thus, *Amici* submit that the decision of the Fourth Circuit should be reversed and remanded.

ARGUMENT

I. INTERNATIONAL LAW IS PART OF UNITED STATES LAW

From the inception of our nation and of this Court, it has been recognized that international law, pursuant to both treaties and customary law, is part of United States law. Under the Constitution, international treaties are the supreme law of the land. U.S. Const. art. VI, cl. 2 ("all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land"). Likewise, for over two centuries, domestic common law has incorporated customary international 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."); *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 ....").[3]

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[3] *See also Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793) ("the United States had . . . become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed"); 1 Opp. Att'y Gen. 26, 27 (1792) ("The law of

Indeed, this Court has stated explicitly that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900) (citing *Hilton v. Guyot*, 159 U.S. 113, 163 (1895)); *see also* Restatement (Third) of the Foreign Relations Law of the United States § 111, reporters' note 4 (1987) (hereinafter the "Restatement") ("international law is 'part of our law' . . . and is federal law") (citation omitted).[4] Thus, "[c]ases arising under treaties to which the United States is a party, as well as cases arising under customary international law" are "within the Judicial Power of the United States under Article III, section 2 of the Constitution." Restatement § 111 cmt. e; *see also Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 348-49 (1809).

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nations, although not specifically adopted . . . is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation."); Jordan J. Paust, *International Law as Law of the United States* 7-16 (2d ed. 2003) (hereinafter "Paust, *International Law*"); Jordan J. Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 Mich. J. Int'l L. 301, 301 (1999) ("The Founders clearly expected that the customary law of nations was binding, was supreme law, created . . . private rights and duties, and would be applicable in United States federal courts.") (collecting authorities); Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 Fordham L. Rev. 463, 464 (1997) ("As new members in the community of nations, the Founders felt bound, both ethically and pragmatically, to inherit and abide by the law of nations.").

[4] This Court has looked to the Restatement for guidance, and cited it with approval, on numerous occasions. *See, e.g., JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91-92 (2002); *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 421 n.3 (2001); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993).

The judiciary, therefore, has the ability to remedy violations of international law, especially where human rights are at stake. As Chief Justice Marshall recognized nearly two centuries ago, our judicial tribunals "are established . . . to decide on human rights." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133 (1810); *see also* Paust, *International Law* at 207-29. The judiciary's responsibility to vindicate human rights norms firmly embedded in the laws of civilized nations cannot and does not end upon the Executive's unchallenged assertion that a United States citizen detainee merits an "enemy combatant" designation. *See Hamdi v. Rumsfeld*, 337 F.3d 335, 376 (4th Cir. 2003) (Motz, J., dissenting from denial of reh'g en banc) ("The Executive's treatment of Hamdi threatens the freedoms we all cherish, but the panel's opinion sustaining the Executive's action constitutes an even greater and 'more subtle blow to liberty.' . . . As Justice Jackson warned, when the Executive 'overstep[s] the bounds of constitutionality, . . . it is an incident,' but when the court 'review[s] and approve[s], that passing incident becomes the doctrine.'") (quoting *Korematsu v. United States*, 323 U.S. 214, 245-46 (1944) (Jackson, J., dissenting)).[5]

A. This Court Has Examined International Law In Comparable Circumstances

In previous cases concerning wartime detainee rights, this Court demonstrated the relevance of international law. For example, in *Ex Parte Quirin*, 317 U.S. 1 (1942), in considering the constitutionality of an American detainee's trial by a military commission, the Court acknowledged that "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of

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[5] *See also* Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int'l L.J. 503, 518-24 (2003) (hereinafter "Paust, *Judicial Power*").

enemy individuals." *Id.* at 27-28; *see also* Paust, *Judicial Power* at 518-24, and cases cited therein.[6] Similarly, in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), in determining whether a German national convicted by a United States 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 id.* at 785 (noting "[t]he practice of every modern government"), 786 (citing treaty law), 787-88 (citing Hague Regulations and secondary sources on international law).[7]

While the substantive body of international law has changed since *Quirin* and *Eisentrager*, the approach of examining the relevant provisions of international law remains correct. As Justice O'Connor has asserted, "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

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[6] In *Quirin*, "the Court did hold that for a violation of the laws of war, even an American citizen could be treated as an 'enemy combatant' and held without the full array of Constitutional rights, but only because *the citizen, after consultation with legal counsel, stipulated to the facts supporting the enemy combatant designation.*" *Hamdi*, 337 F.3d at 369-70 (Motz, J., dissenting from denial of reh'g en banc) (emphasis in original). In contrast, Petitioner has been afforded no ability to contest the Executive's claims regarding his status, and only recently – and purely as a matter of Executive discretion – has he been afforded some limited access to counsel.

[7] As in *Quirin* – and unlike Petitioner's case – a military commission tried the *Eisentrager* petitioners in an adversarial proceeding. *See* 339 U.S. at 766. Thus, *Eisentrager* concerned post-conviction habeas relief – *i.e.*, after a tribunal had considered the legality of detention. Although the *Eisentrager* Court limited access to a second tier of review, it never held that the Executive could deny petitioners *any* meaningful judicial review.

Courts 13, 18 (T. Franck & G. Fox eds., 1996).[8] Under this precedent and guidance, analysis of international law is appropriate and necessary in deciding the instant case.

B. Barring Exceptional Circumstances, United States Law Should Be Interpreted In A Manner Consistent With International Law

Wherever possible, United States law should be construed in a manner that does not conflict with international law. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains") (sometimes called the "*Charming Betsy*" rule); *see also Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801) ("the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law"); Restatement §§ 114, 115.

This Court has relied on the so-called *Charming Betsy* rule on numerous occasions. For example, in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), the Court interpreted the National Labor Relations Act in the maritime context so as not to run afoul of a "well-established rule of international law." *Id.* at 21; *see also id.* at 19 (noting that a contrary decision "would raise considerable disturbance not only in the field of maritime law but in our international relations as well"). Likewise, in *Weinberger v. Rossi*, 456 U.S. 25 (1982), the Court relied upon the rule, and international law, to interpret a statute prohibiting discrimination against United States citizens on military bases overseas. *Id.* at 29-32; *see also Lauritzen v. Larsen*, 345 U.S.

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[8] *See also* Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 Cardozo L. Rev. 253, 282 (1999) ("In my view, comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights.").

571, 578 (1953) (applying the *Charming Betsy* rule and international law in a maritime tort case to interpret the Jones Act).

Even in cases not directly implicating international law, recent Court decisions underscore the importance of respecting the "values we share with a wider civilization." *Lawrence v. Texas*, 123 S. Ct. 2472, 2483 (2003) (citing decisions of the European Court of Human Rights); *see also Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (noting the consensus opinion of "the world community"). Thus, in deciding the present case, international law is applicable and the Court should strive to construe domestic laws in a manner consistent with international human rights laws and principles.

II. INTERNATIONAL HUMAN RIGHTS LAW PROVIDES FOR INDEPENDENT, FAIR, EFFECTIVE, AND MEANINGFUL JUDICIAL REVIEW OF EXECUTIVE DETENTION

By treaty and customary law, international human rights law[9] recognizes the right of persons to be free from arbitrary detention, and the concomitant right to meaningful judicial review to ensure that any detention is lawful.[10] *See Alvarez-*

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[9] International human rights law applies alongside international humanitarian law, sometimes called the "law of war." *See generally* Brief of *Amici Curiae* Experts on the Law of War in Support of Petitioners.

[10] *See, e.g.*, Paust, *Judicial Power* at 507-10, 514 (discussing human rights standards during peacetime, national emergency or war). Although the Fourth Circuit used the phrase, "meaningful judicial review," 316 F.3d at 461, the record reflects that Petitioner in fact had no ability to contest the facts set forth in the government declaration relied upon by the court. *See* 337 F.3d at 358 (Luttig, J., dissenting from denial of reh'g en banc) ("[The panel] promised the citizen seized by the government [petitioner] 'meaningful judicial review' . . . [b]ut it ultimately provided that citizen a review that actually entailed absolutely no judicial inquiry into the facts on the basis of which the government designated that citizen as an enemy combatant."); *id.* at 373 (Motz, J., dissenting from denial of reh'g en banc)

Machain v. United States, 331 F.3d 604, 620 (9th Cir. 2003) (en banc), ("[Under international law,] there exists a clear and universally recognized norm prohibiting arbitrary arrest and detention. This prohibition is codified in every major comprehensive human rights instrument and is reflected in at least 119 national constitutions."), *cert. granted*, 124 S. Ct. 821 (2003) (citing M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235, 260-61 (1993)); *see also* Paust, *Judicial Power* at 504 ("human rights law applicable in all social contexts, including times of national emergency and war, prohibits arbitrary detention of persons and requires the availability of judicial review of the propriety of detention").[11]

Detention is "arbitrary," and thus violative 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.'" *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998) (quoting Restatement § 702 cmt. h). The Restatement makes clear that detention is arbitrary where "the person detained is not given early opportunity to communicate with family or to consult counsel; or is not brought to trial within a reasonable time." Restatement § 702 cmt. h. Here, detaining Petitioner indefinitely under authority of the Executive, without the right to counsel for nearly two years, and without meaningful judicial review of the Executive's asserted bases for

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("although the panel steadfastly maintains that it engages in a 'meaningful judicial review,' . . . its rubberstamp of the Executive's unsupported designation lacks both the procedural and substantive content of such review.").

[11] As Alexander Hamilton proclaimed, "the practice of arbitrary imprisonments, [has] been, in all ages, the favorite and most formidable instrument[ ] of tyranny." Alexander Hamilton, *The Federalist No. 84*, at 533 (Benjamin Fletcher Wright ed., 1961).

detention, is untenable under international law. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) ("[T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it . . . .").

A. The International Covenant on Civil and Political Rights Provides for Independent, Fair, Effective, and Meaningful Judicial Review

The United States has ratified the International Covenant on Civil and Political Rights ("ICCPR"), Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368[12] which prohibits arbitrary detention and requires meaningful judicial review of the lawfulness of detention.[13] Article 9(1) of the treaty provides:

> Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty

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[12] The United States ratified the ICCPR in 1992. *See* 138 Cong. Rec. S4781-01 (Apr. 2, 1992). Including the United States, 151 States have ratified the treaty. Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* (Nov. 2, 2003), *available at* http://www.unhchr.ch/pdf/report/pdf.

[13] The United States' obligation to lead by example in the international arena was a driving force behind its ratification of the ICCPR in 1992, as evidenced by the Senate Committee's report:

> In view of the leading role that the United States plays in the international struggle for human rights, the absence of U.S. ratification of the Covenant is conspicuous and, in the view of many, hypocritical. The Committee believes that ratification will remove doubts about the seriousness of the U.S. commitment to human rights and strengthen the impact of U.S. efforts in the human rights field.

S. Comm. on Foreign Relations Report on the International Covenant on Civil and Political Rights (ICCPR), 31 I.L.M. 645 (May 1992) *reproduced from* S. Exec. Rep. 102-23 (102d Cong., 2d Sess.).

> except on grounds and in accordance with such procedure as are established by law.

In order to safeguard these rights, Article 9(4) adds the guarantee of meaningful judicial review:

> 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.

Article 14(1) also underscores the ICCPR's protections, generally granting access to courts for a judicial determination of rights: "[E]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal." *See Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 82 (Tex. 2000) (noting that "[Article 14(1) is] aimed at ensuring the proper administration of justice, and to this end uphold[s] a series of individual rights such as equality before the courts and tribunals and the right to a fair and public hearing") (citation omitted).

Because of the vital nature of the rights at stake, the ICCPR's protections – including the right to meaningful judicial review of detention – apply even in times of national emergency. *See* Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 239 (July 8), *reprinted in* 35 I.L.M. 809, 820 (1996) ("the protection of the [ICCPR] does not cease in times of war"). Indeed, the United Nations' Human Rights Committee (the "Human Rights Committee"), the panel of experts established to monitor ICCPR implementation, has stated:

> [T]he principles of legality and the rule of law require that fundamental requirements of a fair trial must be respected during a state of emergency. . . . In 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.[14]

U.N. H. R. Comm., General Comment No. 29, ¶ 16 ("General Comment 29"), 1950th mtg., U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).[15] Thus, the ICCPR contemplates that, when the lawfulness of detention is in question, courts should engage in a prompt and thorough review to ensure that such detention does not violate basic human rights.[16]

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[14] While the right to meaningful judicial review of detention implicitly is derogable under the ICCPR, a State may not simply derogate at its convenience. Rather, "[i]n a time of public emergency which threatens the life of the nation," State parties may derogate from their obligations under the treaty, but "only to the extent strictly required by the exigencies of the situation," and "provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour [sic], sex, language, religion or social origin." ICCPR art. 4(1). In order to derogate from the ICCPR, formal procedures must be followed: "Any State Party . . . availing itself of the right of derogation shall immediately inform the other States Parties to the [ICCPR], through the intermediary of the Secretary-General of the United Nations, of the provision from which it has derogated and the reasons [therefore]." *Id.* art. 4(3). Here, the United States formally has not sought to derogate from its obligations under Article 9. Thus, the terms of the treaty should be respected. *See also* Paust, *Judicial Power* at 509 (citing sources and explaining: "[a] strong argument exists that, notwithstanding this language [of Article 4], no circumstances should ever 'strictly require' the denial of judicial review of detention").

[15] *See also* General Comment 29 at ¶¶ 3, 9, 11, n.6; Concluding Observations of the H. R. Comm.: Israel, 63rd Sess., U.N. Doc. CCPR/C/79/Add.93, at ¶ 21 (1998) ("a State party may not depart from the requirement of effective judicial review of detention"); Paust, *Judicial Power* at 506 n.5 (stating that the right against arbitrary detention and the right to judicial review apply in times of war).

[16] . Any dispute over whether Article 9 of the ICCPR is self-executing would be misguided for present purposes. While the Senate, in ratifying the ICCPR, declared that certain provisions, including Article 9, were not

Where persons have been detained arbitrarily without access to meaningful judicial review, the Human Rights Committee consistently has found ICCPR violations. For example, in *Vuolanne v. Finland*, Views of the H.R. Comm. under art. 5, ¶ 4, of the Optional Protocol to the ICCPR, 35th

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self-executing, *see* 138 Cong. Rec. S4781-01 (Apr. 2, 1992), the United States did not add any reservations, conditions, or understandings specifically to Article 9. Furthermore, Article 9 involves matters of habeas corpus review, as to which the federal habeas statute expressly provides relief to any person held in "custody in violation of the . . . *treaties* of the United States," thus executing Article 9 for habeas purposes. 28 U.S.C. § 2241(c)(3) (emphasis added). The Executive intent with respect to the non-self-execution declaration was to preclude a direct cause of action under the ICCPR, a theory not relevant in this case. Also, the non-self-execution declaration does not apply to Article 50 of the ICCPR, which mandates: "The provisions of the present Covenant shall extend to all parts of the federal States without any limitations or exceptions." *See, e.g.*, Paust, *International Law* at 361-65. Thus, the treaty can be used defensively and for habeas purposes. *See id.* at 362, 374, 379-80 n.2. Similarly, the Fourth Circuit erred in determining whether certain rights under the Geneva Conventions are self-executing, and by ignoring their possible use defensively and through -- i.e., as executed by -- the federal habeas statute. See, e.g., Paust, Judicial Power at 515-17.

Further, even if the ICCPR is not directly applicable, the Court may take notice of the United States' obligations under the treaty. As the State Department has made clear, "[e]ven when a treaty is 'non-self-executing,' courts may nonetheless take notice of the obligations of the United States thereunder in an appropriate case and may refer to the principles and objectives, thereof, as well as to the stated policy reasons for ratification." Consideration of Reports Submitted By States Parties Under art. 19 of the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment: United States, Comm. Against Torture, U.N. Doc. CAT/C/28/Add.5, (2000) at ¶ 57; *see also* Consideration of Reports Submitted by States Parties Under art. 40 of the ICCPR: United States, H.R. Comm., U.N. Doc. CCPR/C/81/Add.4, Aug. 24, 1994 ("This declaration [that Articles 1 through 27 are not self-executing] did not limit the international obligations of the United States under the Covenant. . . . [T]he fundamental rights and freedoms protected by the Covenant are already guaranteed as a matter of U.S. law, either by virtue of constitutional protections or enacted statutes, and can be effectively asserted and enforced by individuals in the judicial system on those bases.").

Sess., Communication No. 265/1987, U.N. Doc. CCPR/C/35/D/265/1987 (1989), a Finnish soldier left his unit without permission and, upon his return, was placed in confinement. The supervising military officer rejected without a hearing the soldier's attempt to plead his case. *Id.* at ¶ 2.3. Upon his release, the soldier claimed that his detention without meaningful judicial review violated, *inter alia*, Article 9(4) of the ICCPR. The Human Rights Committee agreed, explaining that whenever a person is deprived of liberty, "there is no doubt that article 9, paragraph 4, obliges the State party concerned to make available to the person detained the right of recourse to a court of law." *Id.* at ¶ 9.6. Rejecting the Finnish government's argument that a decision by a military officer without a hearing satisfied Article 9(4), the Human Rights Committee emphasized the requirement that judicial review be *meaningful*:

> The procedure followed in the case of Mr. Vuolanne did not have a judicial character, the supervisory military officer who upheld the decision of 17 July 1987 against Mr. Vuolanne cannot be deemed to be a 'court' . . . therefore, the obligations laid down [in the ICCPR] have not been complied with by the authorities of the State party.

Id. Because the soldier was "unable to challenge his detention before a court," the Human Rights Committee found a violation of Article 9(4). *Id.* at ¶ 10.

Similarly, in *A v. Australia*, Views of the H.R. Comm. under art. 5, ¶ 4 of the Optional Protocol to the ICCPR, Communication No. 560/1993, 59th Sess., U.N. Doc. CCPR/C/59/D/560/1993 (1997), the Australian government detained a person for approximately four years, pending a determination of his refugee status, during which time he had limited access to the courts. *See id.* at ¶ 9.5. Before the Human Rights Committee, the detainee claimed that his prolonged detention without access to meaningful judicial review was arbitrary and violated the ICCPR. The Human Rights Committee agreed, finding an Article 9(1) violation

because the State had not sufficiently justified the prolonged nature of the detention. *Id.* at ¶ 9.4. Underscoring the right to meaningful judicial review, the Committee also stated that, "[w]hile domestic legal systems may institute differing methods for ensuring court review of [governmental] detention, what is decisive for purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal." *Id.* Because Australia denied the detainee this fundamental right, the Human Rights Committee found a violation of Article 9(4). *Id.* ¶ 10; *see also Hammel v. Madagascar*, Views of the H.R. Comm. under art. 5, ¶ 4 of the Optional Protocol to the ICCPR, Supp. No. 40, Communication No. 155/1983, U.N. Doc. A/42/40 at 130, ¶ 20 (1987) (finding Article 9(4) violation where suspected spy was detained incommunicado prior to deportation because detainee "was unable to take proceedings before a court to determine the lawfulness of his arrest").

The ICCPR's text and the Human Rights Committee decisions construing the treaty make clear that, in order to protect basic human rights, (1) ICCPR signatories must provide detainees with meaningful judicial review, and (2) such judicial review must include the opportunity to challenge the facts supporting the detention in a proceeding that is "real and not merely formal." The Fourth Circuit's reasoning improperly denies Petitioner these most basic, universal, and fundamentally fair protections.

B. Customary International Law Provides for Independent, Fair, Effective, and Meaningful Judicial Review

1. International Human Rights Instruments Uniformly Protect Persons Against Arbitrary Detention and Guarantee Meaningful Judicial Review

The ICCPR protections are not unique to that treaty. Indeed, the right against arbitrary detention and the attendant right to judicial review are entrenched firmly in a myriad of

international human rights instruments and authorities. As our own domestic courts have observed, "[e]ach of the regional human rights instruments" contain similar provisions. *Alvarez-Machain*, 331 F.3d at 621 n.17; *see also de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985) (recognizing "the right not to be arbitrarily detained" as part of the law of nations); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) ("No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment."); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987) ("There is case law finding sufficient consensus to evince a customary international human rights norm against arbitrary detention. The consensus is even clearer in the case of a state's *prolonged* arbitrary detention of its own citizens.") (citations omitted) (emphasis in original); Restatement § 702 cmt. h (stating that state-sanctioned, prolonged and arbitrary detention violates customary law, and that even a "single, brief, arbitrary detention by an official of a state party to one of the principal international agreements might violate" international law).[17]

The Universal Declaration of Human Rights (the "Universal Declaration"), "perhaps the most well-recognized explication of international human rights norms," *Alvarez-Machain*, 331 F.3d at 620-21, provides that, "[n]o one shall be subjected to arbitrary arrest, detention or exile." Universal Declaration of Human Rights, art. 9, G.A. Res. 217A, III U.N. GAOR, U.N. Doc. A/810 (1948).[18] The Universal

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[17] *See also* 22 U.S.C. § 2151n(a) (stating that no assistance may be given to "the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including . . . prolonged detention without charges"); 7 U.S.C. § 1733(j); 22 U.S.C. §§ 262d(a), 2304.

[18] The Universal Declaration also has been described as "'an authoritative statement of the international community.'" *Filartiga v.*

Declaration guarantees this right by providing that, "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." *Id.* art. 10.[19]

The American Convention on Human Rights (the "American Convention"), Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673, which the United States and more than twenty other State parties have signed,[20] similarly prohibits arbitrary arrest or imprisonment, *id.* art. 7(3), and provides that, "[a]ny person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time . . . ." *Id.* art. 7(5). Further, the American Convention states: "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention . . . ." *Id.* art. 7(6).

Likewise, the American Declaration of the Rights and Duties of Man (the "American Declaration"),[21] May 2, 1948,

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Pena-Irala, 630 F.2d 876, 883 (2d Cir. 1980) (quoting E. Schwelb, *Human Rights and the International Community* 70 (1964)).

[19] As President Reagan declared, "the Universal Declaration remains an international standard against which the human rights practices of all governments can be measured." *Proclamation of Bill of Rights Day*, Human Rights Day and Week, U.S. Dep't of State, Selected Documents No. 22 (Dec. 9, 1983).

[20] Although the United States has signed – but not ratified – the American Convention, it is nevertheless obligated by law to refrain from acts that would defeat the object and purpose of the instrument. *See* Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679 ("A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty . . . .").

[21] As a member of the Organization of American States, the United States must respect the terms of the American Declaration.

reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS Doc. OEA/Ser.L.V./II.82 doc.6 rev.1 (1992), provides:

> No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law. . . . Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released.

Id. art. XXV.[22]

The same fundamental protections obtain under the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention"), Nov. 4, 1950, 213 U.N.T.S. 221, which binds every European Union member.[23] That treaty, like its American counterparts, guarantees that anyone "deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court . . . ." *Id.* art. 5(4).[24]

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[22] The American Declaration also provides robust protection for civil rights under all circumstances: "*Every person* has the right to be recognized *everywhere* as a person having rights and obligations, and to enjoy the basic civil rights." *Id.* art. XVII (emphasis added).

[23] There are more than forty State parties to the European Convention.

[24] *See also* African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5, 21 I.L.M. 58 (Art. 6: "No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained." Art. 7(1): "Every individual shall have the right to have his cause heard[, including] the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations, and customs in force . . . ."); U.N. Body of Principles for the Protection of All Persons

Thus, the key instruments of international human rights law have reaffirmed, consistently and with remarkable clarity, the right of meaningful judicial review, precluding the exercise of unilateral power that the Executive claims in this case.

2. Regional Human Rights Courts Have Upheld the Right Against Arbitrary Detention by Providing Meaningful Judicial Review

The basic human rights and protections outlined above have not been ignored by the regional bodies entrusted to uphold them. Instead, international human rights tribunals have worked diligently to secure the right against arbitrary detention – even in the face of terrorism and national security concerns – by ensuring access to the courts, and providing meaningful judicial review.

Decisions by the European Court of Human Rights (the "ECHR"), which this Court found to be of persuasive value as recently as last term, are especially apposite.[25] In *Aksoy v. Turkey*, App. No. 21987/93 (Eur. Ct. H.R. Dec. 18, 1996), for example, the ECHR directly addressed the executive's detention of a suspected terrorist under Article 5 of the European Convention.[26] In *Aksoy*, the Turkish government detained a suspected terrorist for fourteen days without a lawyer or access to the courts. The government defended the detention under Article 5, asserting that terrorist acts recently had killed hundreds of civilians and members of the security forces, creating a "threat to the life of the nation." *Id.* at ¶ 31.

Under Any Form of Detention or Imprisonment, Principle 32, G.A. Res. 173, U.N. GAOR, 43rd Sess., Supp. No. 49, U.N. Doc. A/43/49 (1988).

[25] *See Lawrence*, 123 S. Ct. at 2483.

[26] Aksoy alleged a violation of Article 5(3) of the European Convention. That provision, similar to Article 5(4), provides: "Everyone arrested or detained . . . shall be brought promptly before a judge or other officer authorized by law to exercise judicial power . . . ."

Rejecting that excuse, the court explained that, in times of emergency when national security concerns are heightened, "a wide margin of appreciation should be left to the national authorities," but that "Contracting Parties [to the European Convention] do not enjoy an unlimited discretion." *Id.* at ¶ 68. Considering the balance between national security and fundamental liberties, the court emphasized "the importance of Article 5 in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty." *Id.* at ¶ 76. Thus, acknowledging that "the investigation of terrorist offences undoubtedly presents the authorities with special problems," *id.* at ¶ 78, the court held that "[*j*]*udicial control of interferences by the executive with the individual's right to liberty is an essential feature . . . to minimize the risk of arbitrariness and to ensure the rule of law*." *Id.* at ¶ 76 (emphasis added). Because Aksoy had been held incommunicado, without a lawyer, and without access to a court to test the legality of his detention – *i.e.*, "completely at the mercy of those holding him" – the ECHR found an Article 5 violation. *Id.* at ¶ 83-84.

Similarly, in *Al-Nashif v. Bulgaria*, App. No 50963/99 (Eur. Ct. H.R. June 20, 2002), the Bulgarian government detained a Muslim suspected of practicing fundamentalist Islam and associating with terrorist groups for twenty-six days, incommunicado, before deporting him. *Id.* at ¶¶ 3, 31, 53-58. This government, too, cited national security concerns to justify the detention in the face of claims that such conduct violated Article 5(4) of the European Convention (guaranteeing the right of judicial review). *See id.* at ¶¶ 83, 90. Upholding the petitioner's claim, the court explained:

> [E]veryone who is deprived of his liberty is entitled to a review of the lawfulness of his detention by a court, regardless of the length of detention. The [European] Convention requirement that an act of deprivation of liberty be amenable to independent judicial scrutiny is of fundamental importance in the

> context of . . . provid[ing] safeguards against arbitrariness . . . . The person concerned should have access to a court and the opportunity to be heard either in person or through some form of representation.

Id. at ¶ 92. Rejecting the government's argument that national security concerns trumped the detainee's basic human rights, the court stated, "[n]ational authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved." *Id.* at ¶ 94.[27]

Like the ECHR, the Inter-American Court of Human Rights (the "IACHR"), has upheld the right to be free of arbitrary detention and to obtain access to judicial review.[28] In *Castillo Petruzzi et al. Case*, Inter-Am. Ct. H.R. (Ser. C) No. 52 (May 30, 1999), the IACHR considered potential

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[27] *See also Brogan and others v. United Kingdom*, App. Nos. 11209/84, et al., at ¶¶ 58-60 (Eur. Ct. H.R. Nov. 29, 1988) (emphasizing need for judicial control over detention imposed by the executive, and holding that Article 5 violated where suspected terrorists were not "brought before a judge or judicial officer during [their] time in custody"); *G.B. v. Switzerland*, App. No. 27426/95, at ¶ 38 (Eur. Ct. H.R. Nov. 30, 2000) (finding European Convention violated where suspected terrorist was detained without judicial review: "it is for the State to organize its judicial system in such a way as to enable its courts to comply with the requirements of [Article 5(4)]"); *Wintwerp v. Netherlands*, 33 Eur. Ct. H.R. (ser. A), at ¶¶ 60-61 (1979) ("[I]t is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded 'the fundamental guarantees of procedure applied in matters of deprivation of liberty.' . . . [Because petitioner was not] heard by the courts or given the opportunity to argue his case[,] . . . the guarantees demanded by Article [5(4)] of the Convention were lacking both in law and in practice.").

[28] Decisions of the IACHR have particular relevance here because the United States is a member of the Organization of American States, and a prominent leader in the region.

violations of Article 7 of the American Convention by Peru when it detained several citizens, incommunicado, before ultimately sentencing them to life in prison for aggravated terrorism. Finding that terrorism-related concerns did not justify denying the detainees their right to judicial access under Article 7(5), the IACHR held that "the period of approximately 36 days . . . between the time of detention and the date on which the [petitioners] were brought before a judicial authority [was] excessive and contrary to the provisions of the Convention." *Id.* at ¶ 111.

Additionally, in *Castillo Petruzzi*, the IACHR considered whether a local law denying the writ of habeas corpus to suspected terrorists violated the American Convention. *See id.* at ¶¶ 180-82. Holding that legitimate concerns regarding terrorism could not validate such a law under the Convention, the IACHR stressed that judicial review must be available *and* meaningful:

> [T]he absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, *for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress.*

Id. at ¶ 185 (emphasis added). Noting that habeas corpus is one of the "essential judicial guarantees not subject to derogation or suspension," the IACHR found that the government's local practice violated the American Convention. *Id.* at ¶¶ 187-88; *see also Velasquez Rodriguez Case*, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988) (holding that "arbitrary detention, which deprived [petitioner] of his physical liberty without legal cause and without determination of the lawfulness of his detention by a judge or competent tribunal . . . directly violate[d] the right to personal

liberty recognized by Article 7 of the [American] Convention").

In light of the consistency among international human rights tribunals, it has been aptly observed that, "[s]uch widespread [agreement] and the *jus cogens*[29] nature of the right to freedom from arbitrary detention[,] affirm the nonderogability of judicial review and therefore require that the [United States'] executive branch may not exercise its discretion without independent, fair, and effective judicial review." Paust, *Judicial Power* at 510.[30] *Amici* fully support this principle and urge that it be applied in this case.

CONCLUSION

International law demands adherence to the fundamental human right to meaningful judicial review of Executive detention, even in times of war. Here, this Court has the opportunity to reaffirm this critical principle. As Judge Motz eloquently stated in dissent below, this Court must not "allow[] . . . deference to the Executive's authority in matters of war to eradicate the Judiciary's own Constitutional role:

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[29] The term "jus cogens" refers to a category of peremptory norms that are accepted and recognized by the international community of states as a whole and from which no derogation is permitted. *See Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994); *Seiderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992); Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679.

[30] *See also* Report of the Special Rapporteur of the Comm. on H.R. on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/57/173, (2002) at ¶ 18 (U.N. official surveying international human rights law and reporting that, "in accordance with international law, and as confirmed by States' practice, the following basic legal safeguards should remain . . . in any legislation relating to arrest and detention, including any type of anti-terrorist legislation: the right to habeas corpus, the right to have access to a lawyer within 24 hours from the time of arrest and the right to inform a relative or friend about the detention").

protection of the individual freedoms guaranteed all citizens." *Hamdi*, 337 F.3d at 369 (Motz, J., dissenting from denial of reh'g en banc). *Amici* respectfully submit that, in order to vindicate the vitally important rights at stake here, this Court should reverse the Fourth Circuit and confirm the need for meaningful judicial review.

Respectfully submitted,

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