No. 09-35

SEP 2 2 2009

IN THE

Supreme Court of the United States

GENERAL MANUEL ANTONIO NORIEGA,

Petitioner,

v.

GEORGE PASTRANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

FRANK. A. RUBINO
1001 Brickell Bay Drive
Suite 2206
Miami, FL 33131
(305) 858-5300

JON MAY*
1001 Brickell Bay Drive
Suite 2206
Miami, FL 33131
(305) 373-3740

Counsel for Petitioner

* *Counsel of Record*

225351

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

I. Whether the Eleventh Circuit Court of Appeals's interpretation of Section 5 of the Military Commissions Act of 2006 violates the Supremacy Clause of the Constitution of the United States.

II. Whether the Eleventh Circuit Court of Appeals's interpretation of the Geneva Convention to permit the extradition of prisoners of war conflicts with previous decisions of this Court on treaty interpretation and statutory construction.

ARGUMENT

1. The decision below affects the rights of hundreds of prisoners in United States' custody. While these prisoners are currently designated "enemy combatants" no court has yet decided their status under the Geneva Convention. General Noriega was declared a prisoner of war by the United States District Court for the Southern District of Florida after the Honorable William Hoeveler held that the District Court was a competent tribunal as that term is employed by the Geneva Convention. *United States v. Noriega*, 808 F.Supp. 791, 793-96 (S.D.Fla. 1992)(citing Article 5, Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III), August 12, 1949, 6 U.S.T. 3316). Unless the decision below is overturned, these prisoners will no longer have the right to have their status determined by a competent tribunal.

2. The government's interpretation of Section 5 of the Military Commission Act of 2006 (MCA), 28 U.S.C. § 2241(e) renders the statute unconstitutional. *Boumediene v. Bush*, 128 S.Ct. 2229 (2008). In *Boumediene*, this Court recognized that restrictions to habeas corpus can themselves result in a suspension of the writ. By denying the courts the authority to consider violations of the Geneva Convention, Congress has done just that.

The question presented in *Boumediene* was whether the Detainee Treatment Act of 2005 (DTA), 119 Stat. 2739, provided an adequate substitute for habeas corpus. *Id.* at 2262. Of critical significance to that question was whether detainees were otherwise

afforded an opportunity to litigate their claims in court. At a minimum, an adequate substitute must provide the prisoner "a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene* at 2266, citing *INS v. St. Cyr*, 533 U.S. 289, 302, 121 S.Ct. 2271 (2001). That relevant law remains the Geneva Convention. Indeed, the Eleventh Circuit recognized that the Military Commission Act did not "change the international obligations of the United States under the Geneva Conventions." Response in Opposition, p. 8, citing, Pet. App. 11a.

The legislative history confirms that the Military Commission Act was intended to restrict habeas corpus. *Boumediene* at 2265. It did this by replacing a panoply of procedure protections with a far more limited regime, *Id.* at 2269; a regime that this Court ultimately held constituted a violation of the suspension clause. *Id.* at 2275. But the limitation on habeas corpus was not just procedural. In Article 5 of the MCA, Congress also restricted the substantive law that a petitioner could invoke. If, as the government argues, Section 5 removes the Geneva Convention as relevant law, that effectively works a suspension of the writ as well. In arguing that "Section 5 does nothing to prevent a person from seeking habeas relief," Brief in Opposition p. 8, note, the government asks this Court to ignore the implications of its argument: which is, to divorce the writ from the law is to destroy the writ.

3. The Geneva Convention permits the Detaining Power to delay repatriation of a prisoner of war pending the completion of a criminal sentence imposed by the

Detaining Power. Article 119, para. 5 (GC III). Upon completion of that sentence repatriation is mandatory. Nothing in the Convention authorizes further delay pending completion of a sentence by another nation unrelated to the conflict. Moreover, the Republic of France does not recognize General Noriega's status as a prisoner of war. Pet. App. 26a. If a Detaining Power is permitted to extradite a prisoner of war to another nation, there is no guarantee that the Receiving Power will ever repatriate the prisoner to his home nation.

The government claims there is no indication that the Third Geneva Convention was intended to invalidate or supersede existing extradition treaties. Brief in Opposition, p. 10. This is incorrect. Regardless of the existence of any other treaty, the Geneva Convention affirmatively imposes on a Detaining Power the obligation to prosecute, or extradite for prosecution, war criminals. Article 129 (GCIII). The government's argument is further undermined by the absence of general extradition authority in the Prisoner of War Convention despite the presence of such authority in the Civilian Convention, Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 U.S.T. 3516, Article 45; a circumstance that reflects the intention of the drafters to deny the authority in the former (except for war criminals) that it granted in the latter. *Hamden v. Rumsfeld*, 548 U.S. 557, 578, 126 S.Ct. 2749, 2765-66 (2006). Finally, the government's contention that Article 12 (GCIII) provides the sole limitation on the extradition of prisoners of war, is belied by the Commentary to that Article which demonstrates that this Article was only demonstrates intended to regulate transfers of POWs

between allied powers during times of war. 3 Int'l Committee of the Red Cross, Commentary, Genera Convention Relative to the Treatment of Prisoners of War 131-35 (1960). It was never intended to have anything to do with extradition.

Under a plain reading of Article 118, the United States is required to repatriate General Noriega to Panama. This interpretation is supported by applicable rules of statutory construction and by the Commentary to Article 12. The government has failed to demonstrate that any other result would satisfy the mandate of the Convention.

CONCLUSION

The petition for certiorari should be granted and General Noriega repatriated to Panama.

Respectfully submitted,

FRANK. A. RUBINO
1001 Brickell Bay Drive
Suite 2206
Miami, FL 33131
(305) 858-5300

JON MAY*
1001 Brickell Bay Drive
Suite 2206
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Counsel for Petitioner

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