IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAKHDAR BOUMEDIENE, *et al.* Petitioners, v. GEORGE WALKER BUSH, *et al.* Respondents.	Civil Action No. 04-CV-1166 (RJL)
JAMIL EL-BANNA, *et al.* Petitioners, v. GEORGE WALKER BUSH, *et al.* Respondents.	Civil Action No. 04-1144 (RJR)

BOUMEDIENE AND EL-BANNA PETITIONERS' AMENDED SUPPLEMENTAL REPLY AND OPPOSITION TO THE GOVERNMENT'S "RESPONSE TO PETITIONS FOR WRIT OF HABEAS CORPUS AND MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW"

Dated: November 9, 2004

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Pursuant to the Court's October 12, 2004, Order, Petitioners[1] hereby reply to and oppose Respondents' Response to Petitions For Writ of Habeas Corpus and Motion to Dismiss or For Judgment as a Matter of Law ("Respondents' Br.").[2] Petitioners join in, and hereby incorporate by reference, all portions of the joint Opposition to Respondent's Motion to Dismiss or for Judgment as a Matter of Law (filed on November 5, 2004, in Abdah et al. v. Bush et al. (No. 04-1254(HHK) and in this case) which relate to claims raised by the Boumediene and El-Banna Petitioners in their First Amended Petitions for Writ of Habeas Corpus (respectively "Boumediene Writ" and "El-Banna Writ"), and submit this Supplemental Opposition to present the unique facts concerning their arrests in Bosnia, The Gambia, and Zambia and the following arguments in opposition to the Respondents' Br.: (1) Petitioners are not "enemy combatants," a term that has no legally recognized significance in either U.S. domestic or international law; (2) the law of war does not apply to Petitioners, and (3) Petitioners are entitled to fundamental Constitutional protections under *Rasul v. Bush,* 124 S. Ct. 2686 (2004).

I. INTRODUCTION

This Supplemental Opposition presents the facts related to Petitioners' seizure and internment by U.S. forces under circumstances which Respondents cannot support, and which never should have occurred. Six were abducted in Bosnia immediately after a court there ordered their freedom. Three were seized in Africa. None carried a weapon, and all were thousands of miles from any battlefield and in the custody of governments cooperative with the U.S. until immediately before U.S. troops bound, gagged and shipped them to Guantanamo. The

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[1] The Petitioners in these cases were detained by U.S. forces thousands of miles from the battlefields of Afganistan. They include six Algerian-Bosnians seized in Bosnia and their wives; a Palestinian and an Iraqi (both permanent residents of the U.K.) seized in Gambia; and a British-Zambian citizen, seized in Zambia. All are detained at Guantanamo Bay. All are identified in Section II below. In this Supplemental Opposition, the use of the collective term "Petitioners" refers to all nine men interned at Guantanamo Bay, Cuba. The term "Boumediene Petitioners" refers to the six men seized in Bosnia; and the term "El-Banna Petitioners" refers to the three men seized in Africa.

[2] Petitioners' Supplemental Reply and Opposition is referred to hereafter as the "Supplemental Opposition."

prospect that U.S. troops could enter a friendly foreign country and, in the dark of night, abduct and hold *incommunicado* citizens of that country, without charges, without any process, and in violation of universal norms of international and U.S. domestic law is difficult to fathom in the 21st century. That the United States should be the perpetrator of such abhorrent conduct is anathema to the founding principles of this republic and to our longstanding values as a people guided by the rule of law.

Respondents assert this precise conduct is within the authority of, and subject to, the unreviewable discretion of the Executive, and ask the Court to dismiss the Petitions. In the context of these Petitioners, Respondents' position borders on the frivolous. This Court should deny Respondents the relief they have requested.

II. BRIEF SUMMARY OF FACTS

A. Boumediene Petitioners

The Boumediene Petitioners are five Algerian-Bosnian citizens, and one Algerian citizen with permanent Bosnian residency (Mr. Lahmar). Mr. Nechle worked for the Red Crescent in its Bihartch office, where he lived with his wife, Badra Baouche. (*See* Baouche Aff. at ¶¶ 4-5, attached hereto as *Ex.* A.)[3] Mr. Lahmar, a professor of Arabic language, worked for the Islamic Centre of the High Saudi Arabian Committee in Sarajevo where he lived with his wife, Emina Lahmar. (*See* Lahmar Aff. at ¶¶ 3-4, attached hereto as *Ex.* B.) He is the father of two children.[4] Mr. Ait Idir worked in the Sarajevo office of Taibah, a humanitarian organization, and lived in Sarajevo with his wife, Sabiha Delic Ait Idir and their three children. (*See* Delic Aff. at ¶ 1, attached hereto as *Ex.* C.) Mr. Boumediene has two children with his wife, Abassia Bouadjmi, and worked in the Sarajevo offices of the Red Crescent. (*See* Bouadjmi Aff. at ¶¶ 3-5, attached

[3] The affidavits attached as exhibits hereto were submitted in support of the Boumediene Petitioners' Petition and Amended Petition for a Writ of Habeas Corpus.

[4] Mrs. Lahmar was pregnant with the couple's child when Mr. Lahmar was taken into custody in Bosnia. (*See* Lahmar Aff. at ¶ 8, attached to Amended Petition.)

hereto as *Ex.* D.) Mr. Boudella was a social worker employed by Human Appeal and is a father of seven who lived in Sarajevo with his wife, Emina Planja.[5] (*See* Planja Aff. at ¶¶ 1, 5, attached hereto as *Ex.* E.) Mr. Belkacem is married to Anela Kobilica, and the father of two children. (*See* Kobilica Aff. at ¶ 1, attached hereto as *Ex.* F.)

In October, 2001, each was taken into custody, reportedly at the request of the United States, in Bosnia-Herzegovina ("B-H"), by B-H authorities, on order of the B-H Federation Supreme Court in connection with suspicions that they were planning to attack the United Kingdom and U.S. Embassies in B-H. *See generally, Boudella v. Bosnia and Herzegovina*, Nos. CH/02/8679; CH/02/8689; CH/02/8690; CH/02/8691, H.R. Chamber for B-H (Oct. 11, 2002) ("H.R. Chamber Decision"), attached hereto as *Ex.* G. Petitioners were hundreds of miles from the battlefield of Afghanistan in October 2001; none of them ever were involved in any way in the United States' military campaign there, or in activities related to the attacks of September 11, 2001.

After being held by Bosnian authorities for three months, the Supreme Court of the Federation of B-H, on the recommendation of the Bosnian federal prosecutor, ordered the release of all six from custody, stating:

> [The] Office of the Federal [sic] prosecutor has with document no. KT-115/01 from 17 January 2002 informed [the] investigative judge that [his] opinion is that there are no further reasons or circumstances based upon which this measure for ensuring [the] presence of [the] accused in criminal procedure was ordered. Therefore [,] the measure of the detention can be terminated to all accused persons and they can be released from detention.
>
> Reviewing [the] suggestion of [the] Deputy Federal prosecutor and [the] status of [the] investigation [sic] case, [the] investigative judge agreed with this suggestion and *since the reasons based upon which [the] detention was ordered and extended, article 189,*

[5] Mr. Boudella is also married to Nada Dizdarevic.

> *para [.] 1 and 2 of the Law of Criminal Procedure, do not exist any more, it has been decided as in declaration of this decision.*

Decision and Order of the Supreme Court of the Federation of B-H, No-Ki-1001/01 (Sarajevo, Jan. 17, 2002) (J. Eterovic) (emphasis supplied), attached hereto as *Ex.* H.

In the early morning hours of January 18, 2002, despite the ruling of the B-H Supreme Court, and while family members (who knew of the Supreme Court order through B-H media) watched in horror, Petitioners were not freed, and instead were seized by U.S. forces, who bound, gagged and transported them to Guantanamo Bay. *See* H.R. Chamber Decision at ¶¶ 53-55; *see also* Boudella Statement to Combatant Status Review Tribunal ("CSRT") at 12-13. Petitioners' pre-dawn abduction by U.S. forces, in contravention of the order of Bosnia's highest court, was the subject of protest by international human rights groups and the many people in Sarajevo who witnessed it, and international media attention.[6]

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[6] *See e.g.*, Peter Finn, *U.S. Troops Seize 6 Terror Suspects Freed by Bosnia*, The Washington Post, Jan. 18, 2002 ("Three hundred family members, friends and other supporters of the six suspects gathered in a sign of solidarity with the detained men."); Amra Hadziosmanovic, *Six Terror Suspects Detained in Bosnia Handed Over to the U.S.*, Agence France Presse, Jan. 18, 2002 ("As the hooded prisoners were taken from the jail in two police vehicles, about 100 people from Sarajevo's Muslim community blocked the road calling for the six to be released but police forced their way through. . . . the Bosnian Helsinki Committee for Human Rights [ ] described the move Friday as a drastic violation of human rights. [The Head of the Committee] told AFP that the transfer was made 'under strong pressure from the United States,' and that the Muslim-Croat authorities had made the 'shameful decision' in light of the court ruling."); Alexander S. Dragicevic, *U.N. Human Rights Office Calls for Action Against Handover of Six Algerians,* Associated Press, January 22, 2002) ("The handover came a day after the country's highest court ruled that authorities lacked enough evidence to justify their detention or extradition. 'The Bosnian legal system proved itself to be working well up until early Friday morning,' [Madeline] Rees [the head of the Sarajevo office of the United Nations Commissioner for Human Rights] said . . . adding that 'some sanction must be forthcoming against those individuals or at least those in the government who breached that order.'"); Aida Cerkez-Robinson, *Handover of Algerians Protested*, Canada News, Jan. 25, 2002, *available at* http://www.canoe.ca/CNEWSAttak0201/25.algerians-ap.html ("About 100 supporters of six Algerian terrorism suspects in U.S. custody protested in Bosnia on Friday, kneeling in the snow to pray for the men and demanding to know where they had been taken."); Letter from Javier Zuniga, Amnesty Int'l to United States Ambassador Bond, M2 Presswire, Jan. 21, 2002 ("Amnesty International yesterday called upon the Bosnian authorities not to transfer the six Algerian men to US custody unless guarantees were obtained that they would not be tried before military commissions and that they would not face the death penalty. . . . The organization reiterates its strong belief that the Military Order, establishing the special military commissions, is in violation of international standards guaranteeing the right to a fair trial and freedom from discrimination – in particular provisions enshrined in the International Covenant on Civil and Political Rights. Consequently the organization is calling on you to do everything within your power to heed our concerns."). The Boumediene Petitioners' abduction by U.S. forces was such a significant event in Bosnia that it appears in the BBC's historic chronology of that country's "key events," along with the 1914 assassination of Archduke Ferdinand in Sarajevo that precipitated WWI. *See Timeline: Bosnia-Hercegovina A Chronology of Key Events*, BBC News UK Edition, Sept. 22, 2004, *available at* http://news.bbc.co.uk/1/hi/world/europe/country-profiles/1066981.stm.

The Respondents transported Petitioners by aircraft to Guantanamo[7], where they have been interned in cages for nearly three years.[8] According to recently released British detainees, the Bosnian Algerians have received particularly brutal treatment in Guantanamo at the hands of their American captors:

> By Bosnians we mean six Algerians who were unlawfully taken from Bosnia to Guantanamo Bay. They told us how they had won their court case in Bosnia. As they walked out of court, Americans were there and grabbed them and took them to Camp X-Ray, January 20, 2002. They arrived five days after us. They were treated particularly badly. They were moved every two hours. They were kept naked in their cells. They were taken into interrogation for hours on end. They were short shackled for sometimes days on end.[9] They were deprived of their sleep. They never got letters, nor books, nor reading materials. The Bosnians had the same interrogators for a while as we did and so we knew the names which were the same as ours and they were given a very hard time by those. They told us that the interrogators said if they didn't cooperate that they could ensure that something would happen to their families in Algeria and Bosnia. They had dual nationality. They had families in Bosnia as well as in Algeria.

See Composite Statement: Detention in Afghanistan and Guantanamo Bay by Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed ("Composite Statement"), ¶ 300, *available at* http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf. Consistent with those reports, during his CSRT proceeding, Mr. Ait Idir told the Tribunal that he had been beaten by guards and sustained an injury to his head and a broken finger as a result. *See* Ait Idir Statement to CSRT at 8.

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[7] Based on certain public accounts of the transport, there is reason to believe the plane may have landed in the United States *en route* to Cuba. Petitioners have submitted a Freedom of Information Act request for information concerning Petitioners' precise itinerary from Bosnia to Guantanamo. *See Ex.* I.

[8] *See* Jeffrey Toobin, *Inside the Wire: Can an Air Force colonel help the detainees at Guantanamo?*, The New Yorker, Feb. 8, 2004, at A1 (detainees are held in seven-by-eight foot cells made of steel mesh painted lime green); David Rose, *Operation Take Away My Freedom: Inside Guantanamo Bay on Trial,* Vanity Fair, Jan. 2004 (guards pass cells every thirty seconds, there is no air conditioning and the lights stay on all night).

[9] *See* Composite Statement, ¶ 183, *available at* http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf. ("Short shackling means that the hands and feet are shackled together forcing you to stay in an uncomfortable position for long hours. . . . Being held in the short shackled position was extremely painful [,] but if you tried to move [,] the shackles would cut into your ankles and wrists.").

In September 2002, the B-H Human Rights Chamber Court, established pursuant to the Dayton Peace Accords, heard the applications of Petitioners Boudella, Boumediene, Nechle, and Lahmar, claiming that allowing U.S. forces to abduct them from Bosnia violated the European Convention on Human Rights.[10] It found, consistent with the Supreme Court's order, that "there was no justification under Article 5 paragraph 1 of the [European] Convention [on Human Rights] for the respondent parties B-H and the Federation of B-H to keep the applicants in detention after the order of the Supreme Court to release the applicants from pre-trial detention entered into force in the early evening of 17 January 2002 . . . ." H.R. Chamber Decision at ¶ 230.

On April 9, 2002, the Bosnian Supreme Court issued a decision suspending the criminal proceedings against Messrs. Boudella, Boumediene, Nechle, and Lahmar. *Id.* at ¶ 42.[11] On June 24, 2004, the Federal Prosecution of the Federation of Bosnia and Herzegovina *dismissed* the criminal investigations against Messrs. Belkacem, Lahmar, Ait Idir, Boudella, Boumediene, and Nechle. *See Ex.* P, attached hereto.[12]

Petitioners commenced this proceeding immediately after the U.S. Supreme Court's June 28, 2004, rulings in *Rasul* and *Hamdi*. In July, 2004, the Respondents announced they would

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[10] Specifically, they alleged that their expulsion violated Art. 1 (providing procedural safeguards with respect to expulsion of aliens); 3 (prohibiting expulsion of nationals); 5 (right to liberty and security); 8 (right to respect for private and family life; and that delivering them into U.S. custody amounted to potential violations of Article 2 (limiting use of death penalty); 3 (prohibition of torture); and 6 (right to a fair trial). *See* J. David Yeager, *The Human Rights Chamber for Bosnia and Herzegovina: A Case Study in Transnational Justice*, 14 Int'l Legal Persp. 44, 51 (2004). The Human Rights Chamber court found, *inter alia*, that Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina had violated Article 1, Protocols 6 and 7 to the Convention on Human Rights by (i) failing to seek assurance from the United States that the death penalty would not be imposed; and (ii) failing to provide the required procedural protections relating to expulsion of aliens. *See id.* Petitioners' delivery into the hands of U.S. Stabilization Force ("SFOR") troops violated the laws of Bosnia-Herzegovina, as it incorporates the European Convention on Human Rights. The SFOR Mandate, under which U.S. SFOR troops operate in Bosnia, requires that "SFOR soldiers shall respect local laws." Unlawfully abducting the Petitioners violated B-H law and the SFOR mandate. *See* SFOR Mission, as stated on the website of the SFOR in Bosnia Herzegovina, *available at* http://www.nato.int/sfor/organisation/mission.htm.

[11] The Boumediene Petitioners expect to receive an English version of that order shortly and will supply it to the Court as soon as possible.

[12] As set forth in footnote 12 of Petitioners' November 5 filing, Petitioners hereby submit confirmation of the dismissal of the criminal investigation. Mr. Lahmar remains under investigation in connection with Art. 353 ¶ 1 of the Bosnian criminal code.

conduct CSRTs for each detainee at Guantanamo to review their prior determination that each is an "enemy combatant." In August 2004, Petitioners applied for a Temporary Restraining Order to enjoin the Respondents from holding their CSRTs. Petitioners' application was denied.

Following an initial status conference, Respondents agreed to file returns on Petitioners' writs, stating the factual bases for the detentions, by the week of October 18; that agreement was incorporated into this Court's Coordination Order of September 20, 2004. Despite the fact that Respondents have interned Petitioners for nearly three years, and presumably had a basis to seize and transport the Petitioners away from their families to Cuba in January 2002, Respondents failed to respond to the Petitions of Messrs. Lahmar, Ait Idir, Nechle, and Boudella by October 22. Respondents sought to excuse their failure to comply with the Court's Order by suggesting they needed more time to locate evidence requested by the detainees, *see* Respondents' Status Report on the Submission of Factual Returns to Petitions For Writ of Habeas Corpus at 1-2. However, as this Court recognized, such information could not possibly have formed the basis for Respondents' determination three years ago that Petitioners should be seized and interned. *See* Order Setting Final Deadline for Submission of Factual Returns, Oct. 29, 2004. This Court ordered Respondents—again—to submit all factual returns by November 3.

Respondents have now filed partial returns for all Petitioners. Those returns confirmed Respondents' prior determinations that each Petitioner is an enemy combatant. All Petitioners continue to claim they are wrongfully interned, and charges have been filed against none.

B. El-Banna Petitioners

Petitioner El-Banna is approximately 44 years old. He is married and has five children, all of whom are British citizens. (*See* Sunnrqrout Aff. at ¶ 1, attached hereto as *Ex.* J.) He is a Palestinian who relocated to the United Kingdom approximately ten years ago. At the time of his arrest, he was a permanent resident of the United Kingdom. *Id.*

Petitioner Al-Rawi is approximately 34 years old. His family moved from Iraq to the United Kingdom when Petitioner Al-Rawi was 16 years old and has lived there ever since. At the time of his arrest, he was a permanent resident of the United Kingdom. (*See generally,* Sayyadi Aff., attached hereto as *Ex.* K.)

Petitioner Mubanga is a 32-year old citizen of the United Kingdom and the Republic of Zambia ("Zambia"). (*See* Statement of Constance Mubanga, In the Royal Courts of Justice, Queen's Bench Division, at ¶ 1, attached hereto as *Ex.* L.)

In November 2002, Petitioners El-Banna and Al-Rawi set out on a business trip to The Gambia, where they planned to establish a mobile peanut oil processing facility. (*See* Peirce Aff. on Behalf of Jamil El-Banna at ¶ 5, attached hereto as *Ex.* M; Peirce Aff. on Behalf of Bisher Al-Rawi at ¶ 5, attached hereto as *Ex.* N; Sayyadi Aff. at ¶ 4.) Their plans for the business venture had received full advance approval from Gambian authorities, and all appropriate registration had been obtained. (*See* Peirce Aff. on Behalf of Jamil El-Banna at ¶ 5; Peirce Aff. on Behalf of Bisher Al-Rawi at ¶ 5.) As they attempted to leave the United Kingdom for The Gambia, they were detained for questioning by British authorities, allegedly in connection with a battery charger that Petitioner Al-Rawi sought to transport to Gambia. After three days, they were released when the reason for the detention proved to be erroneous.[13] (*See* Peirce Aff. on Behalf of Jamil El-Banna at ¶ 3; Peirce Aff. on Behalf of Bisher Al-Rawi at ¶ 3.) On November 4, 2002, British authorities released Messrs. El-Banna and Al-Rawi, and they were cleared for travel to The Gambia. *Id.*

Upon their arrival in The Gambia, however, they were taken into custody, allegedly at the request of either British and/or U.S. authorities, once again allegedly based on suspicions related

[13] *See* Respondents' Factual Return to Petition for Writ of Habeas Corpus by Petitioner Jamil El-Banna. Although the battery charger was never in Petitioner El-Banna's possession, the Government concedes that the device was a battery charger and "believed the detainee's rendition of the facts concerning the electronic device."

to Petitioner Al-Rawi's possession of a battery charger. Petitioners El-Banna and Al-Rawi were held for one month in The Gambia and interrogated there by U.S. agents. (*See* Peirce Aff. on Behalf of Jamil El-Banna at ¶¶ 5-7; Peirce Aff. on Behalf of Bisher Al-Rawi at ¶¶ 5-7.) During that period, a Petition for a Writ of Habeas Corpus was filed in the U.K. on behalf of El-Banna and Al-Rawi. (*See* Peirce Aff. on Behalf of Jamil El-Banna at ¶ 23; Peirce Aff. on Behalf of Bisher Al-Rawi at ¶ 23.)

Subsequently, in violation of international law and the domestic laws of the United States, including the 1931 Extradition Treaty between the United States and the United Kingdom, Petitioners El-Banna and Al-Rawi were wrongfully transported to Afghanistan,[14] (*see* Peirce Aff. on Behalf of Jamil El-Banna at ¶¶ 11, 23; Peirce Aff. on Behalf of Bisher Al-Rawi at ¶¶ 11, 23), against their will, during which time they were beaten and jailed in an underground cell in total darkness for approximately three weeks.[15] Thereafter, they were transported to Guantanamo. (*See* Peirce Aff. on Behalf of Jamil El-Banna at ¶ 24; Peirce Aff. on Behalf of Bisher Al-Rawi at ¶ 24.)

In the fall of 2002, Petitioner Mubanga was seized by local government officials and jailed during a visit to Zambia, where he is a citizen. He was detained on false charges of motor vehicle theft by local authorities, (*see* Statement of Constance Mubanga at ¶ 5), allegedly at the request of the United States. In violation of international law and the domestic laws of the United States, including the 1931 Extradition Treaty between the United States and the United Kingdom, Petitioner Mubanga was transported to Guantanamo. *Id.* at ¶ 11.

Each Petitioner was in a country in Africa located thousands of miles from the battlefield of Afghanistan when he was taken into custody. There is no evidence that suggests Petitioners

[14] They were transported despite the fact that a *habeas corpus* petition was pending on their behalf in the British courts. (*See* Peirce Aff. at ¶ 23.)

[15] Extradition Treaty between the United States of America and Great Britain, Dec. 22, 1931, U.S.-U.K., 1947 Stat. 2122.

were involved in any way in the United States' military campaign in Afghanistan, or in any activities related to the attacks of September 11, 2001. None of the factual returns makes such an allegation against any Petitioner. None of the Petitioners possessed a weapon of any sort. Respondents illegally transported Petitioners by aircraft to Guantanamo, where they have been held for two years in cells measuring six by eight feet.[16]

Petitioners filed Petitions for Writs of Habeas Corpus in the District Court for the District of Columbia in July, 2004. The Amended Petition contests both the fact of the Petitioners' incarceration, as well as their inhumane treatment, which violates international law, the law of the United States, and the Uniform Code of Military Justice. On July 22, 2004, the El-Banna Petitioners filed a Motion for the Immediate Issuance of a Writ of *Habeas Corpus* Pursuant to 28 U.S.C. § 2243 or, in the Alternative, an Order to Show Cause. That motion was granted and an Order issued the next day, July 23, 2004.

In August 2004, Petitioners sought a temporary injunction to enjoin the Government from holding their CSRTs. Following oral argument, Petitioners' application was denied.

Respondents determined that each of the El-Banna Petitioners is an enemy combatant. Each Petitioner participated in the CSRT process despite the fact that Petitioners' counsel advised Petitioners El-Banna and Al-Rawi on September 1, 2004, in writing, not to participate in the CSRT, and so advised Petitioner Mubanga on September 2, 2004. Inexplicably, counsel's letters were not delivered to Petitioners until *after* their CSRTs had taken place.

Further, the personal representative assigned to Mr. El-Banna for his CSRT proceeding disagreed with the Tribunal's determination that Mr. El-Banna is an "enemy combatant." *See* Respondents' Factual Return to petition for Writ of Habeas Corpus by Petitioner Jamil El-Banna.

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[16] *See* Ex. 4 to El Banna Petitioners' Motion for the Immediate Issuance of a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2243 or, Alternatively, to Issue an Order to Show Cause; *Suspect at Guantanamo Attempts Suicide,* Associated Press, Aug. 26, 2003; Note 7, *Supra.*

The CSRT record reflects that Mr. El-Banna's personal representative objected to the determination on the ground that there is insufficient evidence to conclude that Mr. El-Banna is an enemy combatant. Indeed, the Tribunal required Respondents to submit additional evidence on two separate occasions before the Tribunal finally reached its decision.

Petitioners continue to maintain their innocence, deny any links with al Qaeda, and claim they are wrongfully imprisoned. Charges have never been filed against these civilian prisoners.

III. ARGUMENT

Respondents cannot have it both ways. On the one hand, Respondents contend that, in the "global war on terror," the Executive's Article II war power and the law of war allows them to detain Petitioners indefinitely, without charge. Simultaneously, Respondents seek to label Petitioners as "enemy combatants," a term they give a malleable definition, and one without any recognized legal significance in U.S. or international law. In so doing, Respondents hope to deny Petitioners the rights any human would have under those very laws of war if, in fact, the law of war applied here. The laws of war do not apply to Petitioners who were forcibly held in and removed from Bosnia, an ally of the United States, or arrested and detained in The Gambia or Zambia, hundreds of miles from the hostilities in Afghanistan and with no connection to those or any other declared hostilities. Even if the law of war did apply, Respondents could not unilaterally exempt Petitioners from the protections afforded them under that body of law.

Ignoring the decision of the Supreme Court in *Rasul*, Respondents continue to assert that Petitioners have no substantive rights in these *habeas* proceedings, including certain fundamental rights afforded by the Constitution. Respondents are wrong, and their unrelenting resistance to the Supreme Court's mandate confesses a fundamental disregard for the rule of law. The Court should compel Respondents to respond adequately to the Petitions, and deny Respondents' Motion to Dismiss.

A. Petitioners Are Not "Enemy Combatants"

In a calculated attempt to evade the reach of both international and domestic law, the Respondents have conjured up a sub-category of humans whom they assert are not entitled to any protections whatsoever. Having labeled these men as "enemy combatants," Respondents transported them to Guantanamo solely to shield their treatment of those men from the basic right of judicial review under U.S. domestic and international law. Under Respondents' rubric, so-called enemy combatants, neither charged with nor convicted of any crime, receive fewer protections than mercenaries, spies, or saboteurs. Like their failed attempt to avoid all judicial oversight, Respondents' Orwellian enemy combatant anti-category is nothing more than a transparent attempt to avoid their legal obligations.[17]

Respondents' entire argument, however, is based upon a false premise—that these Petitioners fall into its new category of "enemy combatants," and thus the Executive has inherent authority to detain them. Respondents, in effect, seek to create from whole cloth the source of their authority to detain Petitioners. But the Respondents' arguments for these Petitioners are misplaced:

> Petitioners proceed as if the actions of the Military in *zones of active hostilities, and in preventing aliens from returning to battle* with the means and intent to bring fresh harm to United States and coalition forces, are no less amenable to searching review by the courts that routine actions of administrative agencies. . . .
>
> On a fundamental level, Petitioners' objection to the Executive's power to *capture and detain alien enemy combatants in foreign territory during on-going hostilities* is flatly inconsistent with the historical understanding of the President's role as Commander in Chief of the Armed Forces . . .

Respondents' Br. at 1-2.

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[17] Perhaps not since *Dred Scott* has a branch of the federal government had the temerity to assert the existence of a category of human beings fully under the control of the U.S. government, yet not entitled to even the most fundamental legal protections of life and liberty.

But Respondents absolute disregard for Petitioners' right to liberty extends far beyond simply seeking to create a category of person and to identify a location where their conduct would be unchallenged and unreviewable. Respondents further seek to imbue their "enemy combatant" definition with a chameleon-like ability to adapt to Respondents changing needs. Indeed, Respondents seek to virtually redefine their concept in order to detain Petitioners. *Cf.* March 21, 2002, News Briefing on Military Commission by William J. Haynes II, General Counsel of the Department of Defense (Guantanamo detainees are "enemy combatants that we *captured on the battlefield* seeking to harm U.S. soldiers or allies")[18] *with* Dec. 12, 2002, Memorandum from William J. Haynes II ("An 'enemy combatant' is an individual who, *under the laws and customs of war*, may be detained for the duration of an armed conflict. In the current conflict with al Qaida [sic] and the Taliban, *the term includes a member, agent, or associate of al Qaida or the Taliban*")[19] *and* Deputy Secretary of Defense Paul Wolfowitz's July 7, 2004, Order Establishing Combatant Status Review Tribunal ("July 7, Wolfowitz Order") ("For purposes of this Order, the term 'enemy combatant' shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. *This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces*").[20] As recently as August 16, 2004, the Government represented to Judge Kollar-Kotelly that, with respect to the question whether detainees can "lawfully be held as enemy combatants," the "hostilities from which these individuals were taken are still ongoing . . ." and "the military is due a great deal of

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[18] News Briefing by William J. Haynes II, General Counsel of the Department of Defense, Department of Defense News Briefing on Military Commissions (Mar. 21, 2002), *available* at http://www.defenselink.mil/transcripts/2002/t03212002_t0321sd.html.

[19] Memorandum from William J. Haynes II, General Counsel, Department of Defense, to Members of the ASIL-CFR Roundtable (Dec. 12, 2002), *available at* http://www.cfr.org/pub5312/william_j_haynes/enemy_combatants.php#

[20] Memorandum for the Secretary of the Navy, Paul Wolfowitz, Deputy Secretary of Defense, Order Establishing Combatant Status Review Tribunal, 1 (Jul. 7, 2004).

deference . . . in what I would say is an unprecedented challenge to the military's ability to hold individuals who were *taken from an area of hostilities. . . .*" *See* Transcript of Motions Hearing before Honorable Colleen Kollar-Kotelly, United States District Judge, at 72, lines 7-21; 74, lines 7-12 Aug. 16, 2004, (No. 02-828) (emphasis supplied). In stark contrast with the broad definition of enemy combatant proffered in the July 7, Wolfowitz Order, to be used for the CSRT proceedings, Respondents, in their open-court statements on August 16, proffered a significantly more narrow definition declaring they consider enemy combatants to be only those individuals detained by the military in an area of hostility, *i.e.*, Afghanistan. This facile manipulation of a definition central to Petitioners continued plight as detainees—whether to justify, post-hoc, Respondents' internment of Petitioners, or to gain a litigation advantage—should not be tolerated by this Court.

Commenting on the Government's oblique definition of the term, Justice O'Conner observed in *Hamdi,* that "[t]here is some debate as to the proper scope of [the] term ['enemy combatant'], and *the Government has never provided any court with the full criteria that it uses in classifying individuals as such.* It has made clear, however, that for the purposes of this case, the 'enemy combatant' that it is seeking to detain is an individual who, it alleges, was 'part of or supporting forces hostile to the United States or its coalition partners' in Afghanistan *and who 'engaged in an armed conflict against the United States there.'*" 124 S. Ct. at 2639 (emphasis supplied).

Respondents define the categories of persons who fall under the definition of enemy combatant in the context of the "war on terror."[21] In effect, Respondents contend that an enemy combatant is any person, regardless of location, who the Executive labels as being a threat to U.S. national security or as "supporting," however tenuously, unintentionally, or involuntarily,

[21] Respondents' Br. at 15.

others who Respondents contend pose such a threat. Respondents' argument that the global war on terror can exist in a legal sense without state actors—a position Petitioners' contest—has far reaching consequences. According to Respondents, the Executive has unreviewable, *carte blanche* authority to detain non-citizens, any place outside of the U.S., at any time—in total disregard to the laws applicable in the United States or other implicated countries, such as The Gambia and Bosnia-Herzegovina. Moreover, once detained and labeled as enemy combatants, Respondents contend such detained persons have no discernible rights.

The Supreme Court in *Hamdi*, in the context of a citizen enemy combatant, flatly rejected the Government's assertion of such an unbounded war power: "[a] state of war is not a blank check for the President when it comes to the rights of the nation's citizens." 124 S. Ct. at 2650. In *Hamdi*, the Supreme Court affirmed the Government's authority, pursuant to Congress's 2001 Authorization for the Use of Military Force ("AUMF"), to detain combatants in the Afghanistan war, for the duration of that conflict, to prevent them from taking up arms again against U.S. forces. *See id.* at 2642. *Hamdi's* narrow holding, however, does not support Respondents' assertion of an unfettered right to detain any non-citizen, anywhere, who is not engaged in a war against the United States.[22] U.S. forces abducted the Boumediene Petitioners upon their court-ordered release from a Sarajevo prison in 2001. Bosnia was not then and is not today, a zone of active hostilities, nor is Africa. Petitioners are not enemy combatants, and the laws of war do not apply to them.[23]

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[22] Nor does it mean that the Executive may detain persons for reasons other than preventing them from returning to battle, *i.e.*, for interrogation purposes. *See Hamdi* 124 S.Ct. at 2641 ("indefinite detention for the purpose of interrogation is not authorized").

[23] Indeed, when this Court first learned of the unique circumstances of the Boumediene Petitioners' case, it recommended that the parties meet to attempt to negotiate a resolution of this case. Petitioners' attempt to follow the Court's suggestion, however, was flatly rejected by the Government.

1. The Term "Enemy Combatant" Has No Legal Significance Under U.S. Law.

Respondents refer to Petitioners as enemy combatants, and use that term 93 times throughout their brief. Respondents' repeated incantation of that phrase, however, cannot imbue it with legal relevance and cannot obscure the facts that the universally accepted preconditions to the application of the law of war are absent here. The phrase enemy combatant appears only once in *Ex parte Quirin*. *See* 317 U.S. 1, 31 (1942).[24] There, the Supreme Court used the term to mean enemy belligerent, or soldier, and it distinguished between such lawful and unlawful combatants:

> By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which tender their belligerency unlawful. . . .
>
> The spy who secretly and without uniform passes the military lines of a belligerent *in time of war*, seeking to gather military information and communicate it to the enemy, *or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property,* are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.

Id. at 30-31 (emphasis supplied). This short passage from *Quirin*—a case Respondents cited seven times—by way of its general illustration of the distinct classes and treatment of persons during wartime, shows exactly why Petitioners cannot be enemy combatants, or even unlawful combatants. The predicate to assignment of such status—the existence of a war

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[24] The *Quirin* petitioners were Nazi saboteurs engaged in undercover operations in the United States against U.S. targets. The Supreme Court held that, because their actions breached the laws of war, they were "unlawful belligerents" or "unlawful combatants," and as such, could, under applicable international and domestic law, properly be denied a civil trial with a jury and instead subjected to the authority of a military tribunal. *See id.* at 31, 35.