IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re Guantanamo Detainee Cases (*except 04-CV-1519 (JR), 02-CV-0828 (CKK)*)	)	Civil Action Nos. 02-CV-0299 (CKK), 02-CV-1130 (CKK), 04-CV-1135 (ESH), 04-CV-1136 (JDB), 04-CV-1137 (RMC), 04-CV-1142 (RJL), 04-CV-1144 (RWR), 04-CV-1164 (RBW), 04-CV-1166 (RJL), 04-CV-1194 (HHK), 04-CV-1227 (RBW), 04-CV-1254 (HHK)

RESPONDENTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW

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Respondents submit this reply memorandum in support of their motion to dismiss or for judgment as a matter of law in the above-captioned coordinated cases.[1]

I. PETITIONERS DO NOT ENJOY RIGHTS UNDER THE UNITED STATES CONSTITUTION

A. Footnote 15 of the Supreme Court's *Rasul* Decision Did Not Overrule Years of Constitutional Precedent in One Fell Swoop

In Respondents' Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support, filed Oct. 4, 2004 ("Response"), the Government explained at length that as aliens held outside the sovereign territory of the United States, petitioners have no cognizable constitutional rights. See Response at 19-30 (citing, inter alia, United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), and Johnson v. Eisentrager, 339 U.S. 763 (1950)). Petitioners' primary answer to this argument is that footnote 15 of the Supreme Court's decision in Rasul v. Bush, 124 S. Ct. 2686 (2004), has already decided this issue. Petrs' Mem. at 9-10. They argue that footnote 15 is not dicta and even if it is, it is authoritative dicta. Dicta or not, as explained in the Response, footnote 15 does not sub silentio overrule long-settled precedent and prejudge the merits of these cases, but instead, in context, merely conveys that the pleading requirements for jurisdiction under 28 U.S.C. § 2241(c)(3) had been met. See Response at 28-30. Of course, that petitioners allege their detention violates the Constitution does not make it so; it only brings those allegations potentially within the federal courts' jurisdiction. See id. at 29-30 & n.33.[2]

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[1] This Memorandum combines replies to Petitioners' Memorandum in Opposition to Respondents' Motion to Dismiss ("Petrs' Mem.") and the Boumediene/El-Banna supplemental reply and opposition ("Petrs' Supp. Mem.").

[2] Contrary to petitioners' argument (Petrs' Mem. at 14), the statement in Rasul that "nothing in Eisentrager or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the 'privilege of litigation' in U.S. courts" (124 S. Ct. at 2698-99) does not alter prior precedent regarding the extraterritorial application of the Constitution any more than (continued...)

B. Petitioners' Reliance on Justice Kennedy's Concurring Opinion in *Verdugo-Urquidez* is Off the Mark

Petitioners also pretend that Justice Kennedy's concurring opinion in United States v. Verdugo-Urquidez, 494 U.S. 259 (1994), constitutes the holding of the Court pursuant to the rule of Marks v. United States, 430 U.S. 188 (1977). Marks plainly does not apply to the Verdugo-Urquidez opinion because five Justices, including Justice Kennedy, joined Chief Justice Rehnquist's majority opinion. The Marks rule applies only in the following situation: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Id. at 193 (emphasis added; internal quotations omitted). In Verdugo-Urquidez, Chief Justice Rehnquist "delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined," thereby forming a five-Justice majority that explained the Court's single rationale for holding that the Fourth Amendment does not apply to aliens outside the sovereign territory of the United States. See Verdugo-Urquidez, 494 U.S. at 261; see also id. at 275 (Kennedy, J., concurring) ("my views . . . do not . . . depart in fundamental respects from the opinion of the Court, which I join"), 278 (Kennedy, J., concurring) (reasoning in concurring opinion was "in addition to the other persuasive justifications stated by the Court"). Simply put, the Court was not "fragmented," and Justice Kennedy did not merely "concur[] in the judgment." Marks, 430 U.S. at 193. Rather, because the majority opinion "enjoys the assent of five Justices," it is

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[2](...continued)
does footnote 15 of Rasul. Obviously, just because a litigant's alien or custodial status does not cause him to be "categorically excluded" from invoking federal jurisdiction does not necessarily mean that he will prevail on any claim, or even that his claims can survive a motion to dismiss, or more importantly, that he has a constitutional right to relief.

binding law. See Catrett v. Johns-Manville Sales Corp., 826 F.2d 33, 34 n.1 (D.C. Cir. 1987) (rejecting argument that Justice White's separate concurring opinion in Celotex Corp. v. Catrett, 477 U.S. 317 (1987), constitutes the holding of the Court under the Marks rule because "Justice White did, after all, join the opinion of the majority and thus that opinion controls our examination of the case").[3]

But even under the supplemental rationale Justice Kennedy alone espoused in his concurring opinion in Verdugo-Urquidez, there is no basis for concluding that alien enemy combatants possess the constitutional rights they assert here. Justice Kennedy himself interpreted the Court's prior decisions as making clear that "we must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad." Verdugo-Urquidez, 494 U.S. at 277 (Kennedy, J., concurring). And in Verdugo-Urquidez, he found that extraterritorial application of the Fourth Amendment – even with respect to an alien present in the United States for criminal proceedings in a United States court – could produce "impracticable and anomalous" results. Verdugo-Urquidez, 494 U.S. at 278 (Kennedy, J., concurring). Precisely such "impracticable and anomalous" results would flow from a conclusion that enemy aliens, captured outside U.S. territory pursuant to a congressional authorization for the use of military force against terrorists and their allies, could invoke the Fifth Amendment's Due Process Clause to require

[3] Petitioners futilely attempt to distinguish Catrett on the grounds that "the narrower view ascribed to Justice White was not apparent from his concurrence; rather, the interpretation of Justice White's concurrence came from Justice Brennan's dissent." Petrs' Mem. at 13 n.12. Regardless of whether Justice Brennan's characterization of Justice White's concurring opinion in Celotex was accurate, the reason the D.C. Circuit held that this was not a situation controlled by Marks is that Justice White also joined the majority opinion, just as Justice Kennedy did in Verdugo-Urquidez. Indeed, Verdugo-Urquidez and Celotex are strikingly similar in the alignment of Justices: both cases involved five-Justice majorities with one Justice who joined the majority opinion – Justice White in Celotex and Justice Kennedy in Verdugo-Urquidez – writing a separate concurring opinion.

military commanders to participate in stateside factfinding proceedings addressed to the accuracy of the commanders' judgment. Military authority over the alien combatants would plainly be undermined, and the mission of securing intelligence would be completely compromised. Thus, even Justice Kennedy's supplemental rationale does not support petitioners' position.

C. The *Insular Cases* Support Respondents' Position That the Constitution Applies Only In Sovereign United States Territory

Petitioners mistakenly rely on the Insular Cases to support their position that the Constitution applies to "territories where the United States possesses governing authority." Petrs' Mem. at 14 n.14. These cases, however, are fully consistent with respondents' position that a distinction exists for constitutional purposes between "sovereignty" and " jurisdiction or control."

In the Insular Cases, the Supreme Court created the doctrine of incorporated and unincorporated territories. See, e.g., Balzac v. Porto Rico, 258 U.S. 298 (1922); Ocampo v. United States, 234 U.S. 91 (1914); Dorr v. United States, 195 U.S. 138 (1904); Downes v. Bidwell, 182 U.S. 244 (1901). Incorporated territories included those "destined for statehood from the time of acquisition, and the Constitution was applied to them with full force." Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 601 n.30 (1976). Conversely, unincorporated territories "included those Territories not possessing that anticipation of statehood. As to them, only 'fundamental' constitutional rights were guaranteed to the inhabitants." Id. Relying on the Insular Cases, petitioners erroneously conclude that the Guantanamo Bay Naval Base is the equivalent of an "unincorporated territory" to which fundamental constitutional rights must apply. See Petrs' Mem. at 14 n.13; Petrs' Supp. Mem. at 36. The central flaw in petitioners' argument is that the legal status of the "unincorporated territories" addressed in the Insular Cases – Puerto Rico and

the Phillippines – was premised on those territories falling within the sovereignty of the United States.[4] See, e.g., Downes, 182 U.S. at 248-49 (stating that "Porto Rico ceased to be a foreign country, and became a territory of the United States"); Dorr, 195 U.S. at 143 (explaining that Spain ceded control of the Philippines to the United States); Treaty of Peace between the United States of America and the Kingdom of Spain, Dec. 10, 1898, U.S.-Spain, arts. I-II, 30 Stat. 1754 (stating that "Spain cedes to the United States" Puerto Rico and the Philippines); see also Verdugo-Urquidez, 494 U.S. at 268 ("[T]he Insular Cases . . . held that not every constitutional provision applies to governmental activity even where the United States has sovereign power.") (emphasis added). In contrast to the "unincorporated territories" discussed in the Insular Cases – which were subject to the sovereign authority of the United States and not leased to the United States – Guantanamo Bay remains under the sovereignty of Cuba while leased to the United States. See Rasul, 124 S. Ct. at 2690. Because Cuba continues to maintain "ultimate sovereignty," id., over Guantanamo Bay, any suggestion that Guantanamo Bay is the equivalent of an "unincorporated territory" is without merit.[5]

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[4] Cf. Murphy v. Ramsey, 114 U.S. 15, 44 (1885) ("The people of the United States, as sovereign owners of the national territories, have supreme power over them and their inhabitants.").

[5] Furthermore, petitioners incorrectly conclude that they may seek the protections of the Constitution because "Guantanamo Bay is like Micronesia" in Ralpho v. Bell, 569 F.2d 607 (D.C. Cir. 1977). In Ralpho the Court permitted an alien claimant to assert a Due Process challenge to a decision of the Micronesian Claims Commission under the Micronesian Claims Act of 1971, on the theory that the relationship between the United States and Micronesia was analogous to the relationship between the United States and the sovereign unincorporated territories in the Insular Cases. Pursuant to a designation by the United Nations Security Council, the United States was appointed to administer Micronesia, which was not the sovereign territory of any nation, as a "Trust Territory" with the the residents of Micronesia "being as much American subjects as those in other American territories." Id. at 619. Because Congress intended the Micronesia Trust Territory to be treated as if it were a territory of the United States, the Court held that Due Process rights applied to the Commission's actions. Id. at 629-30. As explained above, however, Guantanamo Bay is within the sovereignty of another nation, Cuba, and is neither a United States territory, nor made the (continued...)

D. Petitioners' Argument that Aliens Outside the United States Enjoy Constitutional Rights Unless and Until They Have a "Genuine Opportunity" to Form Connections with the United States and Waive That Opportunity is Patently Absurd

In its Response, the government cited well-established D.C. Circuit precedent prohibiting the extraterritorial application of the Constitution to aliens without "substantial connections" with the United States. See Response at 20 & n.23 (citing cases). Petitioners counter that the D.C. Circuit does not approve the denial of constitutional protections based on a person's lack of "substantial connections" with the United States absent a "genuine opportunity" for that person "to form such connections." Petrs' Mem. at 15. Petitioners pluck this theory out of thin air; the D.C. Circuit has never suggested that any such prior "genuine opportunity" is a necessary predicate for the Constitution to be inapplicable to an alien outside the sovereign United States. For example, the court in People's Mojahedin Org. of Iran v. Dep't of State, 182 F.3d 17, 22 (D.C. Cir. 1999), gave no indication that the "opportunity" to develop substantial connections to the United States had any bearing on its holding that a "foreign entity without property or presence in this country has no constitutional rights." Id. at 22. Indeed, the foreign entities at issue had "no presence in the United States" and there is nothing in the court's opinion to indicate that these entities had been given, but declined, an opportunity to develop such a presence. Id. Furthermore, the implications of petitioners' proposed qualification on the D.C. Circuit's holdings are staggering: extraterritorial application of the Constitution would amount to little more than a basic waiver analysis. Constitutional protections would presumptively apply across the board to any inhabitant of the world claiming to be affected by action of the United States government, unless and until a fact-specific

[5](...continued)
equivalent of United States territory by any special trusteeship or statute of Congress.

analysis demonstrated that the alien had been given a "genuine opportunity" – whatever that means – to develop substantial connections with the United States, but declined to take advantage of the opportunity. Such a system not only would eviscerate Eisentrager and its progeny, but also would lead to a hopelessly inconsistent patchwork of constitutional law in an area where consistency is indispensable for the conduct of foreign affairs.[6]

E. There is No General "Common Law" of Habeas Corpus Entitling Petitioners to Relief Independent of Any Constitutional or Statutory Basis

In a subtle nod to the tenuousness of their claim to constitutional rights, petitioners now argue for the first time that they can maintain claims in habeas corpus even without showing that they

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[6] Petitioners also attempt to distinguish two other D.C. Circuit cases – Harbury v. Deutch, 233 F.3d 596, 603-04 (D.C. Cir. 2000), rev'd on other grounds, Christopher v. Harbury, 536 U.S. 403 (2002); Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972) – on the basis that their refusal to recognize constitutional rights for aliens outside the sovereign United States was because "it was a foreign authority," as opposed to "authority exercised by the United States," that was responsible for the alleged constitutional deprivation. Petrs' Mem. at 15. This distinction finds no support in the facts of either case. The complaint in Harbury alleged that constitutional violations were carried out by "CIA 'assets' – members of Guatemalan Security Forces or Intelligence Services paid by the CIA." Harbury, 233 F.3d at 598. Consequently, no party disputed that this allegation rose to the level of government action for purposes of the Bivens claim at issue in that case. Similarly, in Holmes, the petitioners sought an injunction "restraining the American military from surrendering them to the Federal Republic" of Germany for service of criminal sentences in Germany. 459 F.2d at 1214. The court expressly recognized that petitioners were not raising constitutional challenges to the legality of their convictions in German courts; instead, they challenged authority exercised by United States government officials to effect their surrender. Id. at 1217.

Petitioners also erroneously rely on cases involving extraterritorial application of the Constitution and laws of the United States to citizens. See, e.g., Reid v. Covert, 354 U.S. 1, 5 (1957) (plurality opinion). These cases, whose lynchpin is that the individuals in question were citizens of the United States, have little relevance to the issue presented here, which involves nonresident aliens.

Finally, petitioners' citation of cases involving constitutional entitlement of aliens to "due process when they are sued as civil defendants in United States courts" (Petrs' Mem. at 15-16) or to "fair trials" in United States courts (Petrs' Mem. at 13) is quite obviously inapplicable to detainees who have not been sued or criminally charged in United States courts.

enjoy constitutional rights (or, for that matter, statutory or treaty-based rights) or that the Government has violated any such rights. See Petrs' Mem. at 10, 26-27 (citing 28 U.S.C. § 2241(c)(1)). In particular, petitioners claim that they enjoy "common law rights that inhere in the habeas statute." Id. at 26. However, "[a]lthough the writ of habeas corpus is available to any person in federal custody, 28 U.S.C. § 2241(c)(1), the purpose of the writ is to provide a means to secure release from illegal detention," that is, detention that "contravenes applicable constitutional, statutory or regulatory provisions." Luther v. Molina, 627 F.2d 71, 76 (7th Cir. 1980) (emphasis added). Indeed, it is telling that for all their professed reliance on the common law, petitioners do not identify any substantive common-law standard on point,[7] and the cases they cite do not support the notion that release can be ordered absent a valid constitutional, statutory, or treaty basis. For instance, neither Rasul nor Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004), so much as hints at the existence of a previously uncharted parallel universe of supra-constitutional "common law of habeas corpus."[8]

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[7] The closest petitioners get to citing such a standard is to say that habeas provides "notice of the charges against [a detainee] and the opportunity to prove his innocence before a neutral decisionmaker," citing Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2644 (2004). Petrs' Mem. at 27. However, Hamdi makes clear that those requirements emanate from the Due Process Clause (which was available to Hamdi, a United States citizen, as a basis for relief), not from some indeterminate body of habeas corpus common law. Hamdi, 124 S. Ct. at 2648-49 (referring to the "constitutional promises" of notice and an opportunity to be heard before a neutral decisionmaker) (emphasis added).

[8] In citing Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807), petitioners not only overlook the first sentence of that opinion – "As preliminary to any investigation of the merits of this motion, this court deems it proper to declare, that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States," id. at 93 (emphasis added) – but they misleadingly truncate the sentence they quote, which in full reads: "The reasoning from the bar, in relation to it, may be answered by the single observation, that for the meaning of the term habeas corpus, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law." Id. at 93-94 (underlined portion omitted by petitioners). Flores-Miramontes v. INS, 212 F.3d 1133 (9th Cir. 2000), provides no greater aid to (continued...)

As such, petitioners' bid to de facto amend their petitions to add such claims should be denied.

II. PETITIONERS HAVE NOT RAISED ANY SERIOUS QUESTION CONCERNING THE SCOPE OF THE EXECUTIVE'S POWER TO DETAIN ENEMY COMBATANTS

Most of the petitioners do not challenge the basic proposition that, as part of its power to wage war, the Government may capture and detain enemy aliens who have taken up arms against it. See Response at 6-9. They merely quarrel over the fringes of the definition of "enemy combatant." See Petrs' Mem. at 29-30. The El-Banna and Boumediene petitioners, however, raise a more fundamental, categorical challenge to the very power of the Military to detain enemy combatants as part of the ongoing war on terrorism. See Petrs' Supp. Mem. at 11-29. This challenge is a perfect illustration of the types of arguments raised by petitioners that are suffused with questions beyond the purview of the Judiciary in our constitutional scheme.

The El-Banna and Boumediene petitioners' central thesis is that "the global war on terrorism can[not] exist in a legal sense without state actors." Petrs' Supp. Mem. at 15; see also id. at 22-23 (stating that "the Executive's war powers . . . appl[y] only in the context of hostilities between states"). They argue that "the existence of a war between the United States and Bosnia, or between the United States and The Gambia" is an indispensable prerequisite to the United States Military's taking into custody enemy combatants who happen to be apprehended in those countries. Id. at 17. Later, they call the war on terror a "rhetorical declaration" like the "war on drugs" or the "war on poverty." Id. at 26. Petitioners suggest that the only proper response to terrorism is to utilize

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[8](...continued)
petitioners. While the court noted the historical common-law origins of habeas corpus, which respondents do not dispute, in its holding it described § 2241(c)(1) as "allow[ing] for review of both statutory and constitutional claims," not mentioning common-law claims. Id. at 1143 (emphasis added).

criminal justice and extradition channels, not military force. See id. at 18, 27-28. The September 11, 2001, attacks were by far the most spectacular and deadly attacks on American soil in our Nation's history, and the threat of future attacks looms. By petitioners' logic, however, if the Military were to track down the mastermind of the attacks, it would be powerless to use military force to kill, subdue or capture Osama bin Laden, because al Qaeda is not a state actor and under petitioners' view, that makes the present state of war merely a fiction.

Of course, petitioners' logic cannot carry the day because under our constitutional system, decisions about how to provide for the national defense and whether to recognize a state of war and/or employ military force abroad are placed singularly in the Executive Branch.[9] The President, supported by Congress through the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), has chosen to set the Nation on a course of action that aggressively confronts the terrorists through military means. For this Court to proclaim, as petitioners have urged, that the President's prosecution of a war against al Qaeda and its co-belligerents is nothing more than a "rhetorical declaration" would present a separation of powers problem of the most dire sort. The Court should decline the El-Banna and Boumediene petitioners' invitation.

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[9] See, e.g., Ludecke v. Watkins, 335 U.S. 160, 170 (1948) (determination of state of war and status of individual as enemy alien are "matters of political judgment for which judges have neither technical competence nor official responsibility"); United States v. The Three Friends, 166 U.S. 1, 63 (1897) ("[I]t belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed."); Curran v. Laird, 420 F.2d 122, 130 (D.C. Cir. 1969) (en banc) ("It is – and must – be true that the Executive should be accorded wide and normally unassailable discretion with respect to the conduct of the national defense and the prosecution of national objectives through military means."); see also Hirota v. MacArthur, 338 U.S. 197, 215 (1949) (Douglas, J., concurring) ("[T]he capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say.").

The El-Banna and Boumediene petitioners also raise certain more modest, but equally misplaced, objections to the definition of "enemy combatant." They fixate on semantics, noting that courts and commentators have historically used other formulations such as "unlawful combatant," "enemy belligerent," "enemy soldier," and the like, and insisting that the phrase "enemy combatant" has no "legal relevance." Petrs' Supp. Mem. at 16-21. What is important, however, is not the label, but the concept behind it. As set forth in respondents' opening brief, common sense and longstanding precedents alike support the power of the Military to detain members and supporters of enemy forces dedicated to the destruction of American lives and property. See Response at 8-19. Likewise, respondents extensively explained that the detention powers of the Executive transcend the geographic borders of Afghanistan. Id. at 13-15. The El-Banna and Boumediene petitioners take the position that detention is never appropriate outside a "zone of active hostilities," Petrs' Supp. Mem. at 16, but New York and Chicago, where the enemy saboteurs whose detention was upheld in Ex parte Quirin, 317 U.S. 1, 21 (1942), were taken into custody, were no more zones of active hostilities during World War II than Bosnia-Herzegovina, Gambia, or Zambia are today in the context of a truly global war against al Qaeda.

Petitioners also assert that the scope of the enemy combatant category exceeds the power confirmed by Congress in the AUMF, construing that document as allowing military force to be used only against "[t]hose involved in the planning and execution of the September 11 attacks." Petrs' Mem. at 24-25. That construction misleadingly truncates the provision, which refers broadly to any "organizations[] or persons" and those who "harbored such organizations or persons" who "planned, authorized, committed, or aided" the September 11 attacks. Petitioners also neglect to mention Congress's explicit authorization in the AUMF to "use all necessary and appropriate force . . . to

prevent any future acts of international terrorism against the United States" by those organizations or persons. And, contrary to petitioners' myopic interpretation, none of these Congressionally authorized powers contains an Afghanistan-based limitation.[10]

The petitioners other than in El-Banna and Boumediene also object to what they call an "overly expansive" definition of "enemy combatant," in particular that it differs from the Hamdi Plurality's formulation and could include individuals who supported the Taliban or al Qaeda "in any sense." Petrs' Mem. at 29-30. Respondents extensively addressed these issues with arguments and citations that petitioners do not even attempt to meet.[11] See Response at 11-13, 15-16 & nn. 15, 16.[12]

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[10] Petitioners also repeatedly assert that they deny any connection with terrorism or al Qaeda, as if the Military's authority to detain enemy combatants turns on such self-serving denials. Petrs' Supp. Mem. at 11, 18, 25; cf. Quirin, 317 U.S. at 25 n.4 (petitioners argued that they "had no intention to obey the [sabotage] orders given them by the officer of the German High Command"). It is not surprising at all that many enemy combatants will not readily own up to the facts that give them that status, particularly given that al Qaeda's training program specifically instructs terrorist operatives to develop a "security plan," i.e., a detailed and plausible-sounding cover story "through which he will be able to deny any accusation." See Al Qaeda Training Manual seized in Manchester, England, available at http://www.usdoj.gov/ag/manualpart1_3.pdf. Of course, not much would remain of the Executive's ability to effectively prosecute the war if the authority to detain enemy combatants were contingent on what those individuals were willing to admit.

[11] Instead of looking to the laws of war that the Hamdi Plurality identified as the appropriate source of guidance regarding the scope of executive authority, see 124 S. Ct. at 2640, petitioners cite three peacetime cases dealing with domestic, criminal prosecution or deportation of citizens or permanent resident aliens suspected of membership in the Communist party.

[12] Without linking their objection to any of their particular cases, petitioners assert generally that the definition of enemy combatant should be modified to exclude individuals whose connection with the enemy was "involuntary." Petrs' Mem. at 39. This position finds no support in the laws and traditions of war, and it further reveals petitioners' bid to transplant concepts from criminal law that should properly remain there. As we have said repeatedly and as the Hamdi Plurality stated, enemy combatants are detained not to punish them for crimes – a very different posture as to which duress, if proven, might be a defense – but to prevent them from returning to battle and to obtain intelligence vital to the continuing war on terrorism. Hamdi, 124 S. Ct. at 2640. Obviously, the danger to the United States and its Armed Forces posed by an enemy combatant is palpable whether that person

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In any event, except for a single isolated instance, petitioners do not tie their complaint about the breadth of "enemy combatant" to any of their particular situations. Any development of the boundaries of the definition of enemy combatant should await particular cases actually raising those issues. See Hamdi, 124 S. Ct. at 2642 n.1 (plurality opinion).[13] Accordingly, there is no valid basis for the Court to overrule the informed judgment of the Military as to the scope of persons connected with the enemy who may be detained as enemy combatants.

III. THE COMBATANT STATUS REVIEW TRIBUNALS COMPORT WITH DUE PROCESS

Petitioners level a number of criticisms at the Combatant Status Review Tribunals ("CSRTs") (Petrs' Mem. at 27-43) that, as the Government already has explained (Response at 31-42), provide all the process due in the circumstances. However, only twice in their extensive critique (see Petrs' Mem. at 33, 42) do petitioners mention the controlling Supreme Court case whose test that the Hamdi Plurality stated should inform the analysis of what process is due. See Hamdi, 124 S. Ct. at 2646 (citing Mathews v. Eldridge, 424 U.S. 319 (1976)). And, even then, they only mention it in passing, without addressing the specific balancing it calls for. Instead, from the nature of their criticisms, it appears petitioners reflexively and conclusorily assume that the appropriate degree of process must be that which is customary in a criminal case, a proposition unmistakably rejected by the Hamdi Plurality even with respect to a U.S. citizen detained as an enemy combatant – within

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joined anti-U.S. fighters of his own free will, or was pressured, cajoled, or even forced at gunpoint to join the fight. See In re Territo, 156 F.2d 142, 146 (9th Cir. 1946) ("Petitioner argues that he was impressed against his will into the Italian Army, but the status of a volunteer or that of a draftee, as a prisoner of war who is captured upon the field of battle, is not different."). Thus, the motive for joining enemy forces is irrelevant to the issue of enemy combatant status.

[13] Cf. H.L. v. Matheson, 450 U.S. 398, 405-06 (1981) (litigant may not challenge statute as overbroad when her own conduct falls within core of statute).

sovereign U.S. territory, no less.[14]

Petitioners object to several specific aspects of the CSRT procedures. They argue that the CSRTs lack impartial decision-makers because they apparently believe no individual who is part of the Military is capable of being impartial. Petrs' Mem. at 28-29. However, the CSRTs were adopted in response to the Hamdi Plurality's own guidance that "the [due process] standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal." 124 S. Ct. at 2651 (emphasis added). Obviously, a military tribunal is composed of members of the military. Moreover, as pointed out in the Response at 38-39 but wholly ignored by petitioners, the CSRT Order categorically screens out from participation on the Tribunal anyone who has been involved in the "apprehension, detention, interrogation, or previous determination of status of the detainee." CSRT Order ¶ e. Petitioners' rank speculation that "low-ranking military personnel" [15] on the Tribunal will be reluctant to make a fresh, independent determination because they fear that will be perceived as insubordination ignores both that their orders from their superiors charge with

[14] See Hamdi, 124 S. Ct. at 2646 ("The District Court, agreeing with Hamdi, apparently believed that the appropriate process would approach the process that accompanies a criminal trial."), 2648 (holding that "the process apparently envisioned by the District Court" does not "strike[] the proper constitutional balance when a United States citizen is detained in the United States as an enemy combatant" because "some of the 'additional or substitute procedural safeguards' suggested by the District Court are unwarranted in light of their limited 'probable value' and the burdens they may impose on the military in such cases") (citing Mathews, 424 U.S. at 335).

[15] Actually, Tribunal members have been mainly grades O-5 and O-6, see CSRT Implementation Memorandum (attached as Ex. B to Response) Encl. (1) ¶ C(1), which are the highest uniformed ranks below general officers (i.e., generals and admirals). See DoD Instruction 1000.1, Attachment 1 to Enclosure 3, available at <<http://www.dtic.mil/whs/directives/corres/html2/i10001x.htm#ca31>>.

them doing exactly that, and that they have done so.[16] Indeed, petitioners' speculation in this regard is undermined by the fact that military officers of equal or lesser rank than the members of the Tribunal, including a signatory to petitioners' brief, are serving as counsel for two of the petitioners in these coordinated cases. These counsel have zealously advocated for their clients' interests notwithstanding petitioners' suggestion of an inherent conflict of interest pervasive in DoD, and there is no reason to expect that Tribunal members will not similarly be able to perform in accordance with their professional responsibilities.

Petitioners also object that the CSRTs do not allow detainees' counsel to participate, relying chiefly on a passage from Hamdi. Petrs' Mem. at 31. However, the Hamdi passage, by its own terms, addresses nothing other than a U.S. citizen's access to counsel in the "proceedings on remand," i.e., in federal court. 124 S. Ct. at 2652. Petitioners also rely on Judge Kollar-Kotelly's recent opinion in Al Odah concerning real-time monitoring, see Civ. A. No. 02-828(CKK), 2004 WL 2358254 (D.D.C. Oct. 20, 2004), but that Order, too, deals only with representation in this litigation. Quite plainly, neither of these authorities touches on whether the Due Process Clause requires that counsel be allowed to participate in a military tribunal formed exclusively for determining enemy combatant status. Notably absent from petitioners' discussion is any attempt to apply the Mathews balancing test to the issue of counsel participation. Thus, respondents' application of the test stands essentially unrebutted. See Response at 40-42. Petitioners argue that Wolff v. McDonnell, 418 U.S. 539, 569-70 (1974) (holding that Due Process Clause did not require that prisoners be entitled to

[16] Petitioners imply that the fact that only one non-enemy combatant determination has been made out of 295 cases so far is proof that the Tribunal tilts toward finding enemy combatant status. To the contrary, what that statistic shows, if anything, is that the Military's initial, pre-CSRT determinations were highly accurate.

permitted to retain counsel in informal proceedings to revoke good-time credits) has "no applicability here" because the prisoners there were "already beneficiaries of the full protections of the Constitution at a prior criminal trial and sentencing." Petrs' Mem. at 31 n.24. But this distinction does not hold up, because the Wolff Court analyzed entitlement to counsel for purposes of the administrative proceeding there under the Due Process Clause as a discrete issue not dependent on the prior conviction of the prisoners. Wolff, 418 U.S. at 569-70. Here, as in Wolff, "the probable value, if any" of transforming wartime CSRTs into counseled proceedings is outweighed by the "burdens that the additional or substitute procedural requirement would entail," and therefore the Due Process Clause does not compel that transformation. Mathews, 424 U.S. at 335, cited in Hamdi, 124 S. Ct. at 2646.

Petitioners round out their critique with miscellaneous objections to procedural aspects that they say deprive them of a "fair opportunity" to rebut the Government's allegations. See Petrs' Mem. at 31-32. For instance, they claim the CSRT is constitutionally invalid because they are not allowed to see classified information. See Petrs' Mem. at 32. This contention – that persons being detained because they are associated with organizations at war with the United States should be given access to the United States' most sensitive military secrets – is easily rejected.[17] While citing no cases of

[17] Judge Robertson's November 8, 2004, ruling in Hamdan, Civ. A. No. 04-1519 (JR), 2004 WL 2504508, on appeal, No. 04-5392 (D.C. Cir.), does nothing to boost this objection. That ruling involved neither the CSRTs nor the Due Process Clause. Rather, the Court found fault with the fact that criminal military commission proceedings in which Hamdan was being tried for violations of the laws of war did not conform to the rules set forth in the Uniform Code of Military Justice with respect to the treatment of classified information. Id. at *11-*15. Again, the CSRTs are not criminal proceedings (and therefore any rights under the Confrontation Clause – if constitutional rights can even be invoked by enemy aliens outside the sovereign United States, a matter expressly reserved by Judge Robertson, id. at *16 – are flatly inapplicable), and there is no requirement that the CSRTs conform to any form of proceeding established by the Uniform Code of Military Justice.

their own, petitioners attempt to diminish People's Mojahedin Org. of Iran v. Dep't of State, 327 F.3d 1238 (D.C. Cir. 2003), by pointing to its alternate ground of decision that any error from non-disclosure of classified information was harmless. But they ignore the Court's primary rationale: that "[w]e already decided in NCOR that due process required the disclosure of only the unclassified portions of the administrative record." Id. at 1242 (emphasis in original), citing Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 207-09 (D.C. Cir. 2001).[18] The CSRTs are not defective for failing to provide enemy combatant detainees with the Nation's military secrets. Petitioners also complain about a lack of ability to "confront the witnesses and evidence against them," but the only case they cite is one which predates Mathews and expressly limited its holding to criminal situations.[19] Petitioners complain that the CSRTs' "reasonably available" standard for calling witnesses gives them "no meaningful opportunity" to call witnesses or present evidence, but they fail to propose an alternative standard that they believe is constitutionally mandated – the necessary starting point for a Mathews analysis. See Mathews, 424 U.S. at 335 (focus is on value and costs of "additional or substitute procedural safeguards").[20] Finally, petitioners object, without

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[18] Petitioners' attempt to distinguish Jifry v. FAA, 370 F.3d 1174, 1184 (D.C. Cir. 2004) (holding that Due Process Clause in administrative proceeding required Secretary "only to disclose the unclassified portions of the record"), on the ground that in that case the later reviewing court conducted ex parte in camera review of the classified information, is particularly baffling. After all, in this case, not only is this Court reviewing the classified information, but petitioners' cleared counsel are being given access to it.

[19] See Jenkins v. McKeithen, 395 U.S. 411, 427-28, 429 (1969) (involving hearings of state body convened to "expos[e] violations of criminal laws by specific individuals" and "exercise[] an accusatory function," and expressly limiting scope of holding to situations "where the Commission allegedly makes an actual finding that a specific individual is guilty of a crime").

[20] As respondents previously explained, the standards defining the circumstances in which detainees may call witnesses and/or present evidence are identical to those in the Article 5 tribunals (continued...)

analysis, to the rebuttable presumption in favor of the Government's evidence, but that presumption was suggested by no less an authority than the Hamdi Plurality – a fact that petitioners ignore entirely. Hamdi, 124 S. Ct. at 2649.

Apart from their specific procedural objections, petitioners argue more generally that the CSRTs do not "realize" the possibility envisioned by the Hamdi Plurality.[21] Petrs' Mem. at 32-34. They insist that Article 5 tribunals as outlined in Army Regulation 190-8 are designed for a different purpose than are the CSRTs. That is as irrelevant as it is obvious. The Hamdi Plurality cited the Article 5 tribunals not because they were applicable of their own accord, but because they constitute an analogous situation in "related instances." Hamdi, 124 S. Ct. at 2651. Petitioners next opine that the balancing of factors in the Mathews test will be different with respect to the CSRTs than with respect to Article 5 tribunals, resulting in relatively more process due in the CSRTs. That seems unlikely, but in any event, coming from petitioners it is mere supposition, since nowhere in their brief do they actually purport to apply the Mathews framework to the specific CSRT procedures. Moreover, as discussed in respondents' earlier brief, see Response at 34-35, and left unaddressed by petitioners, the CSRTs provide more process than do the Article 5 tribunals. Only the CSRTs contain express qualifications to ensure the independence and lack of prejudgment of the tribunal;

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[20](...continued)
that the Hamdi Plurality cited approvingly, see Response at 33, and are well within the realm of what has been upheld in prior Due Process Clause jurisprudence, see id. at 38 n.48.

[21] Petitioners are quick to point out that only four Justices embraced the proposition that military tribunals might afford adequate process. However, they ignore that a fifth Justice, Justice Thomas, would have held that even the degree of process suggested by the four-Justice plurality went too far. See Hamdi, 124 S. Ct. at 2683-85 (Thomas, J., dissenting). Thus, it is clear that a majority of the Court considers unnecessary any further process beyond that which is suggested by the four-Justice plurality.

only the CSRTs provide the detainee with a personal representative; only the CSRTs obligate the Government to search for evidence to suggest that the detainee should not be designated as an enemy combatant; only the CSRTs provide the detainee with an unclassified summary of the evidence in advance of the hearing; only the CSRTs allow the detainee to introduce relevant documentary evidence; and only the CSRTs include automatic review by a higher authority.

Finally, for an "as applied" challenge, petitioners selectively cite aspects of a small handful of CSRT records out of approximately 60 that had been provided to them, and press reports about CSRTs for detainees who apparently are not even petitioners. Petrs' Mem. at 35-40. It appears that petitioners primarily take issue with fact-specific decisions by the CSRTs about whether certain witnesses or evidence were relevant or reasonably available. Respondents vehemently dispute that the CSRT rulings on these issues worked a violation of due process. We respectfully suggest that if, after taking respondents' motion to dismiss or for judgment as a matter of law under advisement, and reviewing the factual returns for the petitioner-detainees, the Court finds that issues remain to be litigated regarding individual CSRT records, the issues could be addressed, if at all, in individualized petitioner-specific briefing.

IV. CSRT CONCLUSIONS ARE APPROPRIATELY REVIEWED UNDER A "SOME EVIDENCE" STANDARD

Petitioners argue that the "some evidence" standard of review is inappropriate for this Court's review of the CSRTs, apparently based on a theory that prior cases using that standard have involved review of the tribunals that included greater due process protections than the CSRTs, or that were "authorized in the first instance by a tribunal that afforded the petitioner greater due process rights," whatever that means. Petrs' Mem. at 41. However, there is no basis for concluding that the

administrative bodies whose decisions were being reviewed in the cited cases provided due process protections any "greater" than those provided by the CSRTs. Compare Superintendent v. Hill, 472 U.S. 445, 454 (1985) (prison disciplinary hearing characterized by advance written notice, "an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in [one's] defense," and a written statement of decision by the factfinder), with Response at 32-35 (detailing procedures in CSRTs). Petitioners also vaguely insist that the Hill Court limited the "some evidence" standard to the "unique considerations of the prison setting." Petrs' Mem. at 41. However, the type of "unique considerations" the Court actually referred to – "assuring the safety of inmates and prisoners, avoiding burdensome administrative requirements that might be susceptible to manipulation, and preserving the disciplinary process as a means of rehabilitation" (Hill, 472 U.S. at 455) – are matched if not outweighed in significance by equally unique considerations of the military detention setting present here.[22] The "some evidence" standard therefore should be the framework for any factual review of these cases by this Court.[23]

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[22] Those unique considerations include, for example, avoiding undue imposition on military commanders during a time of war; facilitating and not obstructing interrogations in which information is gathered that could help dismantle terrorist cells and/or prevent a future terrorist attack; preventing terrorists from learning sensitive military secrets; protecting intelligence sources and methods; taking precautions to guard against mistakenly releasing detainees who may return to terrorism and/or ongoing hostilities against United States and allied troops; and maintaining a stable and secure environment at the detention facility. See, e.g., Response at 37-42.

[23] Petitioners suggest that the Court should instead borrow from standards that have been developed for motions under Rules 12(b)(6), 12(c), or 56 of the Federal Rules of Civil Procedure. Petrs' Mem. at 1-2. However, respondents did not base their motion to dismiss or for judgment as a matter of law on any of these provisions. Rather, respondents filed a response to petitioners' claims into which was incorporated a simultaneous motion to dismiss or for judgment on the grounds set forth in the response. This Response, together with the factual returns subject to "some evidence" review, shows why the relief sought by petitioners should not issue. If petitioners are not entitled to the relief they seek, then, as a matter of common sense and under the Court's authority in the (continued...)

V. PETITIONERS' ALIEN TORT STATUTE CLAIMS FAIL

A. No Waiver of Sovereign Immunity Permits Petitioners' ATS Claims

Petitioners in roughly half of the cases raise Alien Tort Statute ("ATS") claims.[24] These petitioners appear to concede that the ATS does not waive the Government's sovereign immunity in its own right, and fail to show that the Administrative Procedure Act ("APA") provides the requisite waiver of sovereign immunity that would confer jurisdiction over ATS claims. As discussed in the Response at 54-65, while the APA generally waives the Government's immunity from suits challenging administrative agency action and seeking relief other than damages, 5 U.S.C. § 702, several key exceptions to that waiver render it inapplicable to petitioners' ATS claims.

1. The Petitions Sound in Habeas, Which Offers the Exclusive Remedy for Petitioners' Claims

The APA's waiver of sovereign immunity does not apply unless "there is no other adequate remedy in a court." 5 U.S.C. § 704. Here, petitioners have a remedy in habeas, which they are pursuing. See Razzoli v. Federal Bureau of Prisons, 230 F.3d 371, 373 (D.C. Cir. 2000) ("[W]e adhere to Chatman-Bey: for a federal prisoner, habeas is indeed exclusive even when a non-habeas claim would have a merely probabilistic impact on the duration of custody."); Chatman-Bey v. Thornburgh, 864 F.2d 804, 809 (D.C. Cir. 1988) (holding that "habeas is designed to test the

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[23](...continued)
habeas context, the petitions are due to be dismissed and judgment entered for respondents. See Lonchar v. Thomas, 517 U.S. 314, 325 (1996) (noting that "[t]he Habeas Corpus Rules themselves provide district courts with ample discretionary authority to tailor the proceedings" in habeas cases); White v. Lewis, 874 F.2d 599, 603 (9th Cir. 1989) (approving general motion to dismiss as vehicle to "show cause by written response" why writ of habeas corpus should not issue, and noting that "responding to a habeas petition with a motion to dismiss is common practice").

[24] Petitioners in the following six of the above-captioned cases raise ATS claims: Almurbati, El Banna, Hicks, O.K., Khalid, and Kurnaz.

lawfulness of the government's asserted right to detain an individual") (emphasis in original). Petitioners' overriding objective obviously is to end their confinement, as is evident from their insistence that they seek "a declaration that Petitioners have been subjected to . . . [inter alia] prolonged, arbitrary detention" and "an injunction prohibiting such treatment." Petrs' Mem. at 48.[25] Their petitions uniformly seek release from custody and invoke the jurisdiction of the Court under the habeas statute, 28 U.S.C. § 2241 et seq.[26] Petitioners cite several cases for the proposition that their purported challenges regarding conditions of confinement do not fall under the habeas statutes. Petrs' Mem. at 47-48. However, not a single one of those cases involved situations where the fact of confinement was contested or where the plaintiff sought release from custody, as petitioners do in the present cases.[27] Petitioners' reliance on these cases is therefore misplaced.

2. Petitioners' "Liberty Interests" Do Not Provide a Basis For Judicial Review of Military and Foreign Affairs Committed to Agency Discretion by Law

As respondents have shown, the President's authority to carry out the detentions under the AUMF or otherwise is not subject to judicial review to the extent it is a matter "committed to agency

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[25] Defying logic, petitioners contend that a judicial declaration that detention of a petitioner was "arbitrary" or an injunction prohibiting such detention somehow "would not operate to test the validity of their capture or the legality of their detention." Petrs' Mem. at 48. They offer no explanation of how a declaration that detention is "arbitrary" could be made without addressing the detention's validity or legality, for which habeas is the exclusive remedy.

[26] While some of the petitions had sought damages for alleged torts, petitioners have voluntarily dismissed those claims.

[27] See, e.g., Haines v. Kerner, 404 U.S. 519 (1972) (action to recover damages allegedly resulting from placement in solitary confinement as disciplinary measure while incarcerated); Wilwording v. Swenson, 404 U.S. 249 (1971) (challenge to living conditions and disciplinary measures in maximum security prison); Carter v. Doe, No. 99-7003, 1999 WL 730767 (D.C. Cir. Aug. 19, 1999) (unpublished table disposition, 203 F.3d 51) (due process challenge to administrative segregation); Brown v. Plaut, 131 F.3d 163 (D.C. Cir. 1997) (action seeking damages allegedly resulting from placement in administrative segregation).

discretion by law," 5 U.S.C. § 701(a)(2), and therefore the APA does not waive sovereign immunity so as to confer jurisdiction over petitioners' ATS claims. See Response at 64. Petitioners counter that "significant liberty interests" predominate over national security and foreign policy concerns and entitle them to judicial review of those claims. Petrs' Mem. at 51. Of course, petitioners do not possess such interests under either the United States Constitution or international law, see supra § I; infra § VI, but, in any event, the cases petitioners cite for their argument, Petrs' Mem. at 51 n.45, do not involve applicable APA review of military decisionmaking concerning matters of national security.[28] Thus, none of the cases stands for the proposition that liberty interests automatically trump national security and foreign policy concerns that are committed to agency discretion by law within the meaning of 5 U.S.C. § 701(a)(2) so as to waive sovereign immunity for petitioners' ATS claims.[29]

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[28] See, e.g., Reid v. Covert, 354 U.S. 1 (1957) (calling into question Congress' power to subject civilian U.S. citizen to trial by military tribunal for alleged murder of serviceman husband); United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955) (contesting Congress' power to subject ex-serviceman to trial, for alleged murder while in service, by court martial instead of in civilian court); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (challenging President's power to order government takeover of Nation's steel mills); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (contesting state regulation of mortgage terms in time of economic emergency); Sterling v. Constantin, 287 U.S. 378 (1932) (challenging state attempt to regulate use of private property while under "martial law" in time of purported insurrection); The Paquete Habana, 175 U.S. 677 (1900) (appealing decrees of court condemning two foreign boats and their cargoes as prize of war).

Only one of the cases cited by petitioners concerns the APA at all, but the court's decision in that case hinged on particular statutory language in the National Security Act which has no bearing on this case. See Webster v. Doe, 486 U.S. 592 (1988) (finding that the specific language of the National Security Act committed employment termination decisions to the agency and thereby precluded judicial review under the APA, but that the language did not preclude APA review of constitutional claims arising out of the decision at issue).

[29] Moreover, contrary to petitioners' contention, the exclusion for "military authority exercised in the field in time of war . . .", 5 U.S.C. § 701(b)(1)(G), broadly encompasses the exercise (continued...)

3. The Court Should Not Intercede in Sensitive Military and Foreign Affairs Matters by Providing Discretionary, Nonmonetary Relief

Respondents have also demonstrated that it would be an abuse of discretion for the Court to provide discretionary, nonmonetary relief with respect to sensitive military and foreign affairs matters involved in this litigation, and review of petitioners' claims is therefore precluded under 5 U.S.C. § 702(1). Response at 57-59. Citing Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984), petitioners argue that the foreign affairs context of Executive action cannot shield unlawful conduct from judicial inquiry. See Petrs' Mem. at 53. However, that case involved "[p]rivate United States litigants seeking a determination of the lawfulness of the Executive's deprivation of their private property." Ramirez, 745 F.2d at 1514. Thus, the Court explicitly distinguished the matter as one not involving a "broadside attack[] on fundamental foreign policy decisions" which might result in "conflicting pronouncements from the Judiciary and the political branches over the basic tenets of United States relations with foreign states." Id. Exactly that type of "broadside attack" would result if the Court were to enjoin or otherwise interfere with the detention of aliens captured pursuant to the AUMF and the President's constitutional authority as Commander in Chief because they were supporting forces hostile to the United States. See Response at 8-13.

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[29](...continued)
of military authority outside the domestic United States during wartime. Doe v. Sullivan, 938 F.2d 1370, 1380 (D.C. Cir.1991) (suggesting that APA's military function exclusion applies to cases in which a court was asked to "review military commands made ... in the aftermath of [ ] battle"); see also Al Odah v. United States, 321 F.3d 1134, 1150 (D.C. Cir. 2003) (Randolph, J., concurring), rev'd sub nom. Rasul v. Bush, 124 S. Ct. 2686 (2004); cf. 5 U.S.C. § 701(b)(1)(F) (complementary exclusion from scope of APA review for courts martial and military commissions).

4. Petitioners Challenge Actions of the President, Who Is Not an Agency Whose Actions Are Subject to Judicial Review

Petitioners' contention that the Army is the alleged agency responsible for the detentions at issue in this matter, and that its actions are subject to judicial review pursuant to 5 U.S.C. § 704,[30] is misguided. Petrs' Mem. at 45-46. Petitioners' detention claims arise from action taken by or in response to the orders of the President pursuant to the exercise of his constitutional powers and the express congressional authorization in the AUMF for him to "use all necessary and appropriate force . . . to prevent any future acts of international terrorism against the United States." See Hamdi, 124 S. Ct. at 2639-40 (finding that "the AUMF is explicit congressional authorization for the detention of individuals"); id. at 2640 (noting that AUMF authorized the President to take action, including detentions). The Army, as well as other branches of the Military, have been carrying out the President's commands. See Mitchell v. Forsyth, 472 U.S. 511, 536-37 (1985) (Burger, C.J., concurring) (Cabinet officer "is an 'aide' and arm of the President in the execution of the President's constitutional duty to 'take Care that the Laws be faithfully executed.'"). To the extent petitioners challenge conduct by the Military that was specifically ordered by the President pursuant to the AUMF, such as the decision to detain enemy combatants and prevent them from rejoining the hostilities, those commands emanate from the President. Thus, neither the Military nor any branch thereof can properly be deemed the "agency" responsible for the actions in question.

Petitioners rely on Jaffee v. United States, 592 F.2d 712 (3rd Cir. 1979), for the proposition that the Army is an agency, see Petrs' Mem. at 45-46, but their reliance is unavailing. The issue to

[30] Section 704 of the APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704.

be decided is not whether the Army is an agency, but rather, whether the Army can be sued for petitioners' detentions. In Jaffee, the Army's alleged failure to give medical warnings to soldiers who had been exposed to a nuclear test blast was deemed reviewable "agency action" under 5 U.S.C. § 702. By contrast, the alleged "agency actions" in this case are detentions that were directed by the President pursuant to Congress's authorization. See Dalton v. Specter, 511 U.S. 462, 475 (1994) (noting that "'final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate,'" whether the discretion derives from the Constitution or from a valid statute). Jaffee is therefore not analogous. And since the President is not an "agency" within the meaning of the APA, his actions are not subject to any waiver of sovereign immunity provided by the APA. Franklin v. Massachusetts, 505 U.S. 788, 796, 801 (1992) (plurality opinion).

B. Petitioners Have Failed To State Cognizable Claims Under The Alien Tort Statute

Not only does no applicable waiver of sovereign immunity exist, the handful of petitioners who purport to bring claims under the ATS fail to state cognizable claims, either with respect to their detentions or with respect to their alleged conditions of confinement. The Supreme Court in Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004), rejected the petitioner's proposed rule establishing "a general prohibition of 'arbitrary' detention" as being too broad to have the "status of a binding customary norm in international law." Id. at 2768. The Court noted in dicta that, according to the Restatement (Third) of Foreign Relations Law of the United States, on which petitioners rely, Petrs' Mem. at 55, a state could be deemed to violate international law with respect to detention "if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention.'" 124 S. Ct. at 2768. The Court deemed the Restatement merely to be "the beginning of the enquiry." Id.

at 2769. Even if it were definitively the end of the enquiry, however, the United States has no such policy. The only "policy" of the United States in relation to petitioners is to apprehend enemy combatants pursuant to the AUMF and prevent them from again taking up arms against, or otherwise serving forces hostile to, the United States. See infra § VI.D.

Moreover, no "binding customary norm of international law" forbids detention of enemy combatants during time of war. Indeed, even under the Geneva Conventions, which do not apply to the detentions at issue here, see infra § VI.A.B., a detaining power may continue to hold enemy combatants at least until "the cessation of active hostilities," Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, art. 118, and longer under certain circumstances, see Response at 18 n.21. See also Hamdi, 124 S. Ct. at 2642. Given that operations persist against Taliban remnants, al Qaeda, and their supporters both within and outside Afghanistan, the duration of petitioners' detentions does not violate any "binding customary norm of international law."

To the extent petitioners purport to make claims seeking injunctive or declaratory relief for "torture, cruel, inhuman, or degrading treatment" (Petrs' Mem. at 48), as opposed to their underlying detention, such claims are not cognizable, either. Among other things, those petitioners fail to allege anything specific or definite enough to be tested against any "binding customary norm of international law." Gratuitously incanting the word "torture" at every possible opportunity does not substitute for the concrete and specific allegations required under Sosa. Three of the petitions attempt to poison the well by quoting extensively from a salacious report by former Guantanamo detainees released many months ago, but the allegations linger behind phrasing that carefully

disclaims responsibility for them.[31] The petitions fail squarely to plead that the alleged acts actually occurred, were actually directed toward the specific petitioner in question, and/or actually caused that petitioner harm. Therefore, it cannot be determined what these petitioners' specific conditions-of-confinement claims are, much less whether they violate any international norms. Moreover, even if a petitioner did press a sufficiently specific historical claim, prospective relief – the only type of relief that remains at issue[32] – would be ruled out altogether unless he both alleged and could show that he faced a "real and immediate threat" of being subjected to the conduct complained of in the future. City of Los Angeles v. Lyons, 461 U.S. 95, 105, 110 (1982) (holding that there is no actual case or controversy for equitable relief absent a "real and immediate threat of again being illegally choked").

The allegations of the other three petitioners who bring putative ATS claims – that they were required to use a bucket for a toilet, were denied hygienic facilities and contact with their families, were prevented from exercising their religious beliefs, and were exposed to cameras, El Banna pet. ¶ 44; Khalid pet. ¶ 49; Kurnaz pet. ¶ 35 – certainly do not describe violations of any widely accepted international norm defined with the degree of specificity required under Sosa. See also infra § VI.D. Other than citing federal case law discussing "torture" or "cruel, inhuman or degrading treatment" in only the most general terms, petitioners cite no authorities which establish, on these particular allegations, a violation of an international norm widely accepted as a legal obligation in the civilized

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[31] See, e.g., Almurbati petition ¶¶ 44-48 ("according to a report . . ."; "the report describes . . ."; "The report states further . . . .," etc.); O.K. petition ¶¶ 31-38 ("According to reports . . ."; "Upon information and belief . . . ", etc.).

[32] Petitioners have withdrawn any claims for damages against respondents in their individual capacities, and do not even contend that there is a waiver of sovereign immunity that permits them to maintain damages claims against the United States.

world and defined with the high degree of specificity demanded by Sosa. See Sosa, 124 S. Ct. at 2768 n.27 (rejecting "authority drawn from the federal courts" as insufficient to establish an international norm for "arbitrary detention").

The Supreme Court in Sosa urged the lower courts to employ "an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." Sosa, 124 S. Ct. at 2766. Here, the practical consequences of endowing alien enemy combatants for the first time with a private right of action under the ATS to challenge the conditions of their confinement are truly staggering. The United States Military has detained huge numbers of enemy combatants in every major armed conflict in our Nation's history, including over two million in World War II. George G. Lewis & John Mewha, History of Prisoner of War Utilization by the United States Army, Dep't of the Army Pamphlet No. 20-213, at 244 (1955). If enemy detainees in these past conflicts had been empowered through tort law and the ATS to sue military commanders charged with subduing them in federal court for injunctions and judicial declarations concerning the terms of their confinement, not only would the Military have been greatly hampered in executing its mission to apply force against the enemy, but the federal courts might well have ground to a halt. In the context of the present conflict with al Qaeda, another "practical consequence" of recognizing such a cause of action may be unwittingly to play into the terrorists' documented strategy of resistance by alleging mistreatment and torture to judicial authorities regardless of whether it actually occurred.[33] In keeping with Sosa, the Court should employ an "element of judgment" and not create a new private right of action susceptible of being easily manipulated by the enemy through fabricated

[33] See Al Qaeda Training Manual seized in Manchester, England, at page 16 of 17, available at http://www.usdoj.gov/ag/manualpart1_4.pdf.

claims, particularly where petitioners have failed even to set forth claims with anything approaching the requisite degree of specificity or to establish a live case or controversy for prospective relief. Sosa, 124 S. Ct. at 2766; Lyons, 461 U.S. at 110; see also Sosa, 124 S. Ct. at 2766 n.21 ("policy of case-specific deference to the political branches" may counsel against availability of relief in the federal courts under ATS).

Thus, petitioners' ATS claims must be rejected, both because the only putative waiver of sovereign immunity does not apply, and because petitioners fail to bring allegations that make out a viable ATS cause of action under the standards set forth in Sosa.

VI. PETITIONERS' INTERNATIONAL LAW CLAIMS FAIL

Petitioners' arguments that they have rights under international treaties, including the Geneva Conventions, and customary international law enforceable through habeas fail.

A. The Geneva Conventions Are Not Self-Executing and Do Not Give Rise to Judicially Enforceable Rights

Courts may enforce in habeas an international treaty not implemented by legislation only if the treaty is intended to be self-executing and it creates individual rights that can give rise to habeas relief. See Response at 68; see also Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 937 (D.C. Cir. 1988) (the "question whether a particular treaty requires implementing legislation is different from the international law question of whether [the] treaty aims at the immediate creation of rights and duties of private individuals which are enforceable" in court (quotation omitted)). Petitioners argue that the Geneva Conventions[34] are, in fact, self-executing,

[34] See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Feb. 2, 1956, 1956 WL 54810 (U.S. Treaty), T.I.A.S. No. 3365, 6 U.S.T. (continued...)

relying upon the Senate ratifying report on the Conventions, as well as Article 129 and other language from the Conventions. See Petrs' Mem. at 17-22. These arguments must be rejected, however.

As the Fourth Circuit recently explained:

> [W]hat discussion there is [in the text of the GPW] of enforcement focuses entirely on the vindication by diplomatic means of treaty rights inhering in sovereign nations. If two warring parties disagree about what the Convention requires of them, Article 11 instructs them to arrange a "meeting of their representatives" with the aid of diplomats from other countries, "with a view to settling the disagreement." Geneva Convention, at art. 11. Similarly, Article 132 states that "any alleged violation of the Convention" is to be resolved by a joint transnational effort "in a manner to be decided between the interested Parties." Id. at art. 132; cf. id. at arts. 129-30 (instructing signatories to enact legislation providing for criminal sanction for "persons committing . . . grave breaches of the present Convention"). We therefore agree with other courts of appeals that the language in the Geneva Convention is not "self-executing" and does not "create private rights of action in the domestic courts of the signatory countries." Huynh Thi Anh v. Levi, 586 F.2d 625, 629 (6th Cir. 1978) (applying identical enforcement provisions from the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Feb. 2, 1956, 6 U.S.T. 3516); see also Holmes v. Laird, 459 F.2d 1211, 1222 (D.C. Cir. 1972) (noting that "corrective machinery specified in the treaty itself is nonjudicial").

Hamdi v. Rumsfeld, 316 F.3d 450, 468-69 (4th Cir. 2003), vacated on other grounds, 124 S. Ct. 2633 (2004); see Response at 69-70 (citing cases, including Al Odah v. United States, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J., concurring) (endorsing Fourth Circuit conclusion in Hamdi), rev'd on other grounds sub nom. Rasul v. Bush, 124 S. Ct. 2686 (2004), and Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808-810 (D.C. Cir. 1984) (Bork, J., concurring)).

Even if the Fourth Circuit's holding in Hamdi retains no precedential effect because of its vacatur in the Supreme Court on other grounds, the court's textual analysis, supported by the other opinions cited, is persuasive. Indeed, other Articles of the GPW governing execution of the

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[34](...continued)
3516 ("Geneva Convention IV").

Convention reinforce the conclusion that the treaty is not self-executing.[35] In light of this clear textual framework for enforcing the treaty, there is no sound basis on which to conclude that the treaty was self-executing in the sense of providing detainees with privately enforceable rights.

Contrary to petitioners' claim, the ratifying history of the Conventions in the Senate does not suggest otherwise. The section of the Senate Report latched onto by petitioners, see Petrs' Mem. at 19, noting that few legislative enactments "will be required to give effect to the provisions" in the Conventions, addresses only the need for legislation to restrict or revise prior permitted practices in the United States potentially inconsistent with Convention provisions, such as commercial use of the Red Cross emblem and customs treatment of relief shipments. See Geneva Conventions for the Protection of War Victims: Report of the Senate Comm. on Foreign Relations, S. Rep. No. 9-84, at 30-31 (1955). It does not follow that any of the Conventions' provisions therefore became self-executing in the sense of giving rise to privately enforceable rights. Indeed, the Senate noted that the "requirements of the . . . Conventions to a very great degree reflect the actual policies of the United States in World War II." Id. at 32.[36] The Senate Committee likewise believed that the obligation under the GPW to enact legislation punishing "grave breaches," see GPW art. 129, was

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[35] They call for the contracting parties to permit representatives of the Protecting Powers (neutral nations) and the International Committee of the Red Cross to visit prisoners of war (art. 126); to inculcate the principles of the Convention in their countries' populace (art. 127); and to communicate with one another during hostilities "through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof" (art. 128) (emphasis added). See also art. 8 ("The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers [neutral nations] whose duty it is to safeguard the interests of the Parties to the conflict.").

[36] These policies have been carried forward in Army Reg. 190-8, giving effect to the Geneva Conventions, though not giving rise to judicially enforceable rights. See Response at 72-75; infra note 47. See also infra note 53.

already addressed by legislation existing at the time. Id. at 27.[37] And in addressing how future compliance with the treaty would be achieved, the Senate Report did not mention legal claims or judicial machinery, but instead observed that "the weight of world opinion" would "exercise a salutary restraint on otherwise unbridled actions." Id.

It is also important that the Senate that ratified the GPW was operating against the backdrop of Johnson v. Eisentrager, 339 U.S. 763 (1950), which had determined that the "responsibility for observance and enforcement" of the 1929 Geneva Convention – the predecessor to the GPW – was "upon political and military authorities," not the courts. Id. at 789 & n.14; Response at 69. Yet in discussing the "advance[s]" over the 1929 treaty, the Senate Report never so much as suggested that alleged violations of the updated GPW could be enforced through the judicial system or that the absence of a general need for implementing legislation gave rise to judicially enforceable private rights under the Convention.

We respectfully submit that Judge Robertson's recent contrary decision in Hamdan v. Rumsfeld, No. 04-CV-1519 (JR), 2004 WL 2504508 (D.D.C. Nov. 8, 2004), which the government has appealed, requesting expedited consideration, is wrongly decided. The decision gives undue weight to the isolated comment in the Senate ratifying report regarding the need for implementing legislation and virtually ignores the aspects of the Conventions reflecting diplomatic enforcement mechanisms.[38] Further, the Court did not appreciate the spectacular reach of its conclusion that the

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[37] See also H. Rep. 104-698, at 3-4 (1996), reprinted in 1996 U.S.C.C.A.N. 2166, 2168-69 (updating review of criminal statutes and noting need for additional legislation [War Crimes Act of 1996, 18 U.S.C. § 2441] to implement GPW art. 129).

[38] Judge Robertson's attempt to characterize a refusal by the United States to permit Yemeni diplomats to visit a detainee at Guantanamo Bay as manifesting the futility of diplomatic (continued...)

Conventions give rise to rights enforceable by individuals in the courts: if the Conventions give rise to judicially enforceable individual rights, every person detained by the Military in a war and within the jurisdiction of a district court could, and likely would, continue the fight by challenging their detention and/or various details of their confinement conditions in federal court. As discussed above, see supra § V.B, the prospect of a morass of litigation by enemy detainees within the jurisdiction of a federal court in future wars, contesting the Military's implementation (or alleged lack of implementation) of every applicable provision of the Conventions, from those regarding participation in meal preparation (GPW art. 26) to guaranteeing delivery of sports outfits (id. art. 72), is virtually unimaginable and would, indisputably, seriously hamstring the President's authority as Commander in Chief and the Military's ability to carry out effectively its mission in war (of which detention of enemy combatants is an essential part, see Response at 8-13), if not make the mission altogether impossible. It would also produce an absurd lack of mutuality in providing enemy combatants an enforcement mechanism unavailable to United States troops held by States or powers with less accessible, or less independent, court systems.

For these reasons, the Geneva Conventions are not, and should not be considered, self-executing in the sense of providing detainees with privately enforceable rights.

B. Even if the Geneva Conventions Created Individually Enforceable Rights, the Conventions Would Not Entitle Petitioners to Release From Detention

Even if the Geneva Conventions were considered to be self-executing and giving rise to rights judicially enforceable through habeas, petitioners fail to articulate how application of that

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[38](...continued)
enforcement mechanisms, Hamdan, 2004 WL 2504508, at *10 n.11, fails to appreciate the actual diplomatic enforcement mechanisms contemplated under the Conventions.

conclusion would compel the Court to issue a writ or order petitioners' release from detention. Indeed, as explained in our Response, petitioners' claims based on the Conventions fail on the merits because the Conventions do not afford petitioners protection or because none of their provisions, if applicable, would afford a basis for habeas relief.

1. The Conventions Do Not Afford Petitioners Protections

Each of the petitioners in the cases before the Court has been determined to be, and is being held as, an "enemy combatant," defined as "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." See Response at 12. As noted in our Response at 70-71 n.80, the GPW does not apply at all to al Qaeda detainees, and neither the Taliban nor al Qaeda detainees are entitled to prisoner of war status under the terms of the Convention. See also Memorandum for the Vice President, the Secretary of State, the Secretary of Defense, et al., from President George W. Bush Re: Humane Treatment of al Qaeda and Taliban Detainees ¶ 2 (Feb. 7, 2002) (available at http://www.library.law.pace.edu/research/020207_bushmemo.pdf) ("Feb. 7, 2002 Memo to Vice President et al."). These conclusions are clear from the text of the treaties, and even if reviewable, would at least be entitled to substantial deference. See Response at 70-71 n.80.

The relevant Conventions, by their terms, apply in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties," in "all cases of partial or total occupation of the territory of a High Contracting Party," or when a non-signatory "Power[] in conflict" "accepts and applies the provisions [of the Conventions]." See GPW art. 2; Geneva Convention IV art. 2. The U.S.-al Qaeda armed conflict, however, is not one "between two

or more of the High Contracting Parties" within the meaning of Art. 2 because al Qaeda is not a State; it cannot be a "High Contracting Party" or "Power." Rather, it is a terrorist organization composed of members from many nations, with ongoing operations in many nations.[39] In any event, far from embracing the Convention or any other provision of the law of armed conflict, al Qaeda has consistently acted in flagrant defiance of the law of armed conflict. Thus, the al Qaeda petitioner-detainees cannot claim the protection of the Conventions.

Judge Robertson's contrary decision in Hamdan should not be followed because it not only failed to accord the deference that is due to the President's interpretation of the Conventions, it cannot withstand scrutiny. Judge Robertson rejected the President's decision that the Conventions do not apply to al Qaeda detainees on the ground that the Conventions "are triggered by the place of the conflict [according to the Court, Afghanistan], and not by what particular faction a fighter is associated with."[40] Hamdan, 2004 WL 2504508, at *6. The President's determination regarding the inapplicability of the Conventions to al Qaeda, however, is based on the plain text of the

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[39] See Petrs' Supp. Mem. at 26 & Ex. O (El Banna/ Boumediene petitioners and expert agree war against alleged terrorists, not High Contracting or state party, does not trigger Conventions). See also G.I.A.D. Draper, The Red Cross Conventions 16 (1958) (arguing that "in the context of art. 2 ¶ 3, 'Powers' means States capable then and there of becoming Contracting Parties to these Conventions either by ratification or by accession").

[40] For this proposition, the Hamdan Court relied upon a February 2, 2002 advisory memorandum from the State Department Legal Adviser to the White House. Id. (citing Memorandum from William H. Taft IV, Legal Adviser, Dep't of State, to Counsel to the President (Feb. 2, 2002), available at www.fas.org/sgp/othergov/taft.pdf). It is clear, however, that that memorandum argued a viewpoint that the President, in the exercise of his powers as Executive and Commander in Chief, rejected. See Feb. 7, 2002 Memo to Vice President et al., ¶ 2. It is the President's interpretation of the GPW that is entitled to the deference of this Court.

Conventions[41] and should be accorded deference.[42]

Further, with respect to Taliban petitioner-detainees, the President has determined that while the Geneva Conventions apply because Afghanistan is a party to the Conventions, Taliban detainees do not qualify as prisoners of war under the terms of the GPW. See Response at 70-71 n.80; see also Feb. 7, 2002 Memo to Vice President et al., ¶ 2. This determination is likewise subject to deference and is correct, and, indeed, was confirmed in United States v. Lindh, 212 F. Supp. 2d 541, 557-58 (E.D. Va. 2002). As explained in Lindh, the GPW sets forth four primary criteria that an

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[41] The Hamdan decision, see 2004 WL 2504508, at *8, also rejected the argument that evidence that the Conventions do not apply to al Qaeda can be found in Art. 3 of the Conventions, i.e., Common Article 3, given that the article concerns "armed conflict[s] not of an international character occurring in the territory of one of the High Contracting Parties," and the war against al Qaeda is of "an international character." See Feb. 7, 2002 Memo to Vice President et al., ¶ 2. The Court relied upon a decision of the International Court of Criminal Justice ("ICJ") that Common Article 3 was meant to apply, as a minimum, to all conflicts, regardless of international character. Hamdan, 2004 WL 2504508, at *8 (citing Nicaragua v. United States, 1986 I.C.J. 14, 114 (Judgment of June 27)). To the extent that the Court's description of the ICJ decision is accurate, it is inconsistent with the text of Art. 3 and fails to give weight to the fact that the United States refused to acknowledge the ICJ decision by withdrawing from the compulsory jurisdiction of the ICJ. See Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 932, 944-45 (D.C. Cir. 1988); see also Breard v. Greene, 523 U.S. 371, 374-375, 378 (1998) (disregarding ICJ order calling on the United States to "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these [ICJ] proceedings," and emphasizing that an interpretation of an international treaty rendered by an international court is entitled to nothing more than "respectful consideration" and that a federal court "must decide questions presented to it on the basis of law" rather than on the opinions of international bodies).

[42] The Hamdan decision also veered into the policy arena when it criticized the government's position regarding al Qaeda for undermining the Nation's ability to demand treatment consistent with the Conventions of United States service members held by non-state entities or organizations. This criticism erroneously conflates the issues of whether the Conventions, as a legal matter, apply and whether, regardless of application of the Conventions, treatment of service members consistent with the Conventions is appropriate. The United States has a long history of treatment of prisoners consistent with the Conventions even where the Conventions may not apply by their terms, and of demanding reciprocal treatment of U.S. soldiers. The situation is no different here. See Feb. 7, 2002 Memo to Vice President et al., ¶ 3.

organization must meet for its members to qualify for POW status, including a command organization, fixed distinctive emblems or uniforms, the carrying of arms openly, and conduct of operations in accordance with the laws of war.[43] GPW art. 4(A)(2). The Taliban does not meet these requirements.[44] See Lindh, 212 F. Supp. at 557-58.

Hamdan, however, rejected that the government could make any such categorical determination or judgment that an entity, such as the Taliban or al Qaeda, does not meet the requirements of GPW art. 4. See Hamdan, 2004 WL 2504508, at *7-*8 (addressing al Qaeda). According to Hamdan, under GPW art. 5,[45] a tribunal must determine POW status in any case in

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[43] These criteria apply both to the regular armed forces of a Convention Party, as well as to militias and volunteer groups of a Party; though only explicit in Art. 4 as to militias and volunteer groups, they implicitly apply to regular armed forces. See Lindh, 212 F. Supp. 2d at 557 & n.35; see also Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War at 62-63 (Red Cross 1952) (the four criteria in Art. 4 apply to regular armed forces; there was no need to specify these requirements with respect to regular armed forces) (available at http://www.icrc.org); S. Exec. Rep. No. 84-9 at 5 ("extension of [the treaty's] protection to 'partisans' does not embrace that type of partisan who performs the role of farmer by day, guerilla by night").

[44] Al Qaeda detainees also fail to meet these requirements. See Padilla ex rel. Newman v. Bush, 233 F. Supp. 2d 564, 593 (S.D.N.Y. 2002) (citing the "obvious conclusion" that "when the President designated Padilla an 'enemy combatant,' he necessarily meant that Padilla was an unlawful combatant, acting as an associate of a terrorist organization whose operations do not meet the four criteria necessary to confer lawful combatant status on its members and adherents"), remanded on other grounds, 352 F.3d 695 (2d Cir. 2003), rev'd on other grounds, 124 S. Ct. 2711 (2004).

[45] Article 5 provides:

> The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.
>
> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

which a detainee asserts entitlement to such status, regardless of any objective realities as to whether any force or group falling within the definitions in GPW art. 4 even exist. See id.

The terms of the GPW do not support the Hamdan view, however. Article 4 defines the categories of persons to whom the GPW applies, see GPW art. 5. Article 4 articulates the categories of individuals, by group, to be considered POWs, while Art. 5, correspondingly, provides direction, when such protected categories or groups may exist, as to how to handle occasions when doubt arises as to whether an individual belongs to one of the protected groups, i.e., through the convening of a "competent tribunal" to adjudicate the issue. In other words, Art. 5 assumes that a protected category or group exists to which an individual may belong. It does not contemplate individualized determinations as to whether any group of persons defined in Art. 4 may exist (at least where there can be no doubt such groups do not exist).[46] Nor does it indicate that a categorical determination by the Military, through its Commander in Chief or otherwise, that a group does not satisfy the requirements of Article 4 is prohibited. Nor does it appear from the text of the GPW that any subjective assertion of doubt as to membership in a group or category in Art. 4, in the face of objective reality that no forces entitled to POW status exist, would entitle a detainee to a

[46] See also Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War at 49 (Red Cross 1952) (available at http://www.icrc.org):

> Article 4 is in a sense the key to the Convention, since it defines the people entitled to be treated as prisoners of war. It was therefore essential that the text should be explicit and easy to understand. In addition, the experience gained during the Second World War had to be taken into account, and reference made to certain categories of combatants in terms which would leave no room for doubt.

(endnote omitted).

determination of POW status by a tribunal.[47]

For these reasons, Hamdan's rejection of the Executive's interpretation of the Conventions as they pertain to al Qaeda and the Taliban is not supportable. Rather, the Conventions do not apply to al Qaeda detainees, and neither the Taliban nor al Qaeda detainees are entitled to prisoner of war status under the terms of the GPW. Petitioners' claims under the Conventions, therefore, fail.

2. Petitioners Fail to Point to Any Provisions of the Geneva Conventions That, Even if Applicable, Would Entitle Petitioners to Habeas Relief.

Even if the Conventions provided protection to the detainees, however, petitioners have failed to identify any provisions of the Conventions that would entitle them to the habeas remedy of release from detention. They cite various provisions concerning rights in connection with prosecution of crimes, Petrs' Mem. at 20, but, as explained in our Response at 10-11, detention as an enemy combatant is neither criminal or punitive in nature.[48] Even the Court in Hamdan

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[47] Nor does Army Reg. 190-8, which provides for the convening of a tribunal to determine the status of a person "who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists," id. § 1-6.b; see Hamdan, 2004 WL 2504508, at *7; call for a different result. The regulation states expressly that "[i]n the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence," id. § 1-1.b.(4). And, in any event, it "provides policy, procedures, and responsibilities," i.e., guidance, for the Military to ensure internal compliance with the Geneva Conventions. See Army Reg. 190-8 § 1-1.a; Response at 72-73. The issuance of the regulation – which was undertaken as a matter of discretion by the Executive Branch without statutory direction by Congress – therefore cannot be understood to have created actionable rights in favor of detainees, rights not provided under the Geneva Conventions themselves.

[48] The El Banna / Boumediene petitioners even admit that Geneva Convention IV does not protect them. See Petrs' Supp. Mem. at 31 n.64 (noting that petitioners fail the nationality test of Geneva Convention IV art. 4(2)). But even if the nationality and territorial constraints of Geneva Convention IV art. 4 did not apply, these petitioners identify only one article not pertaining to criminal prosecutions (inapplicable here) they claim has been breached: Article 43, stating that a Detaining Power shall conduct twice yearly reviews of the justification for continued detention. See Petrs' Supp. Mem. at 32 n.69. Petitioners do not explain how this provision would justify habeas (continued...)

essentially agreed that application of the GPW did not require Hamdan's release.[49]

C. Other Treaties Relied Upon By Petitioners Do Not Provide a Basis for Relief

To the extent that petitioners, primarily the El-Banna and Boumediene petitioners, rely upon other treaties as bases for habeas relief, see Petrs' Supp. Mem. at 29; Petrs' Mem. at 23-24,[50] those contentions must be rejected. As noted in our Response at 71-72 & n.81, the International Covenant on Civil and Political Rights is not self-executing and creates no court-enforceable rights; the American Declaration on the Rights and Duties of Man creates no enforceable rights, see Buell v. Mitchell, 274 F.3d 337, 372 (6th Cir. 2001); and the American Convention on Human Rights has not been ratified.

In addition, the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 75 ("Protocol I"), is not, as petitioners claim, "binding on the United States," see Petrs' Supp. Mem. at 30. Rather, the United States refused to ratify Protocol I, and, therefore, it is inapplicable in this

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[48](...continued)
relief, however, especially in light of the fact that petitioners have or are receiving CSRT proceedings and will be receiving Administrative Review Board proceedings. See Response at 17-18, 46 n.56.

[49] See Hamdan, 2004 WL 2504508, at *16 ("the Supreme Court made it clear, in Hamdi, that, whether or not Hamdan has been charged with a crime, he may be detained for the duration of hostilities in Afghanistan if he has been appropriately determined to be an enemy combatant"); see also id. ("It is now clear, by virtue of the Supreme Court's decision in Hamdi, that detentions of enemy combatants at Guantanamo Bay are not unlawful per se."); Padilla ex rel. Newman v. Bush, 233 F. Supp. 2d 564, 590-93 (S.D.N.Y. 2002) (nothing in GPW impedes detention of al Qaeda associate as enemy combatant), remanded on other grounds, 352 F.3d 695 (2d Cir. 2003), rev'd on other grounds, 124 S. Ct. 2711 (2004).

[50] Petitioners' primary brief cites treaties as part of their argument regarding customary international law, which is addressed infra.

case.[51] Also, the Universal Declaration of Human Rights imposes no obligations as a matter of international law.[52] See Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2767 (2004).[53]

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[51] See 81 Am. J. Int'l L. 910 (President Reagan made the following statement regarding his decision not to submit the Protocol to the Senate for ratification: "Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. . . It is unfortunate that Protocol I must be rejected. . . . But we cannot allow other nations of the world, however numerous, to impose upon us and our allies and friends an unacceptable and thoroughly distasteful price for joining a convention drawn to advance the laws of war. In fact, we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.").

[52] Further, the United States is not a party to either the European Convention on the Protection of Human Rights and Fundamental Freedoms or the African Charter on Human and People's Rights (see Petrs' Mem. at 23-24 n.20). See Treaties in Force (U.S. State Dep't 2003) (available at www.state.gov/s/l/24224.htm).

[53] Petitioner O.K. complains, see Petrs' Mem. at 16 n.15, 25-26 n.21, that respondents deal with his unique claims in two footnotes in the Response, but his indignation cannot salvage his claims. Petitioner argues that the two treaties regarding children upon which he relies are self-executing based upon statements made during the ratification process that no changes to United States law or practice would be required to fulfill the treaties. See id. at 25 n.21. These statements, however, on their face, as well as in context, merely indicate that United States law and practice already conforms to the treaties, not that the treaties create privately enforceable rights of their own effect. More to the point, however, petitioner simply does not address, and thus, fails to counter, the fact that the treaties he relies upon do not address the detention of minors as enemy combatants. See Response at 72 n.81. Petitioner's treaty claims, therefore, fail as a matter of law. No further briefing is needed.

Petitioner O.K. also tepidly defends his purported claim under the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. §§ 801, 821. Petrs' Mem. at 16 n.15. The UCMJ clearly does not divest the Military of what O.K. calls "personal jurisdiction" to detain enemy combatants. By its plain language, the provision O.K. cites, 10 U.S.C. § 802(c), does not "limit[] . . . all military jurisdiction" as O.K. contends, but rather preserves the coverage of "this chapter" (i.e., the UCMJ) over certain categories of U.S. military enrollees. Again, the detention of O.K. and the other detainees is not pursuant to the UCMJ. Even if § 802(c) had the withdrawal-of-"jurisdiction" effect O.K. fantastically and counter-textually attributes to it, that provision has nothing to do with petitioner O.K. because he is not and has never been "a person serving with an armed force" as that phrase is used in the UCMJ. See 10 U.S.C. § 101(a)(4) (defining "armed forces" throughout Title 10 as meaning the "Army, Navy, Air Force, Marine Corps, and Coast Guard" of the United States).

(continued...)

D. Customary International Law Provides No Basis for Relief

Petitioners argue that customary international law, which petitioners describe as prohibiting prolonged arbitrary detention, provides them an avenue for habeas relief. See Petrs' Mem. at 22-25. Petitioners are wrong.

Customary international law results from a general, consistent, and widely accepted practice of states, followed out of a sense of legal obligation and not merely because the practice may be politically desirable, morally required, or just a good idea. See Committee of U.S. Citizens Living in Nicaragua, 859 F.2d at 940; Buell v. Mitchell, 274 F.3d 337, 372-73 (6th Cir. 2001). The existence of customary international law does not authorize the free-wheeling exercise of judicial power over and against domestic legal norms or government action, however. Even where customary international law is found to exist, its application and effect can be limited by a number of principles. Customary international law is constantly evolving, Committee of U.S. Citizens Living in Nicaragua, 859 F.2d at 940, thus implying that states can modify their practices to adapt to new or unanticipated circumstances or challenges. And in the United States:

> It has long been established that customary international law is part of the law of the United States to the limited extent that "where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."

United States v. Yousef, 327 F.3d 56, 92 (2nd Cir. 2003) (quoting The Paquete Habana, 175 U.S. 677, 700 (1900)) (emphasis in original); Comm. of U.S. Citizens, 859 F.2d at 939.

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[53](...continued)
Again, no further briefing is needed because this claim is frivolous. Moreover, as Judge Bates held in a different context, to the extent relief sought by petitioner O.K. is prospective in nature – and it is exclusively prospective, following his recent withdrawal of damages claims – arguments based on minority are mooted by his having turned 18. O.K. v. Bush, Civ. A. No. 04-CV-1136(JDB), 2004 WL 2387672, at *15 n.25 (D.D.C. Oct. 26, 2004).

Petitioners' appeal to customary international law to contest their detention fails in light of these principles. Even if customary international law proscribed "prolonged arbitrary detention," it is not at all clear that petitioners' detention fall within this rubric. The detention here is not arbitrary, but based on the Military's determination that petitioners are enemy combatants. The treaties cited by petitioners as evidence of customary international law do not appear to deal with wartime detentions of this type, but rather with criminal-like matters, and petitioners cite no clear evidence of a consistent and widespread norm, followed as a matter of legal obligation, that detention of enemy combatants in a worldwide war against a terrorist organization is improper. Even petitioners themselves admit that their claim is unclear. Petrs' Mem. at 24. Moreover, the President's legitimate exercise of his powers under the Constitution and the AUMF, see Response at 8-13, would constitute a "controlling executive or legislative act" warranting the rejection of a contrary international law claim.

Thus, petitioners' international law claims provide no basis for habeas relief.

CONCLUSION

For the reasons stated above, respondents respectfully request that their motions to dismiss or for judgment as a matter of law be granted, that writs of habeas corpus not issue, and that all relief requested by petitioners be denied.

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Respectfully submitted,

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