Nos. 03-334 & 03-343

IN THE

Supreme Court of the United States

SHAFIQ RASUL, *et al.*,
Petitioners,

v.

GEORGE W. BUSH, *et al.*,
Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH, *et al.*,
Petitioners,

v.

GEORGE W. BUSH, *et al.*,
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia

BRIEF OF *AMICI CURIAE* AMERICAN CENTER FOR LAW & JUSTICE, EUROPEAN CENTRE FOR LAW & JUSTICE & SLAVIC CENTRE FOR LAW & JUSTICE SUPPORTING RESPONDENTS

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Al Odah Brf	Brief for Petitioners (Fawzi Khalid Abdullah Fahad Al Odah, *et al.*)
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BRIEF OF *AMICI CURIAE* AMERICAN CENTER FOR LAW & JUSTICE, EUROPEAN CENTRE FOR LAW & JUSTICE & SLAVIC CENTRE FOR LAW & JUSTICE SUPPORTING RESPONDENTS

INTEREST OF *AMICI*[1]

Amicus American Center for Law and Justice (ACLJ) is a not-for-profit organization committed to upholding the

[1] This brief is filed with the consent of the parties, and letters indicating such consent have been filed with the Court. Pursuant to Rule 37.6, the *amici* disclose that no counsel for any party in this case authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

integrity of our constitutional system of government based on separation of powers. Jay Alan Sekulow, ACLJ Chief Counsel, has argued and participated as counsel of record in numerous cases involving constitutional issues before this Court. ACLJ lawyers have argued numerous cases involving constitutional issues before lower federal courts and state courts throughout the United States. The ACLJ is very concerned about Petitioners' attempts to expand the coverage of United States domestic law to protect and benefit unlawful enemy combatants captured by American or allied forces overseas and presently detained at the Guantanamo Naval Base in Cuba. To do so, Petitioners seek to subvert the well-established authority of the Executive to deal with the exigencies of war in all its facets and to transfer such authority to the Judiciary. Yet, neither the domestic law of the United States nor the 1949 Geneva Conventions permit captured enemy combatants to challenge the legality of their detention in the domestic courts of the detaining power—the United States—during wartime. The ACLJ urges this Court to affirm the appellate court's denial of Petitioners' arguments.

Amicus European Centre for Law and Justice (ECLJ) is a French Association, located in Strasbourg, France, which deals with human rights issues in Europe. *Amicus* Slavic Centre for Law and Justice (SCLJ) is a human rights organization located in Moscow, Russia. ECLJ and SCLJ attorneys have a number of cases currently on application before the European Court of Human Rights and have argued cases before national courts in Europe. Both *amici* are concerned with upholding the rule of law and with maintaining the integrity of the international law of war. Both *amici* agree that allowing enemy combatants—whether lawful or unlawful—to challenge the legality of their detention in the courts of the detaining power during wartime was never foreseen by the 1949 Geneva Conventions and should not now be read into the Conventions.

SUMMARY OF ARGUMENT

The underlying facts at issue in this matter are well-known and need little elaboration. On September 11, 2001, members of the *al-Qaeda*[2] terrorist organization[3] forcibly hijacked civilian airliners in the United States and used them as weapons to attack the World Trade Center towers in New York City and the Pentagon in northern Virginia. A fourth plane crashed in Pennsylvania when airline passengers thwarted the hijackers' mission. As a result, thousands of United States citizens, as well as hundreds of foreign nationals, were killed. The President of the United States took immediate steps as Commander-in-Chief of the armed forces to protect the Nation against further such attacks.

Within days of the attacks, the United States Congress, agreeing with the President that the attacks on the United States constituted acts of war, authorized the President to use military force in response. The President ordered United States armed forces to seek out and destroy the terrorists responsible for the attacks and those who give them safe haven. The President also called on all civilized nations of the world to join the United States in the war on terrorism. Less than one month after the attacks on our soil, United States armed forces took the war to the enemy in Afghan-

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[2] Because Arabic words must be transliterated into English, there are often different spellings. For example, "*al-Qaeda*" is often transliterated as "*al-Qaida*." To avoid confusion, "*al-Qaeda*" will be used in this brief. Where that term is transliterated differently in a source cited in this brief, it will be changed to the above spelling without further notation.

[3] *Al-Qaeda* is "a transnational organization with global ambitions. Its tactics are illegal, but its goals are political. Indeed, they are geopolitical—to drive American influence from the Islamic world, to establish a new caliphate there and to renew the medieval war for dominance between Islam and the West." David B. Rivkin, Jr., et al., *The Law and War*, part 1, Wash. Times (Jan. 26, 2004) ("Rivkin1") at A__. Moreover, on 9-11, "*al-Qaeda* did what few modern states can do—it projected power." *Id.*

istan. Many members of the *al-Qaeda* terrorist organization and their Taliban allies were killed or captured in the ensuing fight. The President ordered the most dangerous of the enemy combatants taken captive to be flown to Guantanamo Bay Naval Base in Cuba to be detained there. The war on global terrorism continues unabated, and enemy combatants continue to be captured around the world and taken to Guantanamo for detention.

The instant matter before this Court concerns the attempt by family members of certain Guantanamo detainees to challenge in United States courts the legality of the detainees' detention. Nothing in the laws of the United States or the 1949 Geneva Conventions permits captured enemy com batants to challenge the legality of their detention in the courts of the detaining power during wartime. The issues Petitioners raise—for example, being held without trial, lack of access to counsel, and lack of a set end date for their detention—all sound in domestic criminal law.

Domestic criminal law, however, is inapplicable to the Petitioners. Although they appear not to grasp the significance of it, the United States is in an actual war. The Nation's armed forces are actively engaged in military combat operations overseas against an actual enemy. Casualties are occurring on a regular basis.

Petitioners argue further that Petitioner-detainees are not enemy aliens, because they come from nations friendly to the United States. *See, e.g.*, *Rasul* Brf at 2, 9; *Al Odah* Brf at 4, 8, 14. This, of course, is a non-sequitur. By taking up arms against the United States, Petitioners became enemies of the United States, irrespective of the otherwise friendly relations between the United States and the country of the respective detainee's citizenship. Even citizens of the United States, this Court has held, become enemy combatants when they take up arms against the United States. *See Ex Parte Quirin*, 317 U.S. 1, 37 (1942). Hence, this Court should dismiss Peti-

tioners' arguments and should affirm the lower courts' denials of Petitioners' writs.

ARGUMENT

Petitioners charge that detaining persons at Guantanamo Naval Base—without trial, without access to lawyers, and with no set date for their release—violates numerous constitutional rights, including the rights to due process of law, to a speedy and public trial, and to counsel.[4] *See, e.g.*, *Rasul* Brf at 2, 4, 5, 7, 9, 32; *Al Odah* Brf at 3, 4, 10, 12, 14, 37, 39. Yet, the Guantanamo detainees are not criminal suspects. Rather, they are enemy combatants captured during the ongoing war on terrorism. Their detention is preventive—to ensure that they do not again take up arms against United States forces—not punitive.[5] Hence,

> [t]he most important legal question *** is whether the United States is actually "at war." *** Indeed, much of

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[4] Rivkin1 at A__.

[5] This is not to say that charges may not be brought at some point. The President's Order establishing Military Commissions anticipates that some detainees may indeed be tried for war crimes. *See* 66 Fed. Reg. 57,833 (Nov. 16, 2001). Moreover, "unlawful" belligerency is itself a war crime for which the "unlawful combatant" may be justly tried under international law. As this Court aptly noted in *Ex Parte Quirin*, 317 U.S. 1 (1942),

> [b]y universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war **** *Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful*.

Id. at 30-31 (emphasis added). This Court noted further, regarding "an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property," that such belligerents "are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals." *Id.* at 31.

> the opposition to the detentions is based on an implicit (or explicit) denial that the United States is engaged in anything other than a new and challenging criminal law enforcement effort, more like "the war on drugs," than Vietnam, Korea, or World War I and World War II.[6]

As will be shown *infra*, the United States is actually "at war" in the sense of Vietnam, Korea, and the two World Wars rather than in the sense of "the war on drugs," which is, and always has been, primarily a law enforcement effort. Hence, it is the law of war that governs United States conduct regarding the detainees and the detainees' legal status, not the United States domestic criminal justice system with its well-established rights, protections, and obligations. The detainees at Guantanamo are captured enemy combatants, not criminals under United States domestic law.

I. THE UNITED STATES IS ACTUALLY AT WAR.

A. Under the Laws of the United States, the Nation is at War.

Following *al-Qaeda*'s unprovoked attacks on the World Trade Center towers in New York and on the Pentagon in Virginia and the crash in Pennsylvania of a fourth hijacked civilian airliner, President Bush, in his role as Commander-in-Chief, took immediate action to protect the Nation. Those heinous attacks, by themselves, created a state of war between the United States and *al-Qaeda* and its allies, obliging the President, as Commander-in-Chief, to take action.[7] *See The Prize Cases*, 67 U.S. (2 Black) 635, 668

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[6] Rivkin1 at A__.

[7] Just as President Roosevelt noted, regarding the Japanese attack on Pearl Harbor, that a state of war existed between the United States and the Empire of Japan *prior to* a formal Congressional declaration of war, *see* http://bcn.boulder.co.us/government/national/speeches/spch.html, so, too, did a state of war exist immediately following the 9-11 attacks upon

(1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. ***").[8] Further, it is the President, as Commander-in-Chief, who determines whether those who threaten the Nation have "the character of belligerents," and, once that decision is made, the courts "must be governed by the decisions and acts of the political department of Government to which this power is entrusted." *Id.* at 670; *see also In Re Yamashita*, 327 U.S. 1, 12 (1946) ("The war power *** is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy *** evils which the military operations have produced.").

The Congress, agreeing with the President that the attacks constituted acts of war, enacted legislation authorizing the President to use military force to respond to the attacks. Pub. L. No. 107-40, 115 Stat. 224 (2001) ("President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."). This Congressional action constituted a *de jure* authorization of war and ratified the President's actions. *See, e.g.*, *Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973) (holding how Congress gives its consent to engage in war to be "a discretionary matter for Congress to decide in

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the United States, despite the lack of Congressional action. *See also The Pedro*, 175 U.S. 354, 363 (1899) (recognizing that war with Spain began prior to an actual declaration by Congress based upon a prior declaration of the Spanish government).

[8] Even the *Al Odah* Petitioners agree with this Court that "'no governmental interest is more compelling than the security of the Nation.'" *Al Odah* Brf at 42 (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981)).

which form *** it will give its consent;" "[a]ny attempt to require a declaration of war as the only permissible form of assent might involve unforeseeable domestic and international consequences"); *see also The Prize Cases*, 67 U.S. at 668; *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) ("Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects and in time**** What, then, is the nature of the contest subsisting between America and France? In my judgment, it is a limited, partial, war. *Congress has not declared war in general terms; but congress has authorised hostilities* ****") (emphasis added); Alexander Hamilton, "The Examination, No. 1, 17 Dec. 1801," *reprinted in*, 3 *The Founder's Constitution* (Kurland & Lerner eds. 1987) ("when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already at war, and any declaration on the part of Congress is nugatory").

B. Under International Law, the United States is at War.

The United States military response was not only authorized by the laws of the United States, but by international law as well. *See, e.g.*, U.N. CHARTER art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations"). The right to national self-defense when attacked was immediately reaffirmed by the UN Security Council in Security Council Resolution 1368, adopted on September 12, 2001. U.N.S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001). Resolution 1368 expressed the Security Council's determination "to combat *by all means* threats to international peace and security caused by terrorist acts." *Id.* (emphasis added).

Consistent with article 51 of the UN Charter, various regional alliances of which the United States is a member

have determined the 9-11 attacks to be acts of war. Accordingly, those regional alliances have invoked the mutual defense provisions of their respective treaties. The North Atlantic Council, for example, condemned the "barbaric acts" committed against the United States and recognized the "urgency of intensifying the battle against terrorism, a battle that the NATO countries—indeed all civilised [sic] nations—must win."[9] In fact, *for the first time in the history of the Alliance*, NATO implemented article 5 of the North Atlantic Treaty, which states "that an armed attack on one or more of [the Allies] in Europe or North America shall be considered an attack against them all." *See* North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 34 U.N.T.S. 243. Article 5 specifically authorizes the "use of armed force" as a means to deal with such attacks on member states. *Id.*

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[9] North Atlantic Council, *Statement on the Terrorist Attacks*, Sept. 11, 2001, available at www.patriotresource.com/wtc/intl/0911/nato2.html. And, as this Court noted in *Hirabayashi v. United States*, 320 U.S. 81 (1943),

> [t]he war power of the national government is "the power to wage war successfully." *** It extends to every matter and activity so related to war as substantially to affect its conduct and progress. *** It embraces every phase of the national defense **** Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the means of resisting it**** Where *** the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility for war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

Id. at 93 (internal citations omitted).

Similarly, the United States and Australia invoked, *for the first time in the history of the ANZUS Pact*, article IV of the ANZUS Treaty, which reads, in pertinent part: "Each Party recognizes that an armed attack *** on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger ****" *See* Security Treaty Between Australia, New Zealand and the United States of America, Sept. 1, 1951, 131 U.N.T.S. 83, 86; Press Release Announcing Application of the Anzus Treaty, Sept. 14, 2001.[10]

Likewise, on September 21, 2001, the Foreign Ministers of the Organization of American States adopted a resolution recognizing that the attacks on the United States were also attacks against all American states that triggered the reciprocal assistance provision of the Rio Pact. *See* Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3(1), 62 Stat. 1681, 1700, 21 U.N.T.S. 77, 95; OAS Resolution on Terrorist Threat to the Americas, OEA/Ser.F/II.24, RC.24/RES.1/01, Sept. 21, 2001.[11] [12]

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[10] Available at www.patriotresource.com/wtc/intl/0914/australia.html.

[11] Available at www.yale.edu/lawweb/avalon/sept_11/oas_0921a.htm.

[12] Many world leaders also roundly condemned the attacks. *See* generally www.patriotresource.com/wtc/intl for statements by various world leaders. For example, Australian Prime Minister John Howard, who was visiting Washington on September 11, 2001, described the attacks as another "day of infamy" and promised the United States that Australia would support whatever action the United States chose to take "to properly retaliate *** to these acts of bastardry against their citizens." Danish Prime Minister Rasmussen, in addressing the opening session of the Danish Parliament, noted that the terrorist attacks on the United States were "a ruthless assault on everything we represent" and that it is "of decisive importance that the democracies strike back," including with "military pressure." Then-Foreign Minister John Manley of Canada noted that, although the attacks "took place over U.S. skies and on U.S. land, *** they were an attack against us all." German Chancellor Schroeder, in his statement to the German Parliament, repeatedly described the attacks on the United States as a "declaration of war" on the free world as a whole

* * *

Clearly, the events of 9-11 marked the entry of the United States into the war on terrorism every bit as much as the events of December 7, 1941, marked America's entry into the Second World War. The President, the Congress, United States allies, and key international bodies have all recognized that the attacks on the United States were acts of war and have responded accordingly.

In contrast, Petitioners and their *amici* fail to grasp this reality. Petitioners seem to believe that the events of 9-11 were merely especially egregious criminal acts which the criminal justice system was meant to prosecute. Petitioners wish to treat 9-11

> as a law enforcement problem, where "suspects" must be indicted, arrested (without excessive force) and processed through the civilian justice system, instead of war, where enemies can be attacked without notice and captives held until victory ****[13]

To determine whether United States courts have jurisdiction to hear Petitioners' causes, this Court must first decide whether the events of 9-11 represented merely criminal acts for which the United States criminal justice system is to provide resolution or whether 9-11 represented the commencement of war against the United States for which the military and political forces of the Nation and the law of

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and on Western values. Norwegian Foreign Minister Jagland described the attacks as attacks "on all open and democratic societies" and declared that all NATO members must be ready to play their parts in combating such acts. UK Prime Minister Tony Blair stated that "[t]his is not a battle between the United States of America and terrorism, but between the free and democratic world and terrorism." French President Jacques Chirac, in his address to the French people, made the following observation: "Never has any country in the world been the target of terrorist attacks of such scope or such violence."

[13] Rivkin1 at A__.

war are the proper tools. Such a determination cannot be made in a vacuum. The President of the United States has determined that the attacks were acts of war, not criminal acts. The Congress has likewise determined that the attacks were acts of war, not criminal acts. America's closest allies acting individually and through our various alliances have also concluded that the 9-11 attacks constituted acts of war, not merely criminal acts. Petitioners and their *amici*, on the other hand, by stressing the well-established legal rights and obligations of the American criminal justice system, erroneously argue otherwise.

II. THE EXISTENCE OF ARMED HOSTILITIES TRIGGERS APPLICATION OF THE LAW OF WAR.

Under international law, the existence of armed conflict is sufficient to trigger the law of war and its rules for dealing with belligerents. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War ("GPW"), Aug. 12, 1949, art. 2, 6 U.S.T. 3316, T.I.A.S. 3364. And, part and parcel of any war is the capture and detention of enemy combatants. In fact,

> [t]he right to detain enemy combatants during wartime is one of the most fundamental aspects of the customary laws of war and represented one of the first great humanitarian advances in the history of armed conflict. *** [T]he right to detain enemy combatants in wartime is so basic that it has rarely been adjudicated [in U.S. courts.] *** It is an inherent part of the president's authority as commander-in-chief, and was well-known to the Constitution's framers. Alexander Hamilton addressed this very point in 1801 **** Hamilton noted that "[w]ar, of itself, gives to the parties a mutual right to kill in battle, and to capture the persons and property of each other" and that the Constitution does not require specific congressional authorization for such actions, at

> least after hostilities have commenced. Indeed, he wrote, "[t]he framers would have blushed at a provision, so repugnant to good sense, so inconsistent with national safety and convenience."[14]

Over the last century, international conventions have sought to regulate the incidents of war in order to protect, *inter alia*, the health, safety, and dignity of combatants who fall into the hands of the enemy. Such conventions set forth rules to govern what is and is not permissible in war. Combatants who fall into enemy hands complying with the rules set forth in the conventions are afforded certain explicit legal protections, whereas combatants who are captured in non-compliance enjoy only basic humane standards of treatment according to the customs of war. Moreover, such combatants may also be prosecuted for war crimes.

A. In Order to Be Lawful Combatants, Forces Must Fully Comply With the Requirements Set Forth in the Hague and Geneva Conventions.

The 1907 Hague Convention set forth four requirements to be fulfilled before belligerents would be recognized as lawful combatants: (1) have a responsible command structure; (2) wear a fixed distinctive emblem recognizable at a distance; (3) carry arms openly; and (4) operate in accordance with the laws and customs of war. *See* Annex to Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907), art. 1. Failure to meet the requirements made a belligerent an unlawful combatant, which, in itself, was a war crime.

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[14] David B. Rivkin, Jr., et al., *The Law and War*, part 2, Wash. Times (Jan. 27, 2004), at A19 (quoting Alexander Hamilton, "The Examination, No. 1, 17 Dec. 1801," *reprinted in*, 3 *The Founder's Constitution* (Kurland & Lerner eds. 1987)).

The 1949 Geneva Conventions retained the four Hague requirements. Article 5 of the GPW determines to whom the GPW applies: "The present Convention shall apply to all persons referred to in Article 4 ****" *A fortiori*, the GPW does not apply to those *not* referred to in article 4. Article 4 of the Convention lists the categories of persons who qualify to be prisoners of war ("POW"), *i.e.*, who qualify to be protected by the terms of the Convention, when they fall into enemy hands. The protected categories are as follows:

> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict *** *provided that such militias and volunteer corps *** fulfil the following conditions*:
>
> > (a) that of being commanded by a person responsible for his subordinates;
> >
> > (b) that of having a fixed distinctive sign recognizable at a distance;
> >
> > (c) that of carrying arms openly;
> >
> > (d) that of conducting their operations in accordance with the laws and customs of war.[15]

[15] The GPW made clear that "members of ad hoc citizen militias and volunteer corps, including members of an 'organized resistance movement,' could be considered to be lawful combatants, entitled to the status of prisoner-of-war upon capture, *but only if they met the four Hague Regulation conditions*." Lee A. Casey, et al., *Unlawful Belligerency and Its Implications Under International Law*, *available at* www.fed-soc.org/Publications/Terrorism/unlawfulcombatants.htm. ("Casey, *Unlawful Belligerency*"). *See also id.* (the ICRC noted in its commentary on the GPW that "there was unanimous agreement about the necessity for partisans to fulfill the conditions laid down in Article 1 of the Hague Regulations and to have an adequate military organization so as to ensure

> (3) Members of regular armed forces who profess allegiance to a government or authority not recognized by the Detaining Power.
>
> (4) Persons who accompany the armed forces without actually being members thereof *** provided that they have received authorization from the armed forces which they accompany ****
>
> (5) Members of [certain merchant marine and civil aircraft crews].
>
> (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having time to form themselves into regular armed units, *provided they carry arms openly and respect the laws and customs of war*.

GPW art. 4 (emphasis added). Failure to fulfill the Hague requirements for lawful belligerency places the offender outside the protections of the GPW. *See* GPW art. 5 ("present Convention shall apply to the persons referred to in Article 4," which in turn enumerates the lawful belligerency requirements).

Moreover, as this Court noted in *Ex Parte Quirin*, unlawful combatants, like lawful combatants, are "subject to capture and detention, but *in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful*." 317 U.S. at 31 (emphasis added).[16]

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that those conditions could be fulfilled, in order for them to qualify as 'prisoners-of-war'"). The requirements in this subcategory merely reflect the inherent characteristics of a Nation's regular armed forces, to wit, the existence of a responsible command hierarchy, the wearing of a uniform distinguishing the military forces from the civilian population, the open bearing of arms, and a commitment to obeying and enforcing the laws and customs of war.

[16] American citizens may also be "enemy combatants" with respect to the United States: "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction

B. Members of *Al-Qaeda* Do Not Meet the Requirements of Lawful Belligerency and Are, Therefore, Unlawful Combatants Not Protected by the Geneva Convention Relative to the Treatment of Prisoners of War.

> There is little doubt that the members of *al-Qaeda* are unlawful combatants under both the Hague Regulations and Geneva Conventions of 1949, as well as customary international law. Although *al-Qaeda* has undertaken military-style attacks, against the United States and others, *i.e.*, it has engaged in "belligerency," its fighters do not operate under a "responsible" command structure, do not wear uniforms [*i.e.*, a distinctive sign], do not carry arms openly, and do not conduct their operations in accordance with the laws and customs of war. Failure to meet any one of these requirements would be sufficient to cast *al-Qaeda*'s operatives into the category of unlawful combatant. They meet none of them.[17]

Since members of *al-Qaeda* meet none of the four Hague requirements, they are unlawful combatants not protected by the terms of the GPW, including article 5, which provides for a hearing before "a competent tribunal" if there is any doubt as to the detainee's status with respect to the article 4 categories. Nevertheless, the Secretary of Defense has announced that the United States will convene a panel to review annually the status of all detainees at Guantanamo.[18] Such status hearings exceed the requirements in article 5.

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enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war." *Ex Parte Quirin*, 317 U.S. at 37-38.

[17] Casey, *Unlawful Belligerency*.

[18] *See* www.cbsnews.com/stories/2003/11/30/terror/main586001.shtml.

C. Taliban Forces Also Fail to Fulfill Each of the Four Requirements of Lawful Belligerency and Are, Therefore, Unlawful Combatants Not Protected by the Geneva Convention Relative to the Treatment of Prisoners of War.

Members of the Taliban also fail to fulfill the Hague requirements, each of which implicitly applies to the regular armed forces of a Party. To meet the first requirement, there must be a responsible command structure "capable of ensuring that the entire military organization complies with *jus in bello* strictures ****"[19] The Taliban appears to have had a vague, constantly changing cast of commanders with no clear lines of authority.[20] Hence, the first requirement is not met. The second requirement is that the group must wear some distinctive sign visible at a distance. The primary purpose of such a sign is to "permit[] opposing forces to identify other belligerents as lawful targets on the battlefield" and to avoid civilian casualties.[21] Taliban forces also failed to comply with this requirement. The third requirement is to carry arms openly. This requirement was probably the only requirement that was at least minimally met. The final requirement was to subscribe to and operate "in accordance with[] the laws and customs of war."[22] This the Taliban clearly failed to meet. Taliban leader Mullah Omar was quoted as saying: "'We do not accept something which somebody imposes on us under the name of human rights which is contradictory to the holy Quranic law.'"[23] Moreover, there are numerous reports that Taliban forces routinely targeted civilian populations, killed

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[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* (quoting *Women in Afghanistan: Pawns in Men's Power Struggles*, www.amnesty.org.)

and beheaded prisoners of war, treated women as spoils of war, wantonly destroyed civilian property, and the like.[24] As such, Taliban forces also fail to meet the strict requirements of lawful belligerency which would entitle them to the protections of the GPW.

* * *

Since neither the *al-Qaeda* nor the Taliban detainees meet the requirements of lawful belligerency under the 1949 Geneva Conventions, they are not POWs as defined in the GPW. Instead, as unlawful combatants, they fall outside of the protections enjoyed by POWs. Yet, assuming *arguendo* that *al-Qaeda* and Taliban members did fall within the protections of the GPW, nothing in that Convention permits an enemy combatant captured and detained pursuant to an ongoing war to challenge the legality of his detention in the courts of the Detaining Power during wartime.[25] Instead, the detainee's interests are expected to be represented, and his problems resolved, either by political representatives of the detainee's home country or by a neutral third party. And such efforts are, in fact, taking place with respect to the detainees in this matter. *See, e.g.*, *Al-Joaid* Brf at 1-2, 5 (admitting that Saudi Arabia is seeking repatriation of its nationals); Dep't of Defense News Release No. 540-03 (July 23, 2003) (announcing meetings between Australian and United States officials regarding trial procedures to be used when trying

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[24] *Id.* (and sources cited).

[25] Also, GPW art. 129 "expressly calls for implementing legislation. It is a well-established rule of treaty interpretation that a provision requiring parties to enforce treaty provisions through domestic legislation evidences an intent that the provision not be self-executing." Michael A. McKenzie, *Recent Development: Treaty Enforcement in U.S. Courts*, 34 Harv. Int'l L.J. 596, 604 (Spring 1993); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(3) (stating that provisions of non-self-executing treaties do not create an individual right to action absent domestic implementing legislation).

Australian detainees); Dep't of State Int'l Information Programs (July 15, 2003) (quoting Ruth Wedgwood, *Justice Will Be Done at Guantanamo* (discussing meetings between U.S. and UK officials regarding UK nationals detained at Guantanamo)).

III. PETITIONERS' DETENTION IS NEITHER ARBITRARY NOR UNLAWFUL UNDER THE LAWS OF THE UNITED STATES OR INTERNATIONAL LAW.

Because Petitioners believe that the war on terrorism is more akin to the "war on drugs" than to armed hostilities, their arguments reflect an emphasis on rights conferred upon the accused in the criminal justice system. Petitioners speak of certain rights to which they believe they are entitled, all of which describe an accused's rights in the criminal justice system. Yet the law of war governs detainees in this matter.[26]

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[26] *See* Kenneth Anderson, *The Military Tribunal Order: What to do with Bin Laden and al-Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 Harv. J.L. & Pub. Pol'y 591, 610-11 (Spring 2002)

> (The ability to prosecute domestic crime, and the necessity of pro viding constitutional standards of due process, including the extraordinarily complex rules of evidence, suppression of evidence, right to counsel, and the rights against self-incrimination have developed *within* a particular political community, and fundamentally reflect decisions about rights within a fundamentally domestic, democratic setting in which all of us have a stake ****
>
> It is a system, in other words, that fundamentally treats crime as a *deviation from* the domestic legal order, not fundamentally an *attack upon* the very basis of that order. Terrorists who come from outside this society, including those who take up residence inside this society for the purpose of destroying it, cannot be assimilated into the structure of the ordinary criminal trial. *** U.S. district courts are, by constitutional design, for criminals and not for those who are at once criminals *and* enemies. U.S. district courts are eminently

A. Enemy Combatants Captured in War Are Not Subject to Indefinite Detention.

Petitioners complain that no set date for their release has been established, *i.e.*, that they are being detained indefinitely. *E.g.*, *Rasul* Brf at 4 n.3; *Al Odah* Brf at 14. Yet, these Petitioners are not being held "indefinitely" any more than men taken prisoner at the beginning of World Wars I and II, the Korean War, and the Vietnam War were held indefinitely upon their capture. At the beginning of any war, it is impossible to know with any certainty when the war will end and the captives will be set free. Merely because the end of the war is not currently in sight and the end may not occur for years is no legitimate basis to claim that Petitioners are being held indefinitely in violation of their rights. Petitioners are being detained to ensure that they do not rejoin the fight. When the war ends and the fighting is over, however, captives must be either repatriated or tried for violations of the laws of war. GPW art. 118.[27] The *Rasul* Petitioners even quote the prison commander at Guantanamo as confirming that the prison there would be used "'as long as the global war on terrorism is ongoing,'"*see Rasul* Brf at 5 n.4 (quoting Charles Savage, *Growth at Base Shows Firm Stand on*

> unsuited by practicality but also by concept for the task of addressing those who planned and executed September 11. (emphasis in original)).

Id.

[27] GPW art. 118 reads, in pertinent part: "Prisoners of war shall be released and repatriated without delay *after the cessation of active hostilities* ****" (emphasis added). Yet, as with the Nuremberg Trials following World War II, nothing prevents trying captives for war crimes or crimes against humanity. 18 U.S.C. § 2441 defines war crimes under the laws of the United States, including "grave breaches" of the 1949 Geneva Conventions. The Nuremberg Charter defines "crimes against humanity" to include "murder *** and other inhumane acts committed against any civilian population, before or during the war ****" Nuremberg Charter, art. 6.c.

Military Detention, Miami Herald, Aug. 24, 2003, at A1), thereby confirming that Petitioners' detention is bounded by the duration of the war on terrorism, a duration for Petitioners' detention which comports fully with the provisions of the Geneva Conventions. GPW art. 118 (concerning release and repatriation). Thus, Petitioners' complaint about indefinite detention is baseless and should be rejected.

B. Enemy Combatants Captured in War Need Not Be Charged To Be Detained.

Petitioners complain that they have not been informed of the charges, if any, against them. *E.g.*, *Rasul* Brf at 2, 4, 9; *Al Odah* Brf at 4. Captives in wartime are detained in preventive, not punitive, detention. They are detained as a consequence of their belligerency and capture, not because they have committed some criminal offense for which they should be tried.

> [T]he capture and detention of enemy combatants is not a criminal proceeding. The purpose of their detention (including the detention of unlawful combatants) is not to punish, nor is it to otherwise stigmatize the individual. The detention of enemy combatants is solely to ensure that they do not rejoin the fight, or continue to support the opponent's war effort.[28]

This is not to say that unlawful combatants have not committed offenses against the law of war for which they *may* be tried. Should detainees be charged for some offense, they are informed *at that time* of the charges against them. Moreover, pursuant to Military Commission Order No. 1, *see* Dep't of Defense Military Commission Order No. 1 (March 21, 2002), detainees who are charged under the Order are

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[28] David B. Rivkin, Jr., et al., *Enemy Combatant Determinations and Judicial Review*, The Federalist Society for Law and Public Policy Studies ("Rivkin, *Enemy Combatant*"), at 8.

given access to counsel and the ability to present a defense before an impartial tribunal. Unless and until charges are filed, detainees—whether POWs or unlawful combatants—are not entitled to the procedures set forth in the Military Commission Order, and Petitioners' complaints about not being informed of the charges against them are without foundation and should be rejected.

C. Enemy Combatants Captured in War Have No Right to Counsel As A Result of Their Capture and Detention.

Petitioners complain that they have been denied access to counsel. *E.g.*, *Rasul* Brf at 2, 9; *Al Odah* Brf at 4, 8, 14. Once again, since Petitioners' detention is preventive, not punitive, there is no need for counsel. Should the President determine that a detainee is to be tried before a military commission for violating the law of war, that detainee will be given access to counsel. *See* Dep't of Defense Military Commission Order No. 1 (March 21, 2002). Absent the bringing of criminal charges, however, detainees have no right to counsel, and Petitioners' arguments to the contrary should be rejected.

D. Persons From Otherwise Friendly Nations Who Take Up Arms Against the United States Make Themselves Enemy Aliens of the United States.

Petitioners argue that, since they are nationals of nations friendly to the United States, they cannot be enemy aliens. *E.g.*, *Rasul* Brf at 9, 22, 38; *Al Odah* Brf at 9, 26. This argument stretches credulity to the limit. Citizens of other lands who take up arms against the United States make themselves enemies of the United States, irrespective of the state of relations between the United States and the enemy combatant's respective homeland. The nationality of the captured enemy combatant is irrelevant. This Court has even noted that U.S. citizens can be enemy combatants against the United States. *See Ex Parte Quirin*, 317 U.S. at 37. Hence, it

is the conduct of the national of the friendly nation that makes him an enemy alien to the United States, and the mere fact that he is a national of a friendly nation will not save him from the consequences of his belligerent conduct. Petitioners' argument is wrong on this point and should be rejected.

E. International Law Does Not Require the United States to Permit Guantanamo Detainees Access to Its Domestic Courts to Challenge the Legality of Their Detention.

Petitioners argue that they have the right to challenge the legality of their detention by writ of habeas corpus based on, *inter alia*, article 5 of the GPW and articles 9(1) and 9(4) of the International Covenant on Civil and Political Rights ("ICCPR"), Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368. *E.g.*, *Rasul* Brf at 2, 25 n.28; *Al Odah* Brf at 38-39. Neither argument is valid.[29]

1. *Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War does not require the United States to grant Petitioners a hearing to challenge their detention.*

Petitioners are wrong regarding the sweep and purpose of article 5 of the GPW. Article 5 reads as follows:

> 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 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

[29] In their brief, the UK Members of Parliament also cite the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3, as a basis to require constitutional due process for the Guantanamo detainees. MP Brf at 16 n.74. Yet, the United States is not a party to the 1977 Additional Protocols and is, therefore, not bound by their terms.

> 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.

GPW art. 5. Article 5 only applies to those meeting the criteria set forth in article 4 of the GPW. *See* discussion *supra* at section II. B. & C., showing that *al-Qaeda* and Taliban members are unlawful combatants not covered by the GPW. The purpose of article 5 is not to require a judicial process through which a captive can challenge his status as an enemy combatant—as Petitioners are seeking to do in this matter—since enemy belligerency is assumed in article 5: "Article 5 *assumes* that the individual is an enemy combatant, having 'committed a belligerent act and having fallen into the hands of the enemy.'"[30] Further, the ICRC Commentary on article 5 limits its application to "deserters" and to those "who accompany the armed forces and have lost their identity card."[31] As such, article 5 is to be narrowly, not broadly, interpreted. Moreover, under the 1949 Conventions, detainees have no private right of action to challenge the legality of their detention.[32]

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[30] Rivkin, *Enemy Combatant*, at 9 (quoting GPW art. 5) (emphasis added).

[31] ICRC Commentary on GPW art. 5; *see also* note 34, *infra* (confirming the creation of a panel to review annually the status of all detainees).

[32] GPW art. 129 "expressly calls for implementing legislation. It is a well-established rule of treaty interpretation that a provision requiring parties to enforce treaty provisions through domestic legislation evidences an intent that the provision not be self-executing." Michael A. McKenzie, *Recent Development: Treaty Enforcement in U.S. Courts*, 34 Harv. Int'l L.J. 596, 604 (Spring 1993); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(3) (stating that provisions of non-self-executing treaties do not create an individual right to action absent domestic implementing legislation).

2. *The International Covenant on Civil and Political Rights does not require the United States to grant Petitioners a hearing to challenge their detention.*

Petitioners cite articles 9(1) and 9(4) of the ICCPR as requiring the United States to permit Petitioners to challenge the legality of their detention in U.S. courts. *E.g.*, *Rasul* Brf at 25 n.28. Although the United States is a signatory to the ICCPR, its ratification document clearly stated that the United States considered articles 1 through 27, inclusive, to be non-self-executing. *See* U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 Cong. Rec. S4783, S4784 (daily ed. Apr. 2, 1992). As such, Petitioners must show that the Congress has enacted specific legislation to make the terms of those articles applicable under the laws of the United States. Petitioners have not met this burden. Further, the ICCPR was never intended to supplant the law of war and to impose criminal justice rules and procedures during wartime. To argue otherwise would turn the law of war on its head. Since detention of enemy combatants results directly from the fact of their armed belligerency and since its purpose is solely to ensure that the captives do not rejoin the fight, the provisions of the ICCPR do not apply to war situations involving captured enemy combatants. As such, the ICCPR does not entitle Petitioners to a hearing in United States courts.

* * *

Even recourse to the Great Writ is different during times of war. In their amicus brief discussing the history and reach of the Great Writ within the nations and traditions of the British Commonwealth, the Commonwealth Lawyers Association admits that the Great Writ is not available to "enemy aliens" or "prisoners of war" "to whom different considerations apply." Commonwealth Brf at 9 n.19. The Commonwealth

Lawyers also note that the GPW provides its own remedies. *Id.* at 3 n.8. Nowhere in the GPW is there any private right of action for those who wish to challenge the legality of their detention. In any event, once again, the reach of the Great Writ is conditioned by whether one is concerned with detention under the criminal justice system (which is not the case with the Guantanamo detainees) or detention pursuant to ongoing hostilities and the law of war (which fully characterizes detention at Guantanamo). And it is not the Department of Justice that bears responsibility for the Guantanamo detainees, but rather the Department of Defense. *See Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950) (this Court has "characterized as 'well-established' the power of the military to exercise jurisdiction over *** enemy belligerents, prisoners of war, or others charged with violating the laws of war"). This comports fully with the terms of the GPW. *See* GPW art. 39 (requiring that captured enemy combatants be detained in camps "under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power").

F. The United States Does Not Wish To Detain the Innocent At Guantanamo.

Petitioners also allege that innocent victims are intentionally being detained at Guantanamo without any recourse to challenge their detention. *E.g.*, *Rasul* Brf at 47, 49; *Al Odah* Brf at 3 n.3, 10, 12, 39. From this premise, Petitioners then argue that they must have access to United States domestic courts to remedy this alleged wrong. Yet, the GPW does not permit a detainee to challenge the legality of his detention in the courts of the detaining power during wartime. Further, as this Court observed in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974): "Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a

reason to find standing." *Id.* at 227. The same applies here. Furthermore, there is ample evidence that United States military authorities are identifying those who should no longer be detained and are releasing such persons. *E.g.*, *Rasul* Brf at 6, 11 n.7; *Al Odah* Brf at 49 & n.107; *see also* DOD News Release No. 882-03 (Nov. 24, 2003) (announcing the release of 20 detainees on November 21). This, in itself, indicates that there is, in fact, a process for screening detainees in an attempt to separate those erroneously detained from those legitimately detained. Petitioners seem to imply that the United States Government is detaining the innocent for some sinister reason. Yet,

> [l]eaving aside the dark mutterings of conspiracy theorists, *** no one has yet to provide a plausible reason why the United States would intentionally hold dozens, or hundreds, of men that it knows are not *al-Qaeda* or Taliban members—feeding, clothing and sheltering them at the taxpayers' expense. *** The purpose of detention is twofold: to remove captives from active service and to obtain information regarding future attacks. Seizing civilians achieves neither goal and wastes scarce resources. Accordingly, the United States has every incentive to identify accurately enemy combatants.[33]

As Petitioners' own briefs attest, *see*, *e.g.*, *Rasul* Brf at 6, 11 n.7; *Al Odah* Brf at 49 & n.107, Guantanamo detainees are, in fact, being released.[34] Hence, Petitioners' allegations that the innocent are being unlawfully detained are simply wrong and should be rejected.[35]

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[33] David A. Rivkin, Jr., *The Law and War*, part 4, Wash. Times (Jan. 29, 2004), at A23.

[34] Secretary Rumsfeld has announced the creation of a panel to review annually the status of all Guantanamo detainees. *See* note 18, *supra*.

[35] *See also* www.csmonitor.com/2002/0404/p01s03-uspo.html ("*Al-Qaeda* operatives use multiple aliases to obscure their true identities.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the decision of the United States Court of Appeals for the District of Columbia.

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They're known to carefully compartmentalize information **** [T]hey are likely to have 'a whole memorized agenda' of 'useless information' for deceiving interrogators ****"). This, of course, lengthens considerably the process of identifying which detainees should be released.