[ORAL ARGUMENT TO BE SCHEDULED]

Nos. 05-5064, 05-5095 through 05-5116

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KHALED A.F. AL ODAH, et al.,
Petitioners-Appellees/Cross-Appellants,

v.

UNITED STATES OF AMERICA, et al.,
Respondents-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OPENING BRIEF FOR THE UNITED STATES, ET AL.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici.

1. In Hicks (Rasul) v. Bush, No. 02-CV-0299-CKK (D.D.C.), petitioner in the district court is David Hicks. Respondents in the district court are George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Gordon R. England, Secretary of the Navy; John D. Altenburg, Jr., Appointing Authority for Military Commissions; Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Brice A. Gyurisko, Commander, Joint Detention Operations Group.

2. In Al-Odah v. United States, No. 02-CV-0828-CKK (D.D.C.), the 12 petitioners in district court are Fawzi Khalid Abdullah Fahad Al Odah, Omar Rajab Amin, Nasser Nijer Naser Al Mutairi, Khalid Abdullah Mishal Al Mutairi, Abdullah Kamal Abdullah Kamal Al Kandari, Abdulaziz Sayer Owain Al Shammari, Abdullah Saleh Ali Al Ajmi, Mohammed Funaitel Al Dihani, Fayiz Mohammed Ahmed Al Kandari, Fwad Mahmoud Al Rabiah, Adil Zamil Abdull Mohssin Al Zamil, and Saad Madai Saad Ha Wash Al-Azmi. "Next friend" petitioners in the district court are Khaled A.F. Al Odah, Mohammad R. M. R. Ameen, Nayef N.N.B.J. Al Mutairi, Meshal A.A. Th Al Mutairi, Mansour K.A. Kamel, Sayer O.Z. Al Shammari, Mesfer Saleh Ali Al Ajmi, Mubarak F.S.M. Al Daihani, Mohammad A.J.M.H. Al Kandari, Monzer M.H.A. Al Rabieah, Walid Z.A. Al Zamel, and Hamad Madai Saad.

Respondents in the district court are the United States of America; George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Gen. Richard B. Myers, Chairman, Joint Chiefs of Staff; Gen. Rick Baccus, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Terry Carrico, Commander, Camp Delta, Camp X-Ray, Guantanamo Bay, Cuba.

3. In Habib v. Bush, No. 02-CV-1130-CKK (D.D.C.), petitioner in the district court is Mamdouh Habib. Next friend petitioner is Maha Habib. Respondents in district court are George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Gen. Rick Baccus, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Lt. Col. William Cline, Commander, Camp Delta.

4. In Kurnaz v. Bush, No. 04-CV-1135-ESH (D.D.C.), petitioner in the district court is Murat Kurnaz. Next friend petitioner is Rabiye Kurnaz.

Respondents in district court are George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

5. In Khadr v. Bush, No. 04-CV-1136-JDB (D.D.C.), petitioner in the district court is Omar Khadr. Next friend petitioner is Fatmah Elsamnah.

Respondents in district court are George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

6. In Begg v. Bush, No. 04-CV-1137-RMC (D.D.C.), petitioners in the district court are Moazzam Begg and Feroz Ali Abbasi. Next friend petitioners are Sally Begg and Zumrati Zaitun Juma. Respondents in district court are George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

7. In El-Banna v. Bush, No. 04-CV-1144-RWR (D.D.C.), petitioners in the district court are Jamil El-Banna, Bisher Al-Rawi, and Martin Mubanga. Next friend petitioners are Sabah Sunnrqrout, Jahida Sayyadi, and Kathleen Mubanga.

Respondents in district court are George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

8. In Gherebi v. Bush, No. 04-CV-1164-RBW (D.D.C.), petitioner in the district court is Falen Gherebi (he is also known as Salim Gherebi and Falen Gherebi). Next Friend petitioner is Belaid Gherebi.

Respondents in district court are George W. Bush, President; Donald Rumsfeld, Secretary of Defense; and "1,000 Unknown Named United States Military Personnel and Government Officers and/or Officials."

9. In Anam v. Bush, No. 04-CV-1194-HHK (D.D.C.), the 14 petitioners in the district court are Suhail Abdu Anam, Fahmi Abdullah Ubad Al-Tawlaqi (also known

as Fahmi Abdullah Ahmed), Bisher Naser Ali Almarwalh (also known as Bashir Naser Ali Almarwalh and Bashir Nasir Ali Al-Marwala), Musaab Omar Al-Madhwani (also known as Musa'ab Omar Madhwani), Abdulkhaliq Al-Baidhani (also known as Abdul Khaleq Ahmed Al-Baidandi), Ali Ahmed Mohammed Al Razehi, Saeed Ahmed Al-Sarim, Imad Abdullah Hassan, Jalal Salim Bin Amer, Ali Yahya Mahdi (also known as Ali Yahaya Mahdi Al-Rimi), Atag Ali Abdoh (also known as Atag Ali Abdoh Al Hag), Khalid Ahmed Kassim, Fahmi Abdullah Ahmed Abdualaziz Abdoh Al Swidi (also known as Abdualaziz Abdoh Alsswidi), and Ali Hussin Al-Tis.

Next friend petitioners in the district court are Mohamed Abdu Anam; Huissen Naser Ali Almarwalh; Ali Omar Madhwani; Khalid Al-Baidhani; Abdullah Ahmed Mohammed Al Razehi; Samir Ahmed Al-Sarim; Amro Abdullah Hassan; Faez Bin Amer; Mohamed Yahya Mahdi; Atag Ali Abdoh Al Hag; Fadhle Ahmed Kassim; Abdullah Ahmed Ubad Al-Tawlaqi; Kmal Abdullah Ahmed; Adnan Abdoh Alswidi; and Hadi Hussin Al-Tis.

Respondents in district court are George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

10. In Almurbati v. Bush, No. 04-CV-1227-RBW, the six petitioners in district court are Isa Ali Abdulla Almurbati, Adel Kamel Abdulla Hajee, Salah Abdul Rasool Al Bloushi, Abdullah Majed Sayyah Hasan Alnoaimi, Salman Bin Ibrahim Bin

Mohammed Bin Ali Al-Kalifa, and Jum'ah Mohammed Abdullatif Aldossari. Their next friend petitioners are Mohamad Ali Abdulla Almurbati; Abdullah Kamel Abdulla Hajee; Abdul Rasool Ali Al Bloushi; Majed Sayah Alnoaimi; Ibrahim Bin Mohammed; Bin Ali Al-Khalifa; and Khalid Mohammed Abdullatif Aldossari.

Respondents in district court are George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

12. In Abdah v. Bush, No. 04-CV-1254-HHK, the 14 petitioners listed in district court are Mahmoad Abdah, Majid Mahmoud Ahmed (also known as Majed Mohmood, and Majid M. Abdu Ahmed), Abdulmalik Abdulwahhab Al-Rahabi, Makhtar Yahia Naji Al-Wrafie, Aref Abd Il Rheem, Yasein Khasem Mohammad Esmail, Adnan Farhan Abdul Latif, Jamal Mar'i, Othman Abdulraheem Mohammad, Adil Saeed El Haj Obaid, Mohamed Mohamed Hassan Odaini, Sadeq Mohammed Said, Farouk Ali Ahmed Saif, and Salman Yahaldi Hsan Mohammed Saud.

Next friend petitioners in district court are Mahmoad Abdah Ahmed; Mahmoud Ahmed; Ahmed Abdulwahhab; Foade Yahla Naji Al-Wrafie; Aref Abd Al Rahjm; Jamel Khasem Mohammad; Mohamed Farhan Abdul Latif; Nabil Mokamed Mar'i; Araf Abdulraheem Mohammad; Nazem Saeed El Haj Obaid; Bashir Mohamed Hassan Odaini; Abd Alsalam Mohammed Saeed; Sheab Al Mohamedi; and Yahiva Hsane Mohammed Saud Al-Rewaye.

Respondents in district court are George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; and Col. Nelson J. Cannon, Commander, Camp Delta.

13. Numerous amici filed briefs in the Supreme Court when the Rasul/Al Odah cases were before that Court: John J. Gibbons, et al.; Diego C. Asencio, et al.; Commonwealth Lawyers Association; Former American Prisoners of War; Human Rights Institute of International Bar Association; Fred Korematsu; International Law Experts Curtis F.J. Doebbler, et al.; Retired Military Officers; International Law and Jurisdiction Professors; International Commission of Jurists, et al.; Omar Ahmed Khadr; Abdullah Al-Joaid; Nathaniel R.Jones, et al.; Bipartisan Coalition of National and International Non-Government Organizations; Legal Historians Listed; Former U.S. Government Officials; National Institute of Military Justice; 175 Members of Both Houses of Parliament of the United Kingdom of Great Britain and Northern Ireland; Center for Justice and Accountability, et al.; Hungarian Jews and Bougainvilleans; American Center for Law & Justice; Washington Legal Foundation, et al.; Citizens for the Common Defense; Former Attorneys General of the United States, et al.; Law Professors Kenneth Anderson, et al.; Bill Owens, et al.; and Alabama, Ohio, Texas, and Virginia.

On remand to the district court, the following amici appeared: Center for International Human Rights of Northwestern University School of Law; Marco Sassoli;

Vaughan Lowe; Fritz Kalshoven; Guy S. Goodwin-Gill; Louise Doswald-Beck; David C. Vladeck; Carlos M. Vasquez; David Sloss; Anne-Marie Slaughter; David Scheffer; Judith Resnick; Jennifer S. Martinez; Kevin R. Johnson; Derek Jinks; Oona Hathaway; Ryan Goodman; Martin S. Flaherty; William S. Dodge; David D. Cole; Sarah H. Cleveland; Rosa Ehrenreich Brooks; Bruce Ackerman; and Charles B. Gittings, Jr.

B. Rulings Under Review.

These consolidated cross-appeals seek review of the order and memorandum opinion "Denying in Part and Granting in Part Respondents' Motion to Dismiss or for Judgment as a Matter of Law," entered by Judge Joyce Hens Green on January 31, 2005, in In re Guantanamo Detainee Litigation, 02-CV-0299 (CKK), 02-CV-0828 (CKK), 02-CV-1130 (CKK), 04-CV-1135 (ESH), 04-CV-1136 (JDB), 04-CV-1137 (RMC), 04-CV-1144 (RWR), 04-CV-1164 (RBW), 04-CV-1194 (HHK), 04-CV-1227 (RBW), 04-CV-1254 (HHK). The opinion is reported at In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005). Judge Green was coordinating the numerous related Guantanamo detainee cases and issued this ruling with respect to eleven of those cases (the full titles of those 11 habeas cases are set out under heading A). Judge Green certified the January 31 order in a separate order issued on February 3, 2005. That order is unreported.

Petitioners in Al Odah appeal from the stay issued by Judge Green on February, 3, 2005, in In re Guantanamo Detainee Cases, 02-CV-0299 (CKK), 02-CV-0828

(CKK), 02-CV-1130 (CKK), 04-CV-1135 (ESH), 04-CV-1136 (JDB), 04-CV-1137 (RMC), 04-CV-1144 (RWR), 04-CV-1164 (RBW), 04-CV-1194 (HHK), 04-CV-1227 (RBW), 04-CV-1254 (HHK), and Judge Green's denial of the motion for reconsideration issued under the same caption on February 7, 2005. The stay order is unreported; the opinion denying reconsideration is reported at Al Odah v. United States, 355 F. Supp. 2d 482 (D.D.C. 2005).

C. Related Cases.

1. The Al Odah and Rasul cases, listed above, were previously before this Court. See Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), reversed and remanded, Rasul v. Bush, 124 S. Ct. 2686 (2004).

2. There is a related habeas case brought by a detainee held as an enemy combatant at the Guantanamo Naval Base, Hamdan v. Rumsfeld, 04-CV-1529 (D.D.C.) (J. Robertson), that is currently pending on appeal to this Court. Hamdan v. Rumsfeld, No. 04-5393 (D.C. Cir.) (argued on April 7, 2005). Although that appeal focuses on whether Hamdan can be subject to a military commission, there is an overlap of issues between the Hamdan appeal and the appeal in the present cases.

3. There are 2 related habeas cases brought by detainees at the Guantanamo Naval Base, Khalid v. Bush, No. 04-CV-1142 (D.D.C.) (J. Leon); Boumediene v. Bush, No. 04-CV-1166 (D.D.C.) (J. Leon), that have been appealed to this Court. They are docketed in this Court as Nos. 05-5062, 05-5063. This Court has ordered

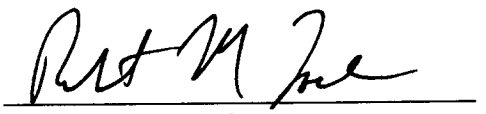
those appeals to be scheduled for oral argument together with these present appeals.

4. Judge Green's order of January 31 also directed that petitioners' counsel be given access to classified information contained in the government's unredacted factual returns to the petitions. Judge Green declined to certify this portion of her order under § 1292(b), but on March 14, the government filed a notice of appeal from the order. That appeal is pending before this Court as No. 05-5118.

5. There are 48 other related habeas cases brought by detainees at the Guantanamo Naval Base pending in the district court in this District: Belmar v. Bush, No. 04-1897 (J. Collyer); Al-Qosi v. Bush, 04-CV-1937 (J. Friedman); Al-Marri v. Bush, No. 04-2035 (J. Kessler); Paracha v. Bush, No. 04-2022 (J. Friedman); Zemiri v. Bush, No. 04-2046 (J. Kollar-Kotelly); Deghayes v. Bush, No. 04-CV-2215 (J. Collyer); Abdullah v. Bush, No. 05-CV-23 (J. Roberts); Mustapha v. Bush, No. 05-CV-22-JR (J. Robertson); Al-Joudi v. Bush, 05-CV-0301 (J. Kessler); Al-Mohammed v. Bush, No. 05-CV-0247 (J. Kennedy); Al-Adahi v. Bush, No. 05-CV-280 (J. Kollar-Kotelly); Al-Wazan v. Bush, 05-CV-0329 (J. Friedman); El-Mashad v. Bush, No. 05-CV-270 (J. Robertson); Al-Anazi v. Bush, 05-CV-0345 (J. Bates); Alhami v. Bush, 05-CV-0359 (J. Kessler); Ameziane v. Bush, 05-CV-0392 (J. Huvelle); M.C. v. Bush, 05-CV-0430 (J. Huvelle); Kabir v. Bush, 05-CV-0431 (J. Leon); Batarfi v. Bush, 05-CV-0409 (J. Kennedy); Does 1-570 v. Bush, 05-CV-313C (J. Kollar-Kotelly); Sliti v. Bush, 05-CV-429 (J. Leon); Qayed v. Bush, 05-CV-0454 (J. Urbina); Aziz v. Bush, 05-CV-

492 (J. Robertson); Qassim v. Bush, 05-CV-497 (J. Robertson); Al-Shihry v. Bush, 05-CV-490 (J. Friedman); Al-Oshan v. Bush, 05-CV-520 (J. Urbina); Al-Oshan v. Bush, 05-CV-533 (J. Leon); Al Shamri v. Bush, 05-CV-551 (J. Roberts); Tumani v. Bush, 05-CV-526 (J. Urbina); Al Rashaidan v. Bush, 05-CV-586 (J. Roberts); Mokit v. Bush, 05-CV-621 (J. Kennedy); Al-Salahi v. Bush, 05-CV-569 (J. Robertson); Mammar v. Bush, 05-CV-573 (J. Leon); Al-Sharekh v. Bush, 05-CV-583 (J. Kennedy); Magram v. Bush, 05-CV-584 (J. Kennedy); Al Daini v. Bush, 05-CV-634 (J. Kennedy); Errachidi v. Bush, 05-CV-640 (J. Robertson); Ahmed v. Bush, 05-CV-665 (J. Roberts); Zaeef v. Bush, 05-CV-640 (J. Kollar-Kotelly); Battayav v. Bush, 05-CV-714 (Robertson); Aboassy v. Bush, 05-748 (J. Kennedy); Adem v. Bush, 05-CV-723 (J. Kennedy); Al Hamamy v. Bush, 05-CV-766 (J. Leon); Hamlily v. Bush, 05-CV-763 (J. Bates); Al Habashi v. Bush, 05-CV-765 (J. Sullivan); Imran v. Bush, 05-CV-764 (J. Kollar-Kotelly); Hamoodah v. Bush, 05-CV-795 (J. Kennedy); and Abdulaziz v. Bush, 05-CV-___.

6. There is also a related Bivens case: Rasul v. Rumsfeld, No. 04-CV-1864 (D.D.C.). Counsel is not aware at this time of any other related cases within the meaning of D.C. Cir. Rule 28(a)(1)(C).



Robert M. Loeb
Counsel for Appellants

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GLOSSARY

CSRT ..... Combatant Status Review Tribunal

Geneva Convention ..... Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949

JA. ..... Joint Appendix

POW ..... Prisoner of War

[ORAL ARGUMENT TO BE SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA, et al.,
Respondents-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OPENING BRIEF FOR THE UNITED STATES, ET AL.

STATEMENT OF JURISDICTION

In these habeas actions, the district court had jurisdiction under 28 U.S.C. §§ 1331 and 2241. On January 31, 2005, the district court entered an order granting in part and denying in part the Government's motion to dismiss. On February 3, that court certified its order for interlocutory appeal under 28 U.S.C. § 1292(b). On February 9, the Government applied to this Court for an interlocutory appeal, and

on February 22, petitioners applied for a cross-appeal. This Court granted both applications on March 10.

STATEMENT OF THE ISSUES

1. Whether the Due Process Clause of the Fifth Amendment applies to aliens captured abroad and held at Guantanamo Bay, Cuba.

2. If so, whether such aliens may be detained as enemy combatants based on formal adjudications conducted by Combatant Status Review Tribunals.

3. Whether the Third Geneva Convention is judicially enforceable at the behest of individual aliens.

4. If so, whether the President permissibly determined that members of the Taliban do not qualify for prisoner-of-war status under the Convention.

5. Whether the President is a proper respondent in these cases.

STATEMENT OF THE CASE

Petitioners are aliens captured abroad in the course of military operations against al Qaeda and the Taliban. They are being held as enemy combatants at Guantanamo Bay, Cuba. Petitioners filed habeas actions and asserted that their detention violates the Fifth Amendment Due Process Clause and the Third Geneva Convention, inter alia. The district court denied the government's motion to

dismiss these claims, but then certified its order for appeal under 28 U.S.C. § 1292(b).

PROVISIONS AT ISSUE

The relevant texts of the Fifth Amendment, the Third Geneva Convention, and the President's Memorandum regarding the applicability of the Geneva Conventions to al Qaeda and the Taliban are set forth in an addendum to this brief.

STATEMENT OF FACTS

1. On September 11, 2001, the United States endured a foreign attack more savage, deadly, and destructive than any other sustained by the Nation in its history. That morning, members of the al Qaeda terrorist network hijacked four commercial airliners and crashed them into targets in the Nation's financial center and its seat of government. The attacks killed almost 3,000 people, injured thousands more, destroyed billions of dollars in property, and exacted a heavy toll on the Nation's infrastructure and economy.

The President took immediate action to defend the country and prevent additional attacks, and Congress swiftly approved his use of "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." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001).

The President ordered U.S. Armed Forces to subdue both the al Qaeda terrorist network and the Taliban regime that harbored it in Afghanistan. Although our troops have removed the Taliban from power and dealt al Qaeda forces a heavy blow, armed combat with al Qaeda and the Taliban remains ongoing. Many courageous Americans have been killed and wounded in combat, and many more continue to put themselves in harm's way in our mission to defeat al Qaeda and the Taliban and to protect this Nation from further attacks.

During these conflicts, the United States, consistent with the law and settled practice of armed conflict, has seized many hostile persons and detained a small proportion of them as enemy combatants. Approximately 520 of these enemy combatants are being held at the U.S. Naval Base at Guantanamo Bay, Cuba. Each of the Guantanamo Bay detainees was captured abroad and is a foreign national.

2. Each Guantanamo Bay detainee has received a formal adjudicatory hearing before a Combatant Status Review Tribunal ("CSRT"). Those tribunals, established pursuant to written orders by the Deputy Secretary of Defense and the Secretary of the Navy, were created specifically "to determine, in a fact-based proceeding, whether the individuals detained * * * at the U.S. Naval Base

Guantanamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation." JA 1191.

During the CSRT proceedings, each detainee received substantial procedural protections that were consistent with and based upon the procedural protections provided by Army regulations for Article 5 hearings under the Geneva Convention. See Army Regulation 190-8. Among other things, each detainee received notice of the unclassified factual basis for his designation as an enemy combatant and an opportunity to testify, call witnesses, and present relevant and reasonably available evidence. JA 1197. Each detainee also received assistance from one military officer designated as his "personal representative for the purpose of assisting the detainee in connection with the [CSRT] review process" (JA 1187). Another military officer, the recorder of each tribunal, is also required to present any evidence which might "suggest that the detainee should not be designated as an enemy combatant" (JA 1203). Each tribunal comprised three military officers sworn to render an impartial decision and in no way "involved in the apprehension, detention, interrogation, or previous determination of status of the detainee." JA 1194. Each tribunal decision was subject to mandatory review first by the CSRT Legal Advisor and then the CSRT Director. JA 1202. Out of 558 CSRTs, 38 have

resulted in determinations that detainees are not enemy combatants. See CSRT Summary, http://www.defenselink.mil/news/Mar2005/d20050329csrt.pdf.

3. Several of the Guantanamo Bay detainees have filed habeas corpus actions. In Rasul v. Bush, 215 F. Supp.2d 55, 65-73 (D.D.C. 2002), the district court dismissed two such actions on the ground that, under Johnson v. Eisentrager, 339 U.S. 763 (1950), neither the federal habeas statute (28 U.S.C. § 2241) nor the general federal question statute (28 U.S.C. § 1331) extends habeas corpus jurisdiction to aliens held outside the sovereign territory of the United States.

This Court affirmed the jurisdictional dismissal. Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003). Citing Eisentrager, it agreed that "no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees." Id. at 1141. This Court further concluded that, under Eisentrager and other precedents, the Fifth Amendment does not apply to aliens held outside the sovereign territory of the United States, including aliens held at Guantanamo Bay, Cuba. See id. at 1140-44.

The Supreme Court reversed this Court on jurisdictional grounds and remanded the matter to the district court. Rasul v. Bush, 124 S. Ct. 2686 (2004). The Court reasoned that, on the question of "statutory jurisdiction" under 28 U.S.C. § 2241, Eisentrager had implicitly rested on the narrow construction of the

habeas statute adopted in Ahrens v. Clark, 335 U.S. 188 (1948), and was therefore implicitly overruled on that question by Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973). See Rasul, 124 S. Ct. at 2694-95. The Court further reasoned that the text of the habeas statute, which was conceded to apply extraterritorially to American citizens, "draws no distinction between Americans and aliens." Id. at 2696. Finally, after "hold[ing] that § 2241 confers * * * jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base," the Court adopted a parallel construction of 28 U.S.C. § 1331. Id. at 2698-99. In concluding its opinion, the Court stressed that it had resolved only the question of jurisdiction, and had not addressed the merits of any Fifth Amendment or other claim raised by the detainees:

> Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now. What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. Answering that question in the affirmative, we reverse the judgment of the Court of Appeals and remand for the District Court to consider in the first instance the merits of petitioners' claims.

Id. at 2699.

4. After the remand in Rasul, numerous other Guantanamo Bay detainees filed their own habeas petitions. To date, two district courts have resolved dispositive motions in these cases.

a. In the order under review here, Judge Green denied in part the Government's motion to dismiss the Fifth Amendment and Geneva Convention claims brought by 54 detainees in 11 cases. JA 1228-1302.

Judge Green concluded that the Fifth Amendment applies extraterritorially to aliens held at Guantanamo Bay, Cuba (JA 1245-65) and that the CSRT procedures fail to satisfy the Due Process Clause of that Amendment (JA 1265-95). In so doing, she identified three perceived flaws in the CSRT procedures: first, that only the personal representative of a detainee, as opposed to the detainee or his attorney, could review pertinent classified information (JA 1272-82); second, that in some cases the CSRT might not have sufficiently considered whether evidence was the product of coercion (JA 1282-86); and third, that the definition of "enemy combatant" used by the CSRTs was potentially vague or overbroad (JA 1286-94). Judge Green described the first perceived defect as "sufficient to find a violation of due process" with respect to each of the detainees at issue. JA 1282. Judge Green stated that the two other perceived defects affected only some of the detainees at issue, and that the government "might ultimately prevail on these issues once the

petitioners have been given an opportunity to litigate them fully." Ibid. Judge Green concluded her due process analysis by reserving the question "whether or not sufficient evidence exists to support the continued detention of any petitioner" (JA 1294), but stating that "in the absence of military tribunal proceedings that comport with constitutional due process requirements, it is the obligation of the court receiving a habeas petition to provide the petitioner with a fair opportunity to challenge the government's factual basis for his detention" (JA 1295).

Regarding the claims of some petitioners under the Third Geneva Convention, Judge Green held that the Convention is judicially enforceable at the behest of individual aliens (JA 1296-97) and that, despite the President's express determination to the contrary, Taliban members are entitled to individual hearings to determine whether they have prisoner-of-war status under the Convention (JA 1297-1300). On both points, Judge Green adopted the reasoning of Judge Robertson in Hamdan v. Rumsfeld, 344 F. Supp.2d 152 (D.D.C. 2004), appeal pending, No. 04-5393 (D.C. Cir.) (argued April 7, 2005). Contrary to Judge Robertson, however, Judge Green held that the Geneva Convention is categorically inapplicable to members of al Qaeda. JA 1297.

Judge Green dismissed various other constitutional, statutory, and treaty claims brought by the petitioners. JA 1300-01. Those dismissals are the subject of the cross-appeals in this case.

b. In two separate cases, Judge Leon dismissed the claims of seven other Guantanamo Bay detainees. Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005). As pertinent to these appeals, Judge Leon held that under Eisentrager and its progeny in both the Supreme Court and this Court, constitutional protections are unavailable to aliens outside United States sovereign territory, including aliens held at Guantanamo Bay, Cuba, and that nothing in the Supreme Court's decision in Rasul implicitly overruled that settled principle. See id. at 323. Appeals from Judge Leon's decision are pending in this Court (Nos. 05-5062, 05-5063) and have been consolidated with these appeals for purposes of oral argument.

SUMMARY OF ARGUMENT

I. The Due Process Clause is inapplicable to aliens captured abroad and held at Guantanamo Bay, Cuba.

A. Both the Supreme Court and this Court have been "emphatic" in rejecting "the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990); see, e.g., Johnson v. Eisentrager, 339 U.S. 763, 781-85 (1950);

People's Mojahedin Org. of Iran v. Department of State, 182 F.3d 17, 22 (D.C. Cir. 1999).

B. Under Eisentrager and its progeny, the applicability of the Fifth Amendment—as distinct from the habeas statute—to aliens turns on whether the United States is sovereign, not whether it merely exercises control, over the territory at issue. See, e.g., Verdugo, 494 U.S. at 269. The United States is not sovereign over Guantanamo Bay; it operates a naval base there, pursuant to written agreements with Cuba, which expressly recognize Cuban sovereignty. Thus, the detainees here have no claim to Fifth Amendment rights. Petitioners also lack constitutional due process rights because they have no voluntary connection to the United States and have not accepted any societal obligations in this country.

C. The district court erred in concluding that a footnote in Rasul v. Bush, 124 S. Ct. 2686 (2004), implicitly overruled the Fifth Amendment holding of Eisentrager. The Rasul decision by its terms addressed only questions regarding statutory jurisdiction, and expressly declined to address any Fifth Amendment or other substantive constitutional question. Moreover, to construe a single, oblique footnote as implicitly overruling decades of settled precedent would be utterly implausible and would violate various governing interpretive principles. The other authorities cited by the district court are even more inapposite.

II. The CSRT procedures satisfy any possibly applicable due process requirements.

A. In Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004), the Court established the extent of process due to an American citizen held in this country as an enemy combatant. The CSRT procedures exceed even that standard: they afford notice to the detainee of the unclassified factual basis for his enemy combatant designation; they provide the detainee an opportunity to testify, call witnesses, and introduce evidence to rebut the Government's case; and they ensure a fair and impartial tribunal. The CSRT procedures afford more process to aliens abroad than the Hamdi plurality said was constitutionally sufficient for citizens held as enemy combatants in this country. The CSRT manifestly satisfies the requirements of due process (if any) in the unique context of ongoing armed hostilities.

B. The specific procedures criticized by the district court are not constitutionally problematic.

1. The Constitution does not mandate that suspected terrorists, or even suspected POWs, be given access to classified information. The Supreme Court repeatedly has stressed the surpassing importance of protecting such classified information, see, e.g., CIA v. Sims, 471 U.S. 159 (1985), and this Court repeatedly has permitted its consideration by tribunals in camera and ex parte.

Moreover, the traditional procedures used by the armed forces to confirm an individual's POW status do not require the sharing of classified information with a likely enemy. Thus, the district court erred in concluding that attorney access to classified information was constitutionally compelled, particularly where each detainee is afforded a personal representative with such access.

2. The district court erred in proceeding to engage in wholesale factfinding based on various fact-based evidentiary and sufficiency concerns that were misplaced, isolated, and unreviewable in any event. Similarly, the court erred in conducting its own factfinding based on the mere existence of evidentiary disputes. That approach is inconsistent with the plurality opinion in Hamdi, which approves the use of military tribunals with factfinding authority, and permits judicial factfinding only in the absence of such tribunals. If particular aspects of the military process were deficient, the appropriate course, under settled law governing much less sensitive contexts, would be to remand to the military for additional process.

3. Contrary to the district court's suggestion, there is nothing impermissibly broad or vague about the "enemy combatant" definition used by the CSRTs, which is keyed to the membership in or support of Taliban or al Qaeda forces.

III. The district court erred in holding that some of the Taliban detainees have rights under the Third Geneva Convention. It is unclear what relief petitioners could obtain under the Geneva Convention, which does not even arguably entitle them to relief. In any event, the Convention does not create judicially enforceable rights, and even if it did, petitioners do not qualify as prisoners of war under the Convention.

IV. The President is not a proper respondent in this litigation. Under settled law, suits challenging executive action must proceed against his subordinates.

STANDARD OF REVIEW

The district court's order rests on legal rulings subject to de novo review. See, e.g., United States v. Bookhardt, 277 F.3d 558, 564 (D.C. Cir. 2002).

ARGUMENT

I. THE DUE PROCESS CLAUSE IS INAPPLICABLE TO ALIENS CAPTURED ABROAD AND HELD AT GUANTANAMO BAY

A. The Fifth Amendment Is Inapplicable To Aliens Outside The Sovereign Territory Of The United States

It is well established that the Fifth Amendment (including its Due Process Clause) does not apply extraterritorially to aliens. In Johnson v. Eisentrager, 339 U.S. 763 (1950), after addressing the constitutional and statutory scope of habeas corpus (id. at 777-81), the Supreme Court addressed the distinct question whether aliens outside the sovereign territory of the United States possess "substantive constitutional rights" in general (id. at 781), and Fifth Amendment rights in particular (id. at 781-85). The Court emphatically held that they do not. It explained that extraterritorial application of the Fifth Amendment to aliens is unsupported by constitutional text (id. at 782), would produce various untoward consequences (id. at 782-84), and is entirely unprecedented:

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it.

Id. at 784-85 (citation omitted).

Subsequent decisions have reaffirmed this holding. In United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), in holding that the Fourth Amendment does not apply to searches of alien property conducted abroad, the Court reasoned in part that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States," and, citing Eisentrager, it described that rejection as "emphatic." Id. at 269; see also id. at 275 (Kennedy, J., concurring) ("[T]he Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory."). Similarly, in Zadvydas v. Davis, 533 U.S. 678 (2001), in reaffirming that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders," the Court cited both Eisentrager and Verdugo for the proposition that the "Fifth Amendment's protections do not extend to aliens outside the territorial boundaries" of the United States. Id. at 693.

This Court has applied those principles in various contexts. See, e.g., Jifry v. FAA, 370 F.3d 1174, 1182 (D.C. Cir. 2004) ("The Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections."); 32 County Sovereignty Comm. v.

Dep't of State, 292 F.3d 797, 799 (D.C. Cir. 2002) (a "'foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise'") (quoting People's Mojahedin Org. of Iran v. Department of State, 182 F.3d 17, 22 (D.C. Cir. 1999)). Moreover, in Al Odah, it specifically concluded that the Fifth Amendment is inapplicable to aliens held at Guantanamo Bay, Cuba. See 321 F.3d at 1140-44. Although the Supreme Court rejected this Court's broader holding that habeas jurisdiction was entirely unavailable, see Rasul, 124 S. Ct. at 2693-98, that Court expressly declined to address any Fifth Amendment or other substantive constitutional question, see id. at 2699.

B. Guantanamo Bay Is Outside The Sovereign Territory Of The United States

1. Under Eisentrager and its progeny, the applicability of the Fifth Amendment to aliens turns on whether the United States is sovereign, not whether it merely exercises control, over the territory at issue. See, e.g., Verdugo, 494 U.S. at 269 (aliens not "entitled to Fifth Amendment rights outside the sovereign territory of the United States" (emphasis added)). In Eisentrager itself, the petitioners were aliens imprisoned at a U.S. military base in Germany, which was controlled by the U.S. Army. See 339 U.S. at 766. Despite that control, the Court stressed that the aliens "at no relevant time were within any territory over which the United States is

sovereign," id. at 778 (emphasis added), and, on that basis, it held that application of the Fifth Amendment would be impermissibly "extraterritorial" (id. at 784). As this Court has explained, "under Eisentrager, control is surely not the test. Our military forces may have control over the naval base at Guantanamo, but our military forces also had control over the Landsberg prison in Germany." Al Odah, 321 F.3d at 1143.

2. The United States manifestly is not sovereign over Guantanamo Bay, Cuba. To the contrary, it operates a naval base at Guantanamo Bay only pursuant to the terms of written agreements between this Nation and Cuba. See Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, T.S. No. 418 (6 Bevans 1113) (Lease); Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, T.S. No. 426 (6 Bevans 1120) (Supplemental Lease); Treaty on Relations with Cuba, May 29, 1934, U.S.-Cuba, 48 Stat. 1682, T.S. No. 866. Under the terms of those agreements, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba" over the leased area, and "Cuba consents" to United States control over that area, but only "during the period" of the lease. Lease art. III. Moreover, the lease prohibits the United States from establishing certain "commercial" or "industrial" enterprises over that area, see id. art II.

Courts repeatedly have concluded that provisions such as these do not effect a transfer of sovereignty. For example, in Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948), the Court concluded that a leased military base in Bermuda, over which, as the Court itself observed, the United States had "substantially the same" rights as it has over the base in Guantanamo Bay (id. at 383), was "beyond the limits of national sovereignty." Id. at 390. Although the Court held the Fair Labor Standards Act applicable to the base, it did so only after discerning a specific congressional intent to apply the statute "on foreign territory." See id. Similarly, in United States v. Spelar, 338 U.S. 217 (1949), the Supreme Court held that the "foreign country" exception to the Federal Tort Claims Act applied to a U.S. military base in Newfoundland because the governing lease had "effected no transfer of sovereignty." Id. at 221-22. The lease terms were "the same" as the ones at issue in Vermilya-Brown. See id. at 218. With respect to Guantanamo Bay specifically, the Eleventh Circuit has held that aliens there "have no First Amendment or Fifth Amendment rights." Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1428 (11th Cir. 1995); see also id. at 1425 ("We disagree that 'control and jurisdiction' is equivalent to sovereignty."). Finally, in Al Odah, this Court similarly held that aliens at Guantanamo Bay have no Fifth Amendment rights, on

the ground that "Cuba—not the United States—has sovereignty" there. 321 F.3d at 1143.

This characterization of Guantanamo Bay, consistent with the views of the Executive Branch, is also appropriate because the "determination of sovereignty over an area is for the legislative and executive departments." Vermilya-Brown, 335 U.S. at 380; see also People's Mojahedin, 182 F.3d at 24 ("'Who is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political question.'") (quoting Jones v. United States, 137 U.S. 202, 212 (1890)). If courts were to second-guess an Executive-Branch determination regarding who is sovereign over a particular foreign territory, they would not only undermine the President's "lead role * * * in foreign policy," First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767 (1972), but also "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments." Crosby v. National Foreign Trade Council, 530 U.S. 363, 381 (2000); see also American Ins. Ass'n v. Garamendi, 539 U.S. 396, 413 (2003).

3. Nothing in Rasul upsets these settled principles. As explained above, the Supreme Court addressed only the extent to which the habeas statute applies extraterritorially, and expressly reserved all substantive constitutional questions. See 124 S. Ct. at 2699. Moreover, in discussing the particular legal status of

Guantanamo Bay, the Court expressly acknowledged that the United States exercises control, but "not 'ultimate sovereignty,'" over the leased area. See id. at 2693 (emphasis added). And in concluding that such control was sufficient to establish habeas jurisdiction even as to aliens, the Court focused on the distinctive language of the habeas statute, see id. at 2696, as well as the "'extraordinary territorial ambit' of the writ at common law," id. at 2697 n.12 (citation omitted). None of that even remotely suggests what extraterritoriality principles should govern in the Fifth Amendment context, much less implicitly overrules the numerous precedents governing precisely that question. Indeed, the very fact that the Court was addressing the extraterritorial reach of the writ underscores that Guantanamo Bay lies outside the territorial sovereignty of the United States.

4. Even if Guantanamo Bay were somehow treated as sovereign United States territory, petitioners still would not have Fifth Amendment rights. In Verdugo, the Supreme Court held that aliens "receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." 494 U.S. at 271 (emphases added); see also Jifry, 370 F.3d at 1182; People's Mojahedin, 182 F.3d at 22. The Court further held that "lawful but involuntary" presence in the United States "is not of the sort to indicate any substantial connection with our country" for constitutional

purposes. Verdugo, 494 U.S. at 271. Applying that rule, the Court denied Fourth Amendment protection to an alien who was being detained in the United States against his will, but who had "no previous significant voluntary connection with the United States." Id. (emphasis added). Similarly, here, petitioners' presence at Guantanamo Bay is involuntary and the detainees do not claim to have any previous significant connections with this country. Such limited and involuntary contact does not trigger constitutional protections under Verdugo, even if Guantanamo Bay were erroneously treated as United States territory.

C. The District Court Misconstrued Various Cases

Despite Eisentrager's square holding that the Fifth Amendment is inapplicable to aliens outside United States sovereign territory, and despite Rasul's express refusal to address any substantive constitutional questions, the district court nonetheless construed Rasul, "in conjunction with other precedent" (JA 1245), as establishing that aliens held at Guantanamo Bay have Fifth Amendment rights. The "strongest basis" for this conclusion, according to the district court, is a single footnote in Rasul. JA 1261-62. The "other precedent" cited by that court (JA 1246-55) consists of the Insular Cases; the splintered opinions in Reid v. Covert, 354 U.S. 1 (1957); Ralpho v. Bell, 569 F.2d 607 (D.C. Cir. 1977); and a concurring opinion in Verdugo. The district court misread all of these precedents.

1. Read in its entirety, Rasul cannot fairly be construed to address the extraterritorial application of the Fifth Amendment, and indeed, went out of its way to avoid addressing that issue. In their briefs to the Supreme Court, petitioners expressly declined to address the "substantive scope of the Fifth Amendment." Reply Br. for Pet., Al Odah v. United States, No. 03-343 (S.Ct.), 2004 WL 768555, at 16. The Supreme Court itself twice framed the "narrow" question presented as "whether United States courts lack jurisdiction to consider" habeas challenges brought by aliens held at Guantanamo Bay. 124 S. Ct. at 2690; see id. at 2693 ("whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens" at Guantanamo Bay). The Court's analysis of Eisentrager focused on the phrase "within their respective jurisdictions," as used in the habeas statute and precedents such as Ahrens and Braden. See id. at 2693-95. Its analysis of extraterritoriality similarly focused on the habeas statute and on historical habeas practice. See id. at 2696-97. The Court then stated its holding: "We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base." Id. at 2698. And, at the end of its opinion, the Court once again emphasized that "only" the question of jurisdiction was "presently at stake"; it declined to decide "[w]hether" any further proceedings

would be necessary on remand; and it instructed the lower courts "to consider in the first instance the merits" on remand. Id. at 2699.

Against all of this, the district court placed dispositive weight on a single, oblique footnote, which states: "Petitioners' allegations * * * unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. § 2241(c)(3)." Id. at 2698 n.15. That footnote cannot fairly be read as an implicit repudiation of the substantive holdings in Eisentrager, Verdugo, and their numerous predecessors and progeny. As an initial matter, such a reading would be inconsistent with the repeated assurances throughout Rasul that habeas jurisdiction was the "only" question raised in or resolved by the Court. Moreover, footnote 15 is appended to a paragraph focused entirely on the question of statutory jurisdiction under 28 U.S.C. § 2241, and to a sentence asserting what "[p]etitioners contend" for jurisdictional purposes. Id. at 2698. To say that these allegations are sufficient for jurisdictional purposes, a reading of footnote 15 strongly suggested by context, establishes only that they are not "wholly insubstantial" or "frivolous" on the merits. See, e.g., Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 88 (1998); Bell v. Hood, 327 U.S. 678, 682-83 (1946). On the other hand, to construe footnote 15 as implicitly overruling the substantive Fifth Amendment holding of Eisentrager, thereby jettisoning decades of settled law

in a single ambiguous sentence, would be implausible in the extreme and would, not coincidentally, violate a slew of familiar interpretive principles: that "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used," Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994); that the Supreme Court, like Congress, ordinarily "does not * * * hide elephants in mouseholes," Whitman v. American Trucking Ass'n, 531 U.S. 457, 468 (2001); and, perhaps most fundamentally, that no "implicit" hint in footnote 15 (JA 1259) could authorize the lower courts to disregard otherwise binding Supreme Court precedent, see, e.g., Tenet v. Doe, 125 S. Ct. 1230, 1235 (2005) (If a "precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); Sierra Club v. EPA, 322 F. 3d 718, 725 (D.C. Cir. 2003) ("failure to [overrule] expressly is dispositive" – lower courts cannot consider whether one Supreme Court precedent "impliedly overrules" another).

2. The other precedents cited by the district court are even further afield. The Insular Cases address the extent to which federal constitutional protections apply in United States territories "not incorporated into the Union." See, e.g., Balzac v. People of Porto Rico, 258 U.S. 298, 312-13 (1922); Dorr v. United

States, 195 U.S. 138, 149 (1904). The territories at issue in those cases were governed by Congress pursuant to its constitutional power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" (Art. IV, § 3, cl.2 (emphasis added)). See Dorr, 195 U.S. at 140. The Supreme Court held that only "certain fundamental rights declared in the Constitution," including the Fifth Amendment but excluding the Sixth and Seventh Amendments, apply to such unincorporated United States territories. See Balzac, 258 U.S. at 304-05, 312-13.

The district court erred in concluding (JA 1252) that the Insular Cases extend "fundamental constitutional rights" to territories "where the United States technically is not considered 'sovereign.'" As noted above, the United States does by definition exercise sovereignty over its own unincorporated territories. In the case of Puerto Rico, for example, the United States acquired sovereignty after the Spanish-American War, see Treaty of Paris, U.S.-Spain, art. II, 30 Stat. 1754 (Apr. 11, 1899) (Spain "cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indes"), and Congress, in exercising its Article IV power to legislate in United States territory, has extended most federal statutes to Puerto Rico, see 48 U.S.C. § 734. Similar treaties and statutes governed the Philippines when Dorr was decided. See 195 U.S. at 143.

And, of course, no other nation has a greater claim to sovereignty in territories of the United States. Here, by contrast, the lease makes clear that Cuba retains sovereignty over Guantanamo Bay.

3. Reid v. Covert, 354 U.S. 1 (1957), a case concerning the rights of citizens overseas, produced no majority opinion and is inapplicable here in any event. Reid involved the question whether spouses of Army personnel stationed abroad could invoke the Fifth and Sixth Amendments. A plurality of the Court concluded that "citizens abroad" are generally protected by the Bill of Rights. See 354 U.S. at 5-6. The narrower controlling opinions agreed with respect to the Fifth and Sixth Amendments but, even as to the rights of citizens, cautioned against wholesale extraterritorial application of the Constitution. See id. at 75 (Harlan, J., concurring in the judgment). Moreover, in Verdugo, a majority of the Court specifically rejected the proposition that Reid has any bearing on the constitutional rights of aliens. See 494 U.S. at 270. In reaffirming Eisentrager's "emphatic" rejection of extraterritorial application of the Fifth Amendment to aliens, the Court specifically limited Reid to the proposition that "citizens stationed abroad could invoke the protection of the Fifth and Sixth Amendments." Id. at 269-270 (emphasis added).

4. Far from being "particularly relevant" here (JA 1252), Ralpho is precisely akin to the inapposite Insular Cases. In Ralpho, this Court held that the Due Process Clause protects residents of Micronesia, a Pacific archipelago governed by the United States under a trusteeship established by the United Nations. See 569 F.2d at 612-13. The Court explained that Micronesia is a "'Territory * * * belonging to the United States'" within the meaning of Article IV, and, citing the Insular Cases, it described the people of Micronesia as being "as much American subjects as those in other American territories." Id. at 618-19. As this Court later explained, Ralpho "establishes nothing" relevant to the entirely distinct legal circumstances that prevail at Guantanamo Bay, Cuba. See Al Odah, 321 F.3d at 1144.

5. Finally, the district court erred in repeatedly claiming support (JA 1255, 1262-63) from Justice Kennedy's concurrence in Verdugo. Justice Kennedy in Verdugo joined in full a majority opinion that expressly reaffirmed the "emphatic" Fifth Amendment holding of Eisentrager (494 U.S. at 269), so his separate concurrence is entitled to no precedential weight. In any event, his Verdugo concurrence, even on its own terms, does not help petitioners here. In that concurrence, Justice Kennedy stressed that Eisentrager, and not Reid, governs "extraterritorial application of the Constitution" where the "person claiming its

protection is * * * an alien." Id. at 275. Moreover, citing the controlling concurrence in Reid, he stressed that even citizens do not necessarily enjoy the full measure of constitutional rights abroad, and, citing the Insular Cases, he stressed that Congress need not "implement all constitutional guarantees" even "in its territories." Id. at 277-78. Finally, he noted the unexceptional proposition that the Fifth Amendment would apply to aliens not abroad, but during a domestic criminal trial in an Article III court. See id. at 278.

* * * *

The Fifth Amendment is inapplicable to aliens captured abroad and held at Guantanamo Bay, Cuba. On that ground alone, this Court should reject on the merits the due process claims raised here by petitioners.

II. THE CSRT PROCEDURES SATISFY ANY POSSIBLY APPLICABLE DUE PROCESS REQUIREMENTS

Even if the Fifth Amendment had some limited application to aliens held at Guantanamo Bay, the CSRT process would readily satisfy any due process requirements for detaining such aliens as enemy combatants.

A. The CSRTs Afford More Process Than That Guaranteed Even To Citizens In This Country

1. In Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004), the Supreme Court addressed the extent of process due to an American citizen held in this country as an enemy combatant. The plurality opinion held that such a citizen "must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." Id. at 2648. The plurality derived that result by applying the balancing test set forth in Mathews v. Eldridge, 424 U.S. 319 (1976), which considers the nature of the affected private interest, the nature of the affected government interest, and the "burdens the Government would face in providing greater process." 124 S. Ct. at 2646. In so doing, the plurality stressed that "substantial interests lie on both sides of the scale." Ibid. In particular, it recognized the "weighty" and "sensitive" government interests in capturing and detaining enemy combatants (id. at 2647), which "by 'universal agreement and practice,' are 'important incident[s] of war.'" Id. at 2640

(quoting Ex parte Quirin, 317 U.S. 1, 28 (1942)). The plurality also acknowledged that these "core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." Id. at 2647.

Given these considerations, and the obvious "exigencies" of conducting armed hostilities, the plurality recognized that, beyond the "core" due process requirements of notice and a fair opportunity for rebuttal, "enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." Id. at 2649. In particular, the plurality specifically approved the consideration of hearsay evidence, the creation of a "presumption in favor of the Government's evidence," and the exclusive focus on a "combatant's acts." Id. at 2649-50. Moreover, the plurality strongly suggested that "the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal" and, as an example, it cited the tribunals constituted under Army Regulation 190-8 to adjudicate prisoner-of-war status under Article V of the Geneva Convention. See id. at 2651. In the "absence of such process," the plurality concluded that a habeas court "must itself assure that the minimum requirements of due process are achieved." Id. Nonetheless, it stressed that courts always must proceed with "caution" in this sensitive area (id. at 2652), warned that any "factfinding process" must be both

"prudent and incremental" (id.), and specifically disapproved the "quite extensive discovery" (id. at 2646) that the district court had ordered.

2. The CSRTs would easily satisfy the due process requirements that the Hamdi plurality said would be constitutionally sufficient for American citizens held in this country. They afford notice: the recorder of a tribunal "shall provide the detainee in advance of the proceedings with notice of the unclassified factual basis for the detainees' designation as an enemy combatant." JA 1188. They afford a fair opportunity to rebut the Government's case: the detainee has a "right to testify or otherwise address the Tribunal in oral or written form, and to introduce relevant documentary evidence," JA 1189; and the detainee "shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal," JA 1188; the detainee "shall be allowed to attend all proceedings," except as to "matters that would compromise national security if held in the presence of the detainee," ibid. Finally, they afford a neutral decisionmaker: each CSRT is composed of three military officers, "none of whom was involved in the apprehension, detention, interrogation, or previous determination of status of the detainee." JA 1187-88.

The CSRT procedures used to adjudicate enemy combatant status are based on and closely track the procedures used to adjudicate prisoner-of-war status under

Article 5 of the Geneva Convention, as set forth in Army Regulation 190-8, which was cited with approval by the plurality in Hamdi. For example, the CSRT and Army Regulation 190-8 procedures have the following features in common, among others:

- Tribunals are composed of three commissioned officers plus a non-voting officer who serves as recorder;[1]
- Tribunal members are sworn to faithfully and impartially execute their duties;[2]
- The detainee has the right to attend the open portions of the proceedings;[3]
- An interpreter is provided if necessary;[4]
- The detainee has the right to (a) call witnesses if reasonably available, (b) question witnesses called by the tribunal, and (c) testify or otherwise address the tribunal;[5]

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[1] Compare JA 1187 and JA 1194-95 with JA 1226.

[2] Compare JA 1188 and JA 1200 with JA 1226.

[3] Compare JA 1188 and JA 1197 with JA 1227.

[4] Compare JA 1188 and JA 1197 with JA 1227.

[5] Compare JA 1188-89 and JA 1197 with JA 1227.

- The detainee may not be forced to testify;[6]
- The tribunals make decisions by majority vote;[7]
- The decision is made based on a preponderance of the evidence;[8]
- The tribunals create a written report of their decision;[9] and
- The tribunal record is reviewed by the Staff Judge Advocate for legal sufficiency.[10]

In several respects, the CSRTs provide even greater procedural protections than those required by Article 5 Tribunals. For example:

- The CSRTs contain express qualifications to ensure the tribunal's independence. See JA 1187-88. There are no comparable qualifications for Article 5 Tribunals.
- The CSRTs provide the detainee a personal representative to assist him in preparing his case. See JA 1187, 1195. There is no such requirement in Article 5 Tribunals.

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[6] Compare JA 1189 and JA 1197 with JA 1227.

[7] Compare JA 1189 and JA 1200 with JA 1227.

[8] Compare JA 1189 and JA 1199 with JA 1227.

[9] Compare JA 1201 with JA 1227.

[10] Compare JA 1189 and JA 1195, 1202 with JA 1227.

- In CSRTs, the Recorder is obligated to search government files for, and provide to the Tribunal, any "evidence to suggest that the detainee should not be designated as an enemy combatant." See JA 1203. There is no such requirement in Article 5 Tribunals.
- In CSRTs, the detainee is provided with an unclassified summary of the evidence supporting his detention in advance of the hearing. See JA 1188, 1197, 1200. There is no such requirement in Article 5 Tribunals.
- CSRTs allow the detainee to introduce relevant documentary evidence. See JA 1189, 1197. Article 5 Tribunals provide no analogous guarantee.
- Every CSRT decision is automatically reviewed by a higher authority, who may return the record to the tribunal for further proceedings. See JA 1189, 1202. There is no counterpart provision for Article 5 Tribunals.

Under the standards set forth in the plurality opinion in Hamdi, these procedural protections would be more than sufficient to adjudicate even whether an American citizen in this country may be held as an enemy combatant.

3. The CSRT procedures are even more clearly constitutional as applied to aliens held abroad. Assuming such aliens have any due process rights at all, those rights are plainly less extensive than those of American citizens in this country. As noted above, the existence and scope of constitutional rights turn on the extent to which aliens "have come within the territory of the United States and established 'substantial connections' with this country, * * * [and] 'accepted some societal obligations.'" Jifry, 370 F.3d at 1182-83 (quoting Verdugo, 494 U.S. at 271, 273). Thus, the Supreme Court has cautioned that, even within the United States, it is a mistake to conclude that "all aliens are entitled to enjoy all the advantages of citizenship or, indeed, * * * that all aliens must be placed in a single homogeneous legal classification." Mathews v. Diaz, 426 U.S. 67, 78 (1976). For example, an alien who is temporarily "paroled" into the United States while seeking admission "has no constitutional rights regarding his application," and "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." Landon v. Plasencia, 459 U.S. 21, 32 (1982). Thus, in Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), the Court held that the Government's two-year exclusion and detention of Mezei, without any hearing at all, was constitutionally permissible. Mezei was an alien who had been a 25-year resident of the United States and who left the country

to visit his dying mother. See id. at 208. His constitutional rights cannot be deemed any less than those of aliens captured during armed hostilities and held at Guantanamo Bay.

The distinction between the rights of citizens and aliens, which permeates immigration law generally, is even more significant during times of armed conflict. The Supreme Court has never suggested that the rights of aliens captured during an armed conflict approach the rights of citizens. To the contrary, in Harisiades v. Shaughnessy, 342 U.S. 580 (1952), it explained that "[w]ar, of course, is the most usual occasion" for distinguishing between the rights of aliens and citizens. Id. at 586-87; see also Eisentrager, 339 U.S. at 769 ("[E]ven by the most magnanimous view, our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens."); see also Hamdi, 124 S. Ct. at 2673 (Scalia, J., dissenting) (noting that his analysis "appl[ies] only to citizens").

Given these various considerations, we submit that even if aliens held at Guantanamo Bay are entitled to some degree of constitutional due process, it is less than the degree of due process that the Hamdi plurality afforded to citizens on American soil. At most, this Court should require a simple notice of the charges and an opportunity to be heard. See Yates v. District of Columbia, 324 F.3d 724, 726 (D.C. Cir. 2003) ("the basic elements of constitutional due process [are]:

notice and the opportunity to be heard"). As explained above, the CSRT process exceeds that elemental due process standard.

B. The Procedures Cited By The District Court Are Constitutionally Permissible

The district court identified three perceived flaws in the CSRT procedures that, in its view, establish actual or possible violations of due process. The court erred on each point.

1. The Constitution Does Not Mandate Access To Classified Information For Suspected Terrorists Or Their Lawyers

a. The district court first held (JA 1272-82) that the CSRT procedures are unconstitutional because they preclude a detainee and his private counsel from access to classified information bearing on the enemy combatant designation. In other words, according to the district court, U.S. armed forces cannot capture and then detain suspected al Qaeda terrorists abroad, during ongoing hostilities against al Qaeda, without affording either those suspected terrorists, or their chosen counsel, wholesale access to classified information about this Nation's intelligence sources and methods against al Qaeda. In its ten pages of analysis, the district court cited no support for that remarkable proposition.

The Supreme Court repeatedly has held that the "'Government has a compelling interest in protecting both the secrecy of information important to our

national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.'" CIA v. Sims, 471 U.S. 159, 175 (1985) (quoting Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (per curiam)). As the Commander-in-Chief, the President has "authority to classify and control access to information bearing on national security," which "exists quite apart from any explicit congressional grant." Department of the Navy v. Egan, 484 U.S. 518, 527 (1988). Moreover, even a "small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.' To induce some sources to cooperate, the Government must tender as absolute an assurance of confidentiality as it possibly can." Sims, 471 U.S. at 175; see Snepp, 444 U.S. at 512. So, for "'reasons * * * too obvious to call for enlarged discussion,' the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it." Egan, 484 U.S. at 529 (quoting Sims, 471 U.S. at 170).

Applying these precedents, this Court repeatedly has rejected due process challenges to the consideration of classified evidence ex parte and in camera, even in cases involving aliens who are present in and have significant contacts with this country, and even where such aliens have significant liberty or property interests at

stake. See, e.g., Jifry, 370 F.3d at 1183-84; Holy Land Foundation v. Ashcroft, 333 F.3d 156, 164 (D.C. Cir. 2003); People's Mojahedin Org. of Iran v. Department of State, 327 F.3d 1238, 1242-43 (D.C. Cir. 2003); National Council of Resistance of Iran v. Department of State, 251 F.3d 192, 208 (D.C. Cir. 2001). It has done so partly because it is "'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation," Jifry, 370 F.3d at 1183 (quoting Haig v. Agee, 453 U.S. 280, 307 (1981)); partly because of "the primacy of the Executive in controlling and exercising responsibility over access to classified information," Holy Land, 333 F.3d at 164; and partly because "the courts are often ill-suited to determine the sensitivity of classified information," People's Mojahedin, 327 F.3d at 1242.

The courts also have recognized, even outside the specific context of classified information, the critical importance of protecting other sensitive information in the ongoing hostilities against al Qaeda. For example, in Center for National Security Studies v. Department of Justice, 331 F.3d 918 (D.C. Cir. 2003), this Court construed Exemption 7(A) of the Freedom of Information Act to protect from disclosure the names of aliens detained pending their removal from this country as part of the law enforcement investigation following the atrocities of September 11. Similarly, in North Jersey Media Group v. Ashcroft, 308 F.3d 198

(3d Cir. 2002), the Third Circuit rejected an alleged First Amendment right of access to the immigration hearings for those aliens. Both cases turned in principal part on concern about the destructive capacity of al Qaeda, see CNSS, 331 F.3d at 928 ("America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore"); about its ability to conduct intelligence and counter-intelligence operations, ibid. ("A complete list of names informing terrorists of every suspect detained by the government at any point during the September 11 investigation would give terrorist organizations a composite view of the government investigation"); about the possibility that "disclosure would deter or hinder cooperation" of potential informants (id. at 929); and about the ensuing need for significant deference to "the executive's judgment in prosecuting the national response to terrorism" (id. at 932). See also Zadvydas, 533 U.S. at 696 ("terrorism" warrants "heightened deference to the judgments of the political branches with respect to matters of national security"); North Jersey Media, 308 F.3d at 219 ("To the extent that the Attorney General's national security concerns seem credible, we will not lightly second-guess them.") .

Finally, Hamdi recognizes similar concerns in the enemy combatant context. In that case, the plurality criticized the district court for approving "quite extensive discovery" (124 S. Ct. at 2646) into communications between the United States and

the Northern Alliance regarding the circumstances of Mr. Hamdi's capture. See id. at 2637 (discovery demand); id. at 2648 (rejecting "process apparently envisioned by the District Court"). The Court acknowledged the dangerous possibility that "discovery into military operations" would "intrude on the sensitive secrets of national defense," and it specifically held that, "[t]o the extent that these burdens are triggered by heightened procedures, they are properly taken into account." Ibid.

b. Faced with all of this, even the district court declined to order the Government to supply classified information directly to suspected al Qaeda terrorists. However, to "compensate" for this perceived "hardship," the district court held that the Government must supply classified information to the chosen lawyers of such suspected terrorists. JA 1279. That too was in error. The district court's analysis fundamentally failed to account for the relevant historical tradition concerning the process due in the unique context of captured enemy combatants. Historically, the process granted to aliens captured on a foreign battlefield was no more than the kind of rudimentary procedures reflected in Article 5 of the Geneva Convention and Army Regulation 190-8. As already noted, the regulation provides suspected POWs access only to those proceedings that are open. It does not provide a right of access to classified information—and understandably so, since

the Article 5 hearing, like the CSRT, may lead to the detainee's release, potentially enabling him to rejoin the enemy. And as noted below, the detainee has no right to counsel at all. That traditional process is highly relevant to the due process analysis. Indeed, as the Supreme Court has explained, tradition can validate a procedural rule without reference to Mathews. See Medina v. California, 505 U.S. 437, 443-46 (1992). In light of that tradition, there is no basis for finding a constitutional right to access to all classified information by the detainee, or to alternative access by a lawyer to which a detainee traditionally had no right in the first place.

Even where the constitutional rights of citizens on American soil are at issue, this Court has gone out of its way to reserve the question whether courts can ever compel the Executive Branch to supply a lawyer with classified information in order to facilitate litigation. See Stillman v. CIA, 319 F.3d 546, 548-49 (D.C. Cir. 2003). And even where the criminal punishment of American citizens is at issue, there is generally no right to counsel in administrative proceedings not unlike the CSRTs. See, e.g., Wolff v. McDonnell, 418 U.S. 539, 569-70 (1974) (prison disciplinary hearing); Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973) (parole revocation hearing). Judge Friendly ably summarized the concern expressed in those cases that counsel would unduly polarize, delay, and impede the tribunal's objective

assessment of the facts: "Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty." Friendly, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267, 1288 (1975). Those concerns are greatly magnified here, where the issue is not the administration of domestic prisons, but the Executive Branch carrying out incidents of its war-making function. For all of these reasons, the district court erred in its remarkable series of conclusions that there is a due process right to counsel in these administrative hearings and it applies to aliens held abroad and it includes a right of access to classified information.

The district court's conclusion is even more implausible because the CSRTs afford each detainee a personal representative with access to classified information. The personal representative is a "military officer, with the appropriate security clearance" assigned to the detainee "for the purpose of assisting the detainee" in the CSRT process. JA 1187. Moreover, the personal representative "shall not have been involved in the apprehension, detention, interrogation, or previous determination of status" of the detainee. JA 1195. The personal representative has access to all Government files (JA 1187) and may attend the entire CSRT proceeding (JA 1188), even where classified information is at issue. The personal

representative fulfills many of the functions of counsel: he is required to "explain the nature of the CSRT process to the detainee, explain his opportunity to present evidence and assist the detainee in collecting relevant and reasonably available information and in preparing and presenting information to the Tribunal." JA 1205. Finally, the personal representative may "comment upon classified information that bears upon the detainee's status if it would aid the Tribunal's deliberations." JA 1201. That is more than sufficient, in a hearing to determine the simple factual question whether the alien detainee supported al Qaeda or the Taliban, to satisfy due process. Nothing in the Constitution or common sense requires the armed forces to go further and furnish classified information to a suspected enemy during an ongoing armed conflict.

c. During its analysis of these issues (JA 1273-79), the district court questioned at length the reliability and sufficiency of evidence underlying two enemy combatant designations (including one in a case not even before it). However, those factual assessments were for each respective CSRT to make, under a preponderance of evidence standard and subject to a rule to "tak[e] into account the reliability" of any hearsay or other evidence. JA 1189. Moreover, the district court was not authorized to review these factual assessments through habeas corpus, as the Supreme Court repeatedly has held in addressing the scope

of habeas review for military commissions that (unlike the CSRTs) were authorized to convict and even impose the death penalty. See, e.g., Yamashita v. Styer, 327 U.S. 1, 8 (1946) ("If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts."); Ex parte Quirin, 317 U.S. at 25 ("We are not here concerned with any question of the guilt or innocence of petitioners."). Finally, we note that the district court's own criticism proves too much. According to the district court (JA 1273), the quoted exchanges demonstrate the perceived unfairness of a detainee being unable to respond effectively to relevant classified information. However, the detainee would be in the identical situation under the district court's own protective order, which would have barred a private lawyer, no less than a personal representative, from conveying classified information to the detainee (JA 1279).

2. The District Court Erred In Proceeding To Re-Try 54 Enemy Combatant Determinations Based On One Allegedly Erroneous Evidentiary Assessment

Based on one anecdotal example involving petitioner Mamdouh Habib (who had already been released (in January 2005) prior to Judge Green's decision), the district court speculated that the CSRTs possibly "did not sufficiently consider" whether particular evidence was "coerced from the detainees" and therefore

unreliable. JA 1283. As noted above, however, all CSRT tribunals were obliged to consider the "reliability" of particular evidence and to find facts based on a "preponderance" standard. JA 1189. The district court cited no basis whatsoever for its speculation that Habib's CSRT did not "sufficiently" consider his allegations of mistreatment by the Egyptian government. To the contrary, the district court itself noted that this CSRT was aware of those allegations and referred them for potential criminal investigation. JA 1284. Nor did the district court explain why those allegations foreclose any permissible inference that Habib was nonetheless an enemy combatant. Furthermore, the district court would have exceeded the bounds of its permissible review even if the Habib case had been a garden-variety habeas action under 28 U.S.C. § 2254. See 28 U.S.C. § 2254(e)(1) (factual determinations "shall be presumed to be correct," and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence"). And the court vastly exceeded the much narrower bounds of permissible review in the enemy combatant context, where factual determinations are not reviewable at all. See, e.g., Yamashita, 327 U.S. at 8. Moreover, the Hamdi plurality specifically concluded that the kind of "heightened procedures" associated with full-blown judicial trials would risk grave intrusion into legitimate military prerogatives and operations (see 124 S. Ct. at 2648); that military tribunals vested

with factfinding powers strike an appropriate due process balance between the private and governmental interests involved (see id. at 2651); that judicial factfinding is appropriate only "[i]n the absence of such process" through the military (ibid. (emphasis added)); and that such judicial factfinding, if appropriate at all, must proceed with "caution" and be "both prudent and incremental" (id. at 2652). All of those limitations would be eviscerated if, as the district court apparently believed, it could simply assume the truth of allegations contrary to the factfinding of the CSRT, see JA 1283 (construing "the evidence in a light most favorable to the petitioners"), as if deciding a garden-variety motion to dismiss or for summary judgment, and then, based on the mere existence of an evidentiary dispute, proceed anew with its own factfinding. Nothing in Yamashita or Hamdi sanctions such an aggressive judicial approach in this context. Finally, even if Habib's individual case presented a due process or other legal error correctable through habeas corpus, which it does not, that putative error as to Habib (who was already released) obviously would not justify the judicial factfinding in 10 additional cases encompassing 53 additional detainees, each with his own CSRT determination and evidentiary record.

3. The "Enemy Combatant" Definition Is Neither Vague Nor Overbroad

Finally, the district court erred in concluding (JA 1286-95) that the operative "enemy combatant" definition might have been impermissibly vague or overbroad. That definition provides:

> [1] For purposes of this order, the term 'enemy combatant' shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. [2] This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

JA 1187. The district court reasoned that, because the second sentence merely states what the definition "includes," the entire definition might encompass individuals "based solely on their membership in anti-American organizations rather than on actual activities supporting the use of violence or harm." JA 1288.

The district court's construction is unfounded. By its terms, the "enemy combatant" definition requires not simply membership in generically-described "anti-American organizations," but membership in or "support" for the "forces" of organizations that have committed horrific attacks against this Nation, its troops, and its innocent civilians. The detention of members or supporters of such forces is an established part of the laws of war. See, e.g., In re Territo, 156 F.2d 142, 144-45 (9th Cir. 1946) (upholding capture and detention of "all persons who are

active in opposing an army," including a private performing manual labor in an army engineering corps); Instructions for the Government of Armies of the United States in the Field (Lieber Code), Apr. 24, 1863, Art. 15 ("Military necessity * * * allows of the capturing" of "every armed enemy," and in addition "every enemy of importance to the hostile government, or of peculiar danger to the captor."); W. Winthrop, Military Law and Precedents 789 (2d ed. 1920) ("class of persons" subject to detention includes "civil persons * * * in immediate connection with an army, such as clerks, telegraphists, aeronauts, teamsters, laborers, messengers, guides, scouts, and men employed on transports and military railways"); J.R. Baker & H.G. Crocker, The Laws of Land Warfare Concerning the Rights And Duties of Belligerents 35 (1919) ("Persons belonging to the auxiliary departments of an army * * * such as commissariat employees, military police, guides, balloonists, messengers, and telegraphists * * * are still liable to capture.").

The district court erred in suggesting that the exercise of this traditional power creates concerns of vagueness or overbreadth. There is nothing vague about a provision keyed to membership in or support for the armed forces of specified purported governments or terrorist organizations. Although there may be difficult calls at the margin, that has been true in every war, and these are quintessentially military judgments. Nor is such a provision overbroad, both

because there is no such thing as an overbreadth doctrine for due process claims, see Sabri v. United States, 124 S. Ct. 1941, 1948 (2004), and because the capture and detention of members or supporters of hostile forces is an important and traditional element of the President's warmaking powers. See Hamdi, 124 S. Ct. at 2639-43 (plurality). Moreover, whatever else can be said about the definition employed by the CSRTs, its application resulted in findings in favor of 38 detainees. Indeed, even outside the context of active armed hostilities, the Supreme Court and this Court have made clear that Congress and the President, in pursuit of foreign policy or national security objectives entrusted to the political branches, may prohibit even American citizens from supporting particular foreign governments, see Zemel v. Rusk, 381 U.S. 1, 15-18 (1965), or foreign terrorist organizations, see Holy Land Foundation v. Ashcroft, 333 F.3d 156, 165 (D.C. Cir. 2003).

Ultimately, the district court rested on two concerns having little to do with vagueness or overbreadth. First, the court conjured up a series of hypotheticals to illustrate the unremarkable proposition that there may be difficult cases at the outer bounds of the "enemy combatant" definition. JA 1288. However, the existence of such cases does not make the definition facially invalid, and the district court itself acknowledged that its hypotheticals have nothing to do with the actual cases

presented here. Ibid. ("The Court can unequivocally report that no factual return by the government in this litigation reveals the detention of a Swiss philanthropist, an English teacher, or a journalist."). Second, the court raised evidentiary concerns about one detainee who concededly had associated with known terrorists (JA 1289) and another detainee whose designation was asserted (by his own personal representative) to be "unsupported by the record" (JA 1293). In both cases, the district court resolved perceived evidentiary disputes against the Government. JA 1293 ("at this stage of the proceedings, the Court must interpret the facts in the light most favorable to the party opposing a motion to dismiss"). Then, the court used that resolution as further purported justification for engaging in its own factfinding with respect to not only those two detainees, but the 52 others as well. For all of the reasons set forth above, that too was erroneous.

C. The District Court Erred In Commencing To Engage In Its Own Factfinding

We have already explained that the district court's identification of isolated evidentiary disagreements does not justify the undertaking of wholesale judicial factfinding. More generally, had the Court identified any legal problems rising to the level of a due process violation (which it did not), its undertaking of factfinding would be similarly inappropriate. If the CSRT proceedings were constitutionally insufficient in some respect, the appropriate remedy would not be for the district

court to revisit a factfinding process committed to the military. Instead, under settled administrative law principles that govern contexts far less sensitive than these, the proper course would be to remand, with instructions as necessary, for the Executive Branch to cure any defects and to evaluate the evidence under an appropriate CSRT procedure. See, e.g., INS v. Ventura, 537 U.S. 12 (2002); Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

Those principles are even more important in this context, because the determination of who are enemy combatants is a quintessentially military judgment entrusted primarily to the Executive Branch. See Hamdi, 124 S. Ct. at 2647 (plurality opinion); see also id. at 2640 (capture and detention of combatants is an "important incident of war"). As reflected throughout Hamdi and the other precedents we have discussed, the Executive has a unique institutional capacity to determine enemy combatant status and a unique constitutional authority to prosecute armed conflict abroad and to protect the Nation from further terrorist attacks. By contrast, the judiciary lacks the institutional competence, experience, or accountability to make such military judgments at the core of the war-making powers. See Tozer v. LTV Corp., 792 F.2d 403, 405 (4th Cir. 1986); Curran v. Laird, 420 F.2d 122, 130 (D.C. Cir. 1969) (en banc). These concerns are especially pronounced given the unconventional nature of the current war and

enemy, involving individuals of many nationalities fighting without uniform or insignia and often in an unorthodox or covert fashion. See, e.g., CNSS, 331 F.3d at 928-32.

Determinations of enemy combatant status lie at the heart of the Military's ability to conduct war successfully and implicate the safety of the Nation's troops and, ultimately, its citizens. If there were a defect in the current CSRT process, the proper remedy would be to vacate the CSRT rulings in question and permit that process to be conducted under corrected procedures.

III. THE DISTRICT COURT ERRED IN HOLDING THAT INDIVIDUAL TALIBAN DETAINEES CAN JUDICIALLY ENFORCE THE GENEVA CONVENTION

Some of the petitioners have asserted rights under the Third Geneva Convention. The district court properly held that the Convention does not extend rights to members of al Qaeda detainees, a non-signatory terrorist organization. JA 1297. But because Afghanistan is a party to the Convention, the court held that petitioners who were Taliban members are entitled to POW status under the Third Geneva Convention, absent a contrary determination by a competent tribunal with regard to each individual detainee. JA 1298. This was error.

A. The Geneva Convention Confers No Arguable Entitlement To Release For Petitioners, And Thus Provides No Basis For A Habeas Petition

As an initial matter, it is unclear what relief petitioners could seek in habeas under the Geneva Convention, even if it were judicially enforceable and even if they were covered by it. The Convention provides for the release of prisoners only upon "the cessation of active hostilities" (Art. 118). Such cessation plainly has not arrived in the conflict between the United States and al Qaeda and the Taliban. See, e.g., N.C. Aizenman, Karzai Seeks Extended U.S. Security Deal, Wash. Post, Apr. 14, 2005, at A15 (describing ongoing fighting between U.S. and the Taliban). The Convention therefore confers no arguable entitlement to release, and it provides no basis for a habeas petition. See 28 U.S.C. § 2241(c)(3) (habeas petitioner must be "in custody in violation of the Constitution or laws or treaties") (emphasis added).[11] Thus, the Geneva Convention claims are not properly asserted by petitioners as part of the their claims for habeas relief.

B. The Geneva Convention Does Not Create Judicially Enforceable Rights

The Geneva Convention creates no judicially enforceable rights. In adopting a contrary view, the district court relied on the reasoning of Hamdan v. Rumsfeld,

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[11] Petitioners are not asserting a challenge (such as that in Hamdan) to a trial before a military commission.

which is on appeal to this Court, and which is inconsistent with settled law governing the interpretation and enforcement of treaties.

A treaty "is primarily a compact between independent nations." Head Money Cases, 112 U.S. 580, 597 (1884). Judicial enforcement of treaties is not presumed. Rather, absent a clear contrary intent, a treaty "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." Ibid.; see also Whitney v. Robertson, 124 U.S. 190, 194-195 (1888); Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 937 (D.C. Cir. 1988) (refusing to adjudicate the claim that U.S. policy and actions concerning Nicaragua violated the U.N. Charter).

The Supreme Court has held that the 1929 version of the Convention did not create judicially enforceable rights. In Eisentrager, the Court held that German prisoners challenging the jurisdiction of the military tribunal that convicted them could not invoke the 1929 Geneva Convention because the rights afforded under it are not judicially enforceable by the captured party. 339 U.S. at 789. Rather, those rights "are vindicated under it only through protests and intervention of protecting powers." Id. at 789 n.14; accord Holmes v. Laird, 459 F.2d 1211, 1222 (D.C. Cir. 1972) ("[T]he obvious scheme of the [1929 Convention] is that responsibility for observance and enforcement of these rights is upon political and military

authorities, and that rights of alien enemies are vindicated under it only through protests and intervention of protecting powers.") (footnotes and quotations omitted).

When the President signed and the Senate ratified the current version of the Convention in 1955, they did so with that background understanding and without any indication that they changed the essential character of the treaty to permit alleged violations to be redressed by captured enemy forces through our judicial system. Like the revolutionary interpretation of the Constitution rejected in Eisentrager but embraced by the court below, reading the treaty to grant captured parties judicially enforceable rights in our domestic courts "could scarcely have failed to excite contemporary comment." Eisentrager, 339 U.S. at 784-85. Instead, the terms and history of the revised Convention show that, as with the 1929 version, vindication of terms of the treaty is a matter of state-to-state relations, not domestic court resolution.

The first Article of the treaty explains that the parties to the Convention each "undertake to respect and to ensure respect for the present Convention in all circumstances." Art. 1. This was an important revision of the 1929 Convention, because it clarified that it was the duty of all parties not only to adhere to the Convention, but also to ensure compliance by every other party to the convention.

To further effectuate compliance, the 1949 Convention relied upon third-party oversight by "protecting powers." Article 8 provides that the treaty is to be "applied with the cooperation and under the scrutiny of the Protecting Powers." Art. 8. Reliance upon "protecting powers" was also a feature of the 1929 Convention, see 1929 Convention Art. 86, but the 1949 revision of the Convention increased the role of the protecting powers in cases of disagreement about the application of interpretation of the Treaty. See Art. 11. Another method for resolving disputes in the 1949 Convention is the "enquiry" provided for in Article 132, which further provides that, if "agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed." Ibid. This Article was an improvement over the 1929 Convention, which did not provide for the use of an "umpire" to settle disputes. See 1929 Convention, Art. 30. None of these provisions remotely suggests an intent to grant those captured in war judicially enforceable rights.

Where the drafters of the Convention wanted to require enforcement beyond the two prescribed methods and the peer enforcement mandated by Article 1, they said so directly. Article 129 requires the signatory nations to "undertake to enact any legislation necessary to provide effective penal sanctions for persons

committing, or ordering to be committed, any of the grave breaches of the present Convention defined in [Article 130]." Then, under the Convention, it is the duty of the signatory nations, to bring the offenders before their own courts. Art. 129. Even under this Article, however, enforcement is by the states. As was the case with the 1929 Convention, the 1949 Convention itself does not provide judicially enforceable rights to individuals.

No court of appeals has ever construed the 1949 Convention as granting individuals judicially enforceable rights. See Hamdi v. Rumsfeld, 316 F.3d 450, 468-69 (4th Cir. 2003), rev'd on other grounds, 124 S. Ct. 2633 (2004); see also Al Odah, 321 F.3d at 1147) (Randolph, J., concurring); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808-810 (D.C. Cir. 1984) (Bork, J., concurring).

Hamdan's rationale for concluding that the Convention provides judicially enforceable rights is that the treaty protects the rights of individuals. But if that were the case, it would have been equally true of the 1929 version of the treaty, which the Supreme Court held did not create judicially enforceable rights.

Finally, to the extent there is any ambiguity on this matter, the district court should have deferred to the view of the Executive as to whether the treaty was intended to grant those captured during an armed conflict judicially enforceable

rights. See El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999).

C. Taliban Detainees Are Not Entitled To POW Status

The district court noted that the CSRT records for "many of those petitioners" found to have been with the Taliban did not contain specific findings regarding whether the petitioner was entitled to POW status. JA 1299. Such findings were unnecessary because the President made a determination that the Taliban organization, as a whole, did not meet the requirements of the Geneva Convention, so its members therefore could not qualify as POWs. Again relying on Hamdan, the district court concluded that this determination violated the Convention because the President is not "authorize[d]" to "rule by fiat" on the status of a group of enemy combatants. JA 1299. It held that the detainees must instead be treated as POWs until a "competent tribunal" under Article 5 of the Convention determines their status. This holding is unsupported by the Convention and is inconsistent with the deference owed to the President as Commander-in-Chief.

Article 4 of the Convention defines the "[p]risoners of war" who are entitled to the convention's protections to include those who are members of "militias," provided that the militias are "commanded by a person responsible for his

subordinates," "hav[e] a fixed distinctive sign recognizable at a distance," "carry[] arms openly," and "conduct[] their operations in accordance with the laws and customs of war." See Third Geneva Convention, Art. 4(A). Merely to state these criteria is to demonstrate that they lend themselves to group, i.e., militia-by-militia, determination and are designed for military, not judicial, application.

The President made that determination as to the Taliban. While they might carry arms openly, the Taliban do not meet any of the other requirements of Article 4. They have no organized command structure whereby members of the Taliban report to a military commander who takes responsibility for the actions of his subordinates. There is no indication that the Taliban wear any distinctive uniform or other insignia. Finally, there is no indication that the Taliban understand, consider themselves bound by, or indeed are even aware of, the Geneva Conventions or any other part of the international law of armed conflict. The Taliban also have made little attempt to distinguish between combatants and non-combatants when engaging in hostilities, and there are widespread reports of Taliban massacres of civilians, raping of women, pillaging of villages, and various other atrocities that plainly violate the laws of war.

The Convention's definition of POW status turns on the characteristics of the armed group to which an individual fighter belongs—an individual who is a

member of a "militia" or "volunteer corps" is a POW only if the "militi[a] or volunteer corps * * * fulfil[s]" each of the four conditions set out in Article 4. Article 4 of the Convention is based upon a group-level determination of status. Indeed, POW status can only be determined at a group level—under the terms of Article 4, it would make little sense to say that one member of a militia group was a POW while another member of the same group was not. See Mallison and Mallison, The Juridical Status of Irregular Combatants Under the International Law of Armed Conflict, 9 Case W. Res. J. Int'l L. 39, 62 (1977) (explaining that "the accepted view" of Article 4 is that "if the group does not meet the first three criteria . . . the individual member cannot qualify for privileged status as a POW"). Thus, once the President made the general determination that Taliban members are not POWs, the only question remaining was whether an individual combatant was a member of the Taliban — a question that has been answered by CSRTs.

The district court did not dispute that each CSRT was a "competent tribunal" within the meaning of the Geneva Convention, but nonetheless required the Executive to convene an additional "competent tribunal" to determine whether Taliban members fall under Article 4. Nothing in the Convention requires the pointless exercise of creating multiple tribunals, and conducting repeated hearings, to determine the status of individual members of the same fighting force, or nullifies

the President's determination that a particular terrorist force does not satisfy Article 4's requirements. Indeed, in past conflicts, the United States has made group status determinations of captured enemy combatants. See, e.g., Headquarters, U.S. Military Assistance Command, Vietnam, Directive No. 381-46, Annex A, Criteria for Classification and Disposition of Detainees, ¶4 (Dec. 27, 1967), reprinted in 62 Am. J. Int'l L. 765, 767 (1968) (setting out categories of persons to be classified POWs or non-POWs).

The district court relied on Article 5 of the Convention, which provides that certain detainees are entitled to be treated as prisoners of war "until such time as their status has been determined by a competent tribunal." JA 1298. That provision only applies, however, if "doubt arise[s] as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy," meet the convention's definition of prisoners of war. Petitioners have never explained why their status would be doubtful under Article 5, which contemplates that a detainee who challenges his status must provide some basis for doubt. The district court in Hamdan asserted that a detainee's claim of entitlement to POW status should itself be sufficient to establish "doubt," 344 F. Supp.2d at 162, but nothing in the text or the history of the Convention supports this sweeping and counterintuitive interpretation of Article 5. Notably, the contracting parties apparently believed it

necessary to adopt such a requirement in a subsequent protocol[12] — one that the United States has refused to adopt because it "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 law of war." Message from the President Transmitting Protocol II to the U.S. Senate, reprinted in S. Treaty Doc. 100-2, at IV (1987).

The district court also relied on Army regulations that, in its view, require that detainees be treated as if their status is "in doubt" under Article 5. JA 1298-99. Even if the court's interpretation of the regulations were correct, those regulations would not serve to override the determination of the Commander-in-Chief that Taliban detainees are not entitled to "prisoner of war" status under the Geneva Convention. See Taylor v. Department of the Army, 684 F.2d 99, 109 (D.C. Cir. 1982) ("regulations cannot override [a Presidential] Executive Order, which is controlling"); Carlisle Tire & Rubber Co. v. U.S. Customs Serv., 663 F.2d 210, 217-218 (D.C. Cir. 1980) ("a regulation of a cabinet department" cannot "serve to override a direct Executive Order of the President").

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[12] Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, Article 45 (adopted June 8, 1977).

IV. THE PRESIDENT IS NOT A PROPER RESPONDENT

The district court should have dismissed the President as a respondent because federal courts have "'no jurisdiction * * * to enjoin the President in the performance of his official duties'" or otherwise to compel the President to perform any official act. Franklin v. Massachusetts, 505 U.S. 788, 803 (1992) (plurality opinion) (quoting Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1866)). Although the Supreme Court has left open the question whether the President may be ordered to perform a purely "ministerial" duty, see 505 U.S. at 802, the relief petitioners seek here – primarily, their release from custody – is far from ministerial. As the Seventh Circuit recently explained, in a habeas case brought by an alien enemy combatant, naming the President as a respondent was "improper" because "[s]uits contesting actions of the executive branch should be brought against the President's subordinates." Al-Marri v. Rumsfeld, 360 F.3d 707, 708 (7th Cir. 2004). Moreover, the President is not the immediate custodian of any detainee, and is thus an improper habeas respondent on that additional ground as well. See Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004).

CONCLUSION

For the foregoing reasons, the district court's order should be reversed insofar as it denies the Government's motions to dismiss, and the cases should be remanded with instructions to dismiss.

Respectfully submitted,

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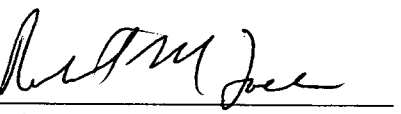
April 27, 2005

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 13,984 words (which does not exceed the applicable 14,000 word limit).



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I hereby certify that on this April 27, 2005, I caused copies of the foregoing brief to be served upon counsel of record by causing copies to be sent by first-class mail and by e-mail transmission to lead counsel for each case:

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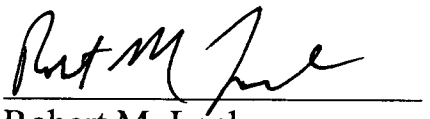

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ADDENDUM

Constitution of the United States

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Geneva Convention Relative to the Treatment of Prisoners of War
Aug. 12, 1949, 6 U.S.T. 3316

Part I. General Provisions

Article 1. The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Article 2. In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Article 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may

offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Article 4.
A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(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 armed 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 and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, 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.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(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 had time to form themselves into regular armed units, provided they carry arms openly and respect the laws

and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

Article 5. 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.

* * * * *

Article 8. The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.

The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.

The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties.

* * * * *

Article 11. In cases where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for prisoners of war, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval by the Parties to the conflict a person belonging to a neutral Power, or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting.

* * * * *

Part III. Juridicial Proceedings

* * * * *

Article 102. A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

* * * * *

Part IV. Termination of Captivity

* * * * *

Section II. Release and Repatriation of Prisoners of War at the Close of Hostilities

* * * * *

Article 118. Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.

In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph.

In either case, the measures adopted shall be brought to the knowledge of the prisoners of war.

The costs of repatriation of prisoners of war shall in all cases be equitably apportioned between the Detaining Power and the Power on which the prisoners depend. This apportionment shall be carried out on the following basis:

(a) If the two Powers are contiguous, the Power on which the prisoners of war depend shall bear the costs of repatriation from the frontiers of the Detaining Power.
(b) If the two Powers are not contiguous, the Detaining Power shall bear the costs of transport of prisoners of war over its own territory as far as its frontier or its port of embarkation nearest to the territory of the Power on which the prisoners of war depend. The Parties concerned shall agree between themselves as to the equitable apportionment of the remaining costs of the repatriation. The conclusion of this agreement shall in no circumstances justify any delay in the repatriation of the prisoners of war.

* * * * *

Part VI. Execution of the Convention

Section I. General Provisions

Article 126. Representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be, particularly to places of internment, imprisonment and labour, and shall have access to all premises occupied by prisoners of war; they shall also be allowed to go to the places of departure, passage and arrival of prisoners who are being transferred. They shall be able to interview the prisoners, and in particular the prisoners' representatives, without witnesses, either personally or through an interpreter.

Representatives and delegates of the Protecting Powers shall have full liberty to select the places they wish to visit. The duration and frequency of these visits shall not be restricted. Visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure.

The Detaining Power and the Power on which the said prisoners of war depend may agree, if necessary, that compatriots of these prisoners of war be permitted to participate in the visits.

The delegates of the International Committee of the Red Cross shall enjoy the same prerogatives. The appointment of such delegates shall be submitted to the approval of the Power detaining the prisoners of war to be visited.

Article 127. The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population.

Any military or other authorities, who in time of war assume responsibilities in respect of prisoners of war, must possess the text of the Convention and be specially instructed as to its provisions.

Article 128. The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, 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.

Article 129. The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed. or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the present Convention.

Article 130. Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and

regular trial prescribed in this Convention.

Article 131. No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.

Article 132. At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

[redacted]

UNCLASSIFIED

THE WHITE HOUSE

WASHINGTON

February 7, 2002

MEMORANDUM FOR THE VICE PRESIDENT
THE SECRETARY OF STATE
THE SECRETARY OF DEFENSE
THE ATTORNEY GENERAL
CHIEF OF STAFF TO THE PRESIDENT
DIRECTOR OF CENTRAL INTELLIGENCE
ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Humane Treatment of al Qaeda and Taliban Detainees

1. Our recent extensive discussions regarding the status of al Qaeda and Taliban detainees confirm that the application of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva) to the conflict with al Qaeda and the Taliban involves complex legal questions. By its terms, Geneva applies to conflicts involving "High Contracting Parties," which can only be states. Moreover, it assumes the existence of "regular" armed forces fighting on behalf of states. However, the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm -- ushered in not by us, but by terrorists -- requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.

2. Pursuant to my authority as Commander in Chief and Chief Executive of the United States, and relying on the opinion of the Department of Justice dated January 22, 2002, and on the legal opinion rendered by the Attorney General in his letter of February 1, 2002, I hereby determine as follows:

a. I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.

b. I accept the legal conclusion of the Attorney General and the Department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but I decline to

[redacted]
Reason: 1.5 (d)
Declassify on: 02/07/12

exercise that authority at this time. Accordingly, I determine that the provisions of Geneva will apply to our present conflict with the Taliban. I reserve the right to exercise this authority in this or future conflicts.

c. I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character."

d. Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.

3. Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

4. The United States will hold states, organizations, and individuals who gain control of United States personnel responsible for treating such personnel humanely and consistent with applicable law.

5. I hereby reaffirm the order previously issued by the Secretary of Defense to the United States Armed Forces requiring that the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

6. I hereby direct the Secretary of State to communicate my determinations in an appropriate manner to our allies, and other countries and international organizations cooperating in the war against terrorism of global reach.