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

FAWZI KHALID A.F. AL ODAH, et al.,

Plaintiffs-Petitioners-Appellees/Cross-Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Respondents-Appellants/Cross-Appellees.

ON CONSOLIDATED APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE GUANTANAMO DETAINEES

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MISCELLANEOUS

GLOSSARY

APA ..... Administrative Procedure Act

ATS ..... Alien Tort Statute

Br..... Opening Brief

CSRT ..... Combatant Status Review Tribunal

ICCPR..... International Covenant on Civil and Political Rights

ILO..... International Labour Organization

J.A..... Joint Appendix

S.A..... Supplemental Appendix

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v.

UNITED STATES OF AMERICA, et al.,

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ON CONSOLIDATED APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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INTRODUCTION AND SUMMARY

Exactly one year ago today, the Supreme Court ruled that these petitioners are entitled to habeas review of their detentions. It reversed this Court's decision that the Detainees have no rights because they are foreign nationals detained beyond our borders, and held that the Detainees at Guantanamo "no less than American citizens" have the "right to judicial review of the legality of Executive detention" imposed upon them. The Supreme Court remanded the case to the district court "to consider in the first instance the merits of petitioners' claims" that they are innocent civilians detained by mistake. *Rasul v. Bush*, 124 S. Ct. 2686, 2693, 2696, 2699 (2004).

For the past year, the government has tried to avoid the Supreme Court's ruling, and its recent brief to this Court does a good job of confusing the issues and trying to obscure that ruling. Nowhere, however, does the government offer any plausible explanation why the Supreme Court would confirm the Detainees' right to obtain habeas review of their detentions if they had no rights and no relief could be granted to them. The government's contention that these cases must be dismissed simply cannot be squared with the Supreme Court's ruling in *Rasul*.

The Supreme Court remanded the case to the district court with specific instructions "to consider in the first instance the merits of petitioners' claims." The

district court cannot do that by summarily dismissing those claims without examination.

ARGUMENT

1. The Supreme Court Has Already Rejected The Government's Attack On The Courts' Authority To Review The Legality Of These Detentions.

From the very first sentence, asserting that the Detainees seek "judicial superintendence of the ongoing conduct of a war," the government sounds the central theme of its brief (Gov't. Reply 1). It claims in one form or another throughout its brief that the sky would fall and this nation's ability to wage war would be eviscerated if the courts were to examine the legality of these Detainees' claims.

These are the same arguments the government made to the Supreme Court, *see* Brief for Respondents at 42, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334 and 03-343), and the Court rejected them, unpersuaded by the government's apocalyptic vision of the harms that would result from judicial review of the legality of the detentions at Guantanamo. As the Supreme Court recognized, the Detainees seek judicial review only of their claims that they are innocent civilians held by mistake and without adequate process, and the Court held that they are entitled to such review. The Court "recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive

detention, in wartime as well as in times of peace." 124 S. Ct. at 2692-93. The Court made the same point in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004), holding that "unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role . . . serving as an important judicial check on the Executive's discretion in the realm of detentions." As the Court pointed out:

> [A]rguments that military officers ought not have to wage war under the threat of litigation lose much of their steam when factual disputes at enemy-combatant hearings are limited to the alleged combatant's acts . . . . While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war . . . it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.

Id. at 2649-50.

There is simply no basis for the government's dire warnings. The government argues that, just as Guantanamo is subject to the control of the U.S. military, so is every other place where the United States holds people captured in combat, and allowing all these people to challenge their detentions would make it impossible to wage war, and would have made it impossible for us to have won World War II, when we held more than two million enemy captives (Gov't Reply

15-19, 37).[1] But this case does not involve everyone picked up by the United States and held anywhere in the world. Rather, it involves a limited number of individuals, often taken into custody on the say-so of bounty hunters, transported halfway around the world, and held for more than three years at a specific place – Guantanamo Bay. The Supreme Court emphasized the unique nature of Guantanamo; it is an area "within 'the territorial jurisdiction' of the United States" where "the United States exercises 'complete jurisdiction and control' . . . and may continue" to do so "permanently if it so chooses." *Rasul*, 124 S. Ct. at 2696.[2] No questions beyond those presented by these specific Detainees held at this specific place are presented by these cases.

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1 The comparison to the enemy soldiers captured during World War II is inapt. Virtually all of the prisoners taken captive during World War II were enemy aliens dressed in the uniforms of enemy nations. There was no doubt about their enemy status, and they claimed none. By contrast, as the Supreme Court pointed out in *Rasul*, the petitioners here "are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States." *Rasul*, 124 S. Ct. at 2693.

2 The Guantanamo lease differs significantly from other leases for U.S. military bases, including those for Newfoundland, Bermuda, Jamaica, St. Lucia, Antigua, Trinidad, and British Guiana. The Guantanamo lease is the only one that continues indefinitely so long as the United States chooses to stay there. E.A.S. No. 235, Dept. of State Pub. No. 1726 (1941) 55 Stat. 1560, 1572, 1576, 1590; Treaty Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, art. III, 48 Stat. 1682, 1683, T.S. No. 866. As Justice Kennedy pointed out, the Guantanamo lease "is no ordinary lease. . . . From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." 124 S. Ct. at 2700 (Kennedy, J., concurring).

2. The Supreme Court Held That The Detainees Have Stated A Claim For The Violation Of U.S. Law.

The Detainees do not, as the government asserts, read the *Rasul* decision as "overruling *Eisentrager* and *Verdugo*." (Gov't Reply 14). Whether the statements in those cases regarding the extraterritorial application of the Constitution may have application elsewhere is not a question this Court need decide. Because Guantanamo is "within 'the territorial jurisdiction' of the United States," and because the Detainees are held there, they are entitled to rights under U.S. law. Footnote 15 in *Rasul* simply recognizes what flows from that fact – Detainees' allegations that they are innocent civilians held by mistake and without legal process suffice to state a claim under section 2241(c)(3) of the habeas statute for the violation of U.S. law.

The government's assertion that footnote 15 addresses only "jurisdictional" issues divorced from whether the Detainees have stated a claim makes no sense. This Court had decided that the federal courts lack jurisdiction to consider the Detainees' claims because the Detainees have no rights under the Constitution or other sources of U.S. law. *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003). The Supreme Court reversed. In doing so, the Supreme Court could have said that it disagreed with this Court that jurisdiction depended on Detainees having substantive rights under U.S. law, or it could simply have remained silent with respect to Detainees' claims for violations of U.S. law. But it did neither.

Instead, it explicitly said in footnote 15 that Detainees' allegations that they have been deprived of their liberty without sufficient cause or process "unquestionably" state a claim for the violation of U.S. law. That statement clearly speaks to the merits and responds to the basis for this Court's decision. The government's argument that Detainees have no legal rights under U.S. law that can be vindicated through habeas simply cannot be reconciled with that statement by the Supreme Court.[3]

3. Habeas Relief For A Prisoner In Federal Custody Does Not Depend On Proving An Independent Violation Of "Positive" Law.

The government argues that, to grant habeas relief under 28 U.S.C. § 2241(c)(1) to someone in custody "under or by color of the authority of the United States," the court must find that the government has violated the Constitution or a federal statute or regulation, and that a detention is "illegal" under that section only if the government has violated such an independent provision of "positive" law. That argument is directly contrary to the wording of the habeas statute and directly contrary to the interpretation of habeas corpus by our courts from the beginning of the Republic, and by the English courts under the common law.

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3 One of the Detainees, Mr. Hicks, was held on an U.S. naval vessel – an extension of the sovereignty of the United States – and is therefore clearly entitled to all applicable constitutional protections. *See United States v. Rodgers*, 150 U.S. 249, 260-65 (1893); *United States v. Flores*, 289 U.S. 137, 155-56 (1933).

Habeas relief for a prisoner in federal custody does not depend on proving an independent violation of the Constitution or federal statute or regulation. The inquiry into the "legality" of the detention required in a habeas review under § 2241(c)(1), as under the common law, is an inquiry into whether there is sufficient legal and factual basis for the detention. Holding someone arbitrarily and without sufficient cause is unlawful and, in the words of Blackstone and Alexander Hamilton, habeas corpus is the "remedy for this fatal evil." The Federalist No. 84.

To support its unprecedented argument, the government does a number of remarkable things:

First, it asks this Court to rewrite § 2241(c)(1) – which has been part of U.S. law in substantially the same form since 1789 – by grafting onto it a clause making relief under that provision dependent on a violation of the Constitution or federal laws or treaties. As the Supreme Court has emphasized, however, "it is not the province of [the] Court to rewrite the statute." *Artuz v. Bennett*, 531 U.S. 4, 10 (2000).

Second, the government mischaracterizes the holdings of some of the seminal precedents in our legal history. To start with, it misstates the holding in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807). It quotes Chief Justice Marshall's statement in that case that "the power to award the writ by any of the courts of the United States, must be given by written law," apparently to support its argument

that habeas relief can only be granted for violations of the Constitution or written statutory or regulatory law. *Id.* at 94. That is simply not what the quoted statement meant. Rather, it clarified that courts must be granted the authority to award the writ through written law, as the federal courts were in section 14 of the First Judiciary Act (now codified at § 2241(c)(1)). Once that authority exists, as Chief Justice Marshall made clear, the court may grant habeas relief if, upon examination, it finds that the prisoner is held without sufficient cause.

The government says that the *Bollman* Court mentioned the constitutional definition of treason in its analysis. But the point is that the Court's award of habeas relief in that case did not depend on any finding of a violation of the Constitution or statute or regulation. The Court awarded habeas relief and ordered the prisoners discharged because it found, after it "fully examined and attentively considered" the government's evidence, that there was insufficient factual and legal cause for the detentions. *Id.* at 125, 136-37.

The same was true in *Ex parte Burford*, 7 U.S. (3 Cranch) 448 (1806), where the Court issued a writ of habeas corpus and discharged a federal prisoner who had been committed to the custody of federal marshals. The prisoner neither did nor could claim that any federal statute or regulatory or constitutional provision was violated by his detention. His sole claim was that his detention was without sufficient cause in fact or law. The decision was that: "the Judges of this court

were unanimously of opinion, that the warrant of commitment was illegal, for want of stating some good cause certain . . . . The prisoner is discharged." *Id.* at 453.

The government attempts to confuse the issues by citing the statement in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) that "There is no federal general common law." But Detainees are not asking the court to create any general federal common law. Rather, the writ of habeas corpus is a common law writ that was explicitly preserved in the Suspension Cause of the Constitution and enacted into law in the First Judiciary Act. As the Supreme Court has made clear time and again, the meaning and scope of that writ is found in the common law. *See, e.g., Ex parte Bollman*, 8 U.S. (4 Cranch) at 93-94 ("[F]or the meaning of the term habeas corpus, resort may unquestionably be had to the common law."); *Ex parte Watkins*, 28 U.S. 193, 202 (1830).[4]

The Supreme Court emphasized that point again in *McNally v. Hill*, 293 U.S. 131, 135-37 (1934):

> "The statute does not define the term habeas corpus. To ascertain its meaning and the appropriate use of the writ in the federal courts, recourse must be had to the common law from which the term was drawn, and to the

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4 In reviewing the common law history, Chief Justice Marshall explained: "The English judges, being originally under the influence of the crown, neglected to issue this writ where the government entertained suspicions which could not be sustained by evidence . . . and great individual oppression was suffered in consequence." *Id.* at 203.

> decisions of this Court interpreting and applying the common law principles which define its use . . . .
>
> . . . [The] legislation and the decisions of the English courts interpreting it have been accepted by this Court as authoritative guides in defining the principles which control the use of the writ in the federal courts.

More recently, in *INS v. St. Cyr*, 533 U.S. 289, 301 (2001), the Supreme Court recognized that, "[A]t the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789,'" and the Court looked to common law cases to determine the scope and meaning of the writ. In doing so, the Court pointed out:

> In England prior to 1789, in the Colonies, and in this Nation during the formative years of our Government, the writ of habeas corpus was available to nonenemy aliens as well as to citizens . . . . [T]hose early cases contain no suggestion that habeas relief in cases involving executive detention was only available for constitutional error.

Id. at 301-03.

And, in this very case, as the government acknowledges (Gov't Reply 9-11), the Supreme Court looked directly to common law cases to define the scope and meaning of the writ in the federal courts. *See Rasul*, 124 S. Ct. at 2692, 2696-97; *see also Hamdi*, 124 S. Ct. 2633, 2661-62 (Scalia J., dissenting). Significantly, there is no suggestion in the numerous cases cited with approval by the Supreme Court in either *Rasul* or *St. Cyr* that any independent constitutional, statutory or regulatory violation is required to grant habeas relief. Rather, those cases make

clear that relief is warranted if it appears to the court after examination that there is insufficient legal or factual cause for the detention.[5]

The Supreme Court decided that the writ extends to these Detainees, and they allege that they are detained without sufficient cause. The Supreme Court remanded to the district court with instructions "to consider in the first instance the merits of petitioners' claims." The district court cannot do that by summarily dismissing those claims.

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5 *See, e.g., Ex parte Randolph,* 20 F. Cas. 242 (C.C.D. Va. 1833); *Commonwealth v. Holloway*, 1 Serg. & Rawle 392 (Pa. 1815); *Ex parte D'Olivera*, 7 F. Cas. 853 (C.C.D. Mass. 1813); *United States v. Villato*, 28 F. Cas. 377 (C.C.D. Pa. 1797); *Republica v. Keppele*, 2 U.S. 197 (1793); *Case of the Hottentot Venus*, 13 East 195, 104 Eng. Rep. 344 (K.B. 1810); *Rex v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759); *Alder v. Puisy*, 1 Freeman 12, 89 Eng. Rep. 10 (K.B. 1671); *King v. Salmon*, 2 Keble 450, 84 Eng. Rep. 282 (K.B. 1669).

The government cites a single case, *Luther v. Molina*, 627 F.2d 71 (7th Cir. 1980), to support its novel proposition that habeas relief under § 2241(c)(1) requires an independent violation of the Constitution or federal statutes or regulations. That case holds no such thing. It involved an application for bail by a parolee incarcerated pending a hearing for revocation of his parole. The court stated unequivocally that under 28 USC § 2241(c)(1) the "writ of habeas corpus is available to any person in federal custody" and "the purpose of the writ is to provide a means to secure release from illegal detention." *Id.* at 76. The court did not define "illegal detention" to mean only a detention in violation of some constitutional, statutory or regulatory provision. The government simply omits a portion of the court's statement. The court pointed out that, when the decision to detain someone pending revocation of his parole is subject to a hearing before the Parole Commission to which discretion is committed by law, the detention must generally be regarded as legal and with sufficient cause. Even in those circumstances, however, the detention may nevertheless be challenged if "it contravenes applicable constitutional, statutory or regulatory provisions." *Id.*

4. The CSRTs Comport Neither With International Law Nor With Due Process.

The government continues to argue that Detainees' petitions should be dismissed on the pleadings because the government established the CSRT process. The primary thrust of the government's argument is that the CSRTs satisfy due process as a matter of law for every Detainee because they were modeled on the Article 5 tribunals "cited with approval" in *Hamdi*. To be sure, a plurality of the Court in *Hamdi* suggested that under some circumstances there was "the possibility" that Article 5 tribunals might satisfy due process, 124 S. Ct. at 2651, while an equal number of justices disagreed. *See id.* at 2652 (Souter, J., concurring in part and dissenting in part); *id.* at 2660 (Scalia, J., dissenting). The *Hamdi* plurality emphatically concluded, however, that *Mathews v. Eldridge,* 424 U.S. 319 (1976) – a case not even cited in the government's brief – provides the appropriate standard for measuring the sufficiency of a process for determining whether a detainee can be held as an enemy combatant. The government makes no attempt to establish that the CSRTs satisfy the *Mathews v. Eldridge* standard. As demonstrated in our opening brief, the CSRTs cannot possibly satisfy that standard because they did not give the Detainees notice of or a fair opportunity to rebut the government's factual assertions before a neutral decision maker. *See* Br. 31-60.

Even if the Article 5 procedures, rather than *Mathews v. Eldridge*, provided the relevant standard, the CSRTs differ from Article 5 tribunals in at least four fundamental ways:

First, the timing of the two procedures differs significantly. Article 5 tribunals are provided in the immediate aftermath of capture. In contrast, the CSRTs were not provided until almost three years after detention was imposed. As the *Hamdi* plurality emphasized, to satisfy constitutional muster, a process "must be granted at a meaningful time and in a meaningful manner.'" *Hamdi*, 124 S. Ct. at 2649. Thus, what might have been sufficient at the onset of the detention is not the same as what is required three years later.

Second, the Article 5 and CSRT procedures have fundamentally different purposes. Article 5 tribunals are intended to determine in the first instance an individual's status under the Geneva Conventions. The CSRTs, in contrast, were intended to review a longstanding determination, stated repeatedly by those in command, that the Detainees fit the government's newly created "enemy combatant" category.

Third, the legal impact of the two procedures differs fundamentally. Article 5 tribunals assign to all Detainees a recognized status under carefully delineated categories prescribed by international law, which carries with it a body of identifiable rights and protections. In contrast, the CSRTs were designed to

confirm a status created by the government for the first time in defending this litigation that seeks to deny to Detainees any rights guaranteed by the Geneva Conventions or U.S. law.

Fourth, the evidentiary burden in the two procedures is entirely different. In an Article 5 hearing the government bears the burden of establishing by a "preponderance of the evidence" that a Detainee is not entitled to protected status. *See* J.A. 1227; United States Central Command Regulation No. 27-13 (1995), App. C § 6 (c)(2). The CSRTs, in contrast, create a presumption in favor of the government's evidence, including its secret evidence, and its conclusion that a Detainee is an enemy combatant entitled to no protection or status under law.

Thus, far from receiving the "process historically available to captured combatants" (Gov't Reply 3), Detainees were denied the process required by the military's own regulations and the Geneva Conventions and, instead, received a process unprecedented in the history of the laws of war—a process intended to preclude Detainees from securing any rights.

The government fundamentally misunderstands the role of the courts in judging the validity of the CSRTs. As the *Hamdi* plurality emphasized, a court "must itself ensure that the minimum requirements of due process are achieved." 124 S. Ct. at 2672. The government argues, however, that this Court must accept the validity of the CSRTs without undertaking any factual or evidentiary review.

The government does not deny that the CSRTs would be inconsistent with due process if they relied on statements obtained by torture, but simply asserts as a factual matter that the CSRTs did not rely on coerced statements and asks this Court to take it at its word. *See* Gov't Reply 33-34. But, the district court has a duty to examine this question, and whether the CSRTs actually relied on statements obtained through torture can be determined only on a case-by-case basis through examination of the evidence. Indeed, the government's own factual returns strongly suggest that the CSRTs may have relied on statements obtained by torture (Br. 46-48).

Likewise, the government apparently recognizes that a CSRT would not satisfy due process if it condoned the detention of a person who "supported" terrorism only unwittingly. Again, the government simply asks this Court to take its word that this did not occur and is "unsupported by the record." (Gov't Reply 35). But the CSRT in Mohammed Daihani's case, for example, found that he is an enemy combatant notwithstanding its express conclusion that the record was "absent evidence" that Mr. Daihani knew his activities in donating to a charity could have supported terrorism. S.A. 1314. In any event, whether the CSRTs resulted in the detention of innocent people cannot be resolved on the pleadings or on the government's say-so.

In arguing that all of Detainees' petitions must be dismissed without any judicial inquiry into the factual basis of the detentions or how the CSRTs were actually applied, the government relies heavily on 28 U.S.C. § 2254(d). But that section addresses post-conviction habeas petitions from persons in custody pursuant to the judgment of state courts. It does not articulate the standard of review for persons held in federal custody under § 2241(c)(1) who have never been tried, let alone charged, and have been subjected to seemingly endless detention without any meaningful hearing.

Similarly, the government relies on a number of cases – *Ex parte Quirin, In re Yamashita*, and *Herrera v. Collins* – all of which involved petitions filed by petitioners following their convictions by juries or other tribunals established pursuant to an act of Congress, where the petitioners were granted all the due process rights the Detainees have been denied here – the right to confront and rebut the factual evidence against them, to cross-examine their accusers, to call witnesses and present evidence and to be represented by counsel. *See Ex parte Quirin*, 317 U.S. 1, 23, 27-28 (1942) (duly constituted military commission heard evidence by the prosecution and defense counsel); *In re Yamashita*, 327 U.S. 1, 5, 16 (1946) (duly constituted military commission found petitioner guilty only after hearing from two hundred and eighty-six witnesses, who gave over three thousand pages of

testimony); *Herrera v. Collins*, 506 U.S. 390, 400 (1993) (state court convicted petitioner "by due process of law" after a "fair trial").

In those circumstances, the factual decisions of the tribunals that convicted them were clearly entitled to substantial deference. The same is as clearly not true for the CSRTs, which were not established by law but cobbled together by the government just days after the Supreme Court's ruling,[6] and which, on their face and in practice, denied Detainees the most fundamental protections of due process. Here, however, the government goes well beyond seeking a deferential standard of review. It claims that the establishment of the CSRT process is itself dispositive, that no judicial review is permitted, and that Detainees' factual claims must be dismissed on the pleadings without examination.

5. The District Court Should Consider The Merits Of Detainees' Geneva Convention Claims.

The Supreme Court in *Rasul* ordered the district court to consider the merits of *all* the Detainees' claims, including their habeas claims based on the Geneva Conventions. The government asserts that the court should dismiss all those claims as a matter of law and without consideration, arguing that (i) the Geneva

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6 Unlike the tribunals in *Quirin* and *Yamashita*, which were established pursuant to an act of Congress. *See* 10 U.S.C. §§ 1483, 1486, 1509, 1577, the CSRT process was established purely as a matter of Executive discretion with the express caveat that it does not "create any right or benefit, substantive or procedural, enforceable at law." J.A. 1190.

Conventions address only "conditions-of-confinement" and not "release from custody," (ii) the rights created by the Conventions "are not judicially enforceable;" and (iii) the underlying Convention claims "are meritless." (Gov't Reply 46-47). None of these reasons withstands scrutiny.

A. The Geneva Conventions Address Release From Custody.

The Geneva Conventions clearly address "release from custody."[7] The Fourth Convention protects "civilian persons" in times of war. Article 79 of that Convention provides that civilians may not be detained except in accordance with other provisions of the Convention, and Article 132 provides that each detained person must be released as soon as the reasons necessitating detention no longer exist. Thus, Detainees' claims that they are in custody in violation of the Fourth Geneva Convention are cognizable in habeas.

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7 The premise of the government's argument, that habeas is unavailable to challenge conditions of confinement, is incorrect. As the Second Circuit held in *Poindexter v. Nash*, 333 F.3d 372 (2d. Cir. 2003), a case relied upon by the government (Gov't Reply 52), habeas may be used to challenge conditions of confinement. Detainees challenge both the lawfulness of their custody and the conditions of their confinement. In addition, Detainees have alleged jurisdiction not only under the habeas statute but also under 28 U.S.C. § 1331. The Supreme Court expressly held that Detainees' invocation of federal question jurisdiction under § 1331 is appropriate. *Rasul*, 124 S. Ct. at 2698. Therefore, the Detainees' Convention-based claims deserve plenary consideration whether they are cognizable under habeas or under federal question jurisdiction.

Moreover, Article 5 of the Third Convention creates the fundamental right for any individual detained during hostilities who raises "any doubt" as to his status to obtain an individual determination by an impartial "competent tribunal." As the U.S. regulations implementing that provision make clear, one of the specific determinations to be made by the competent tribunal is whether the detainee is an "innocent civilian who should be immediately returned to his home or released." J.A. 1225, 1227. The United States has followed that requirement in each of our other recent conflicts, from Vietnam to the current conflict in Iraq. Indeed, in the prior Gulf War, the military held 1,196 of these individual hearings, and in almost three quarters of those cases, found the persons detained not to be combatants but "innocent civilians" picked up by mistake.[8] The Third Geneva Convention thus directly addresses release from custody issues, and Detainees' claims under that Convention are cognizable in habeas.

B. The Geneva Conventions Create Judicially Enforceable Rights.

The habeas statute, at 28 U.S.C. § 2241(c)(3), extends the Great Writ to prisoners who are "in custody in violation of the Constitution or laws *or treaties* of the United States." (Emphasis added). As demonstrated above, Detainees have claims under the Conventions that are cognizable in habeas. Given the

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8 U.S. Dept. of Defense, 102nd Cong., Conduct of the Persian Gulf War: Final Report to Congress (April 1992).

unambiguous language of 28 U.S.C. § 2241(c)(3), it would seem nothing further need be said about the justiciability of those claims. Nonetheless, the government argues that: "if a treaty does not itself create judicially enforceable individual rights, then the habeas statute does not make it enforceable." (Gov't Reply 51). The government seeks to support this argument with a string of cases holding that, because the International Covenant on Civil and Political Rights ("ICCPR") is not self-executing, its provisions may not be relied upon to secure relief in a habeas petition. *Id.* at 51-52. However, the government's argument fails.

First, the government is unable to meaningfully distinguish the present case from *Wildenhus's Case*, 120 U.S. 1 (1887), in which the Supreme Court held that a consular treaty between the United States and Belgium was enforceable in federal court under habeas even though the treaty did not explicitly provide for judicial enforcement of its provisions. *See also United States v. Rauscher*, 119 U.S. 407, 431 (1886) (treaties are the law of the land under the Supremacy Clause and enforceable in the courts; if the prisoner is under arrest, a "writ of habeas corpus from one of the federal judges or federal courts, issued on the ground that he is restrained of his liberty in violation of the constitution or a law or *a treaty of the United States*, will bring him before a federal tribunal, where the truth of that allegation can be inquired into, and, if well founded, he will be discharged" (emphasis added)); *United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801)

("[W]here a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an Act of Congress.").

Second, it is clear from the text and history of the Geneva Conventions that they do create individual rights that are judicially enforceable. Article 5 of the Third Geneva Convention, for example, creates the fundamental right for any detained individual whose status is in "doubt" to have an individual hearing by a "competent tribunal." Further process is due under Article 106, which requires that "[e]very prisoner of war shall have . . . the right of appeal," and under Article 129, which guarantees that "[i]n all circumstances, the accused persons shall benefit by safeguards of proper trial and defense." Similarly, the Fourth Geneva Convention affords civilians subject to military detention because they are suspected of criminal activity or of constituting a security threat, explicit "rights of fair and regular trial," "the right to present evidence," "the right to be assisted by a qualified advocate or counsel of their own choice," the "right at any time to object," and "the right of appeal" if convicted. *See* Geneva Convention IV, arts. 5, 72, 73, 78, & 147. The Geneva Conventions themselves refer to these protections as "rights," which no nation can restrict and "[p]rotected persons . . . in no circumstances [can] renounce in part or in entirety." *Id.* arts. 7, 8; Geneva Convention III, arts. 6, 7.

Despite this unambiguous language, the government belittles the "occasional[]" reference to rights in the Third Geneva Convention and, further, misrepresents the drafting history of the 1949 Geneva Conventions. (Gov't Reply 55-57). The government incorrectly portrays the Commentary to the Third Geneva Convention as emphasizing the "robust mechanisms for diplomatic enforcement" to the exclusion of judicially enforceable private rights and simply misstates the substance of the Commentary to the First Geneva Convention as not providing for private enforcement of rights against a detaining state. *Id.* at 56-57.

The Commentary is clear: the 1949 Geneva Conventions were written "first and foremost to protect individuals, and not to serve state interests."[9] The drafters of the Conventions worked to correct the deficiencies of the 1929 Conventions, which, although they contained the word "right," had failed adequately to safeguard the rights of individuals. Diplomacy had proved inadequate to safeguard the rights of the very people the Convention sought to protect. It was in this context that the drafters adopted the unanimous recommendation of the Red Cross Societies "to confer upon the rights recognized by the Conventions 'a personal and intangible character' allowing the beneficiaries to claim them irrespective of the attitude adopted by their home country."[10] Thus, under the 1949 Conventions,

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9 Oscar Uhler *et al.*, *Geneva Convention IV: ICRC Commentary* 21 (1958).

10 Jean de Preux *et al.*, *Geneva Convention III: ICRC Commentary* 91 (1960).

protected persons "may even, either personally or through their prisoners' representative, put their claim *directly to the detaining authorities*" because "[t]his is the *practical application of the concept of rights which the individual may invoke, independently of the State.*"[11] The provisions allow protected persons to "claim the protection of the Convention, not as a favour, but as a *right*, and enable them to employ any procedure available, however rudimentary, to demand respect for the terms of the Conventions in case of violation."[12] Accordingly, the "existence of 'rights' conferred on prisoners of war was affirmed" in the 1949 Conventions.[13]

Thus, contrary to the government's description, the Conventions' language and drafting history make clear that the rights afforded individuals are privately enforceable.

Third, the ICCPR cases cited by the government are inapposite. The ICCPR was ratified by the Senate with an express reservation that certain provisions are not self-executing. *See* 138 Cong. Rec. S4784 (daily ed. Apr. 2, 1992). No such express reservation was made by the Senate when it ratified the Geneva Conventions. On the contrary, the Senate Foreign Relations Committee

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11 Jean Pictet *et al.*, *Geneva Convention I: ICRC Commentary* 84 (1952).

12 *Id.*

13 Preux *et al.*, *supra* note 10.

recognized, and the Executive concurred, that implementing legislation was *not* required for the Geneva Convention provisions pertaining to the protection of individuals at issue here (Br. 64-65). Furthermore, the government has not cited a single case analyzing the availability of habeas relief for Convention-based claims. Indeed, the government does not even mention, much less attempt to distinguish, the cases cited in Detainees' opening brief (Br. 66 n.52-53) that the provisions of the Conventions relating to individual rights are judicially enforceable and the Conventions are self-executing.[14] *See, e.g., Hamdan*, 344 F. Supp. 2d at 165; *In re Guantanamo Detainee cases*, 355 F. Supp. 2d at 478;. *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992). As one court has stated, the Third Convention "is a self-executing treaty to which the United States is a signatory. It follows from this that the provisions in issue here are a part of American law and thus binding in federal courts under the Supremacy Clause." *United States v. Lindh*, 212 F. Supp. 2d 541, 553-54 (E.D. Va. 2002); *see also Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 590 (S.D.N.Y. 2002) (holding that the Geneva Conventions "under the Supremacy Cause ha[ve] the force of domestic law"), *remanded on other grounds*, 352 F.3d 695 (2d Cir. 2003), *rev'd on other grounds*, *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) .

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14 The government relies upon the vacated decision in *Hamdi* (Gov't Reply 52), but vacated decision has no precedential value. *See, e.g., Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 317 n.31 (1988).

The government also ignores the consistent recognition by the U.S. military that the Conventions are the "law . . . of the United States," enforceable by prisoners. *In re Guantanamo Detainee cases*, at 355 F. Supp. 2d at 479 (citing *Hamdan v. Rumsfeld*, 344 F. Supp. 2d at 165); *see also* Law of War Workshop Deskbook 85 (Brian J. Bill ed., June 2000) (prisoners of war "have standing to file a Habeas Corpus action . . . to seek enforcement of their GPW rights"). The regulations promulgated by every branch of the armed forces have consistently treated the Conventions as binding law. *See* J.A. 1226 § 1-5(a)(2); Dep't of the Army Field Manual No. 27-10, *The Law of Land Warfare*, ch. 3, § I ¶ 71(d) (1956).

In sum, Detainees' claims under the Geneva Conventions are judicially enforceable and cognizable in habeas.

C. The Merits Of The Detainees' Convention Claims Are Not Before This Court.

The government attempts to confuse the issues on appeal by arguing that Detainees' claims have no merit. (Gov't Reply 58-64). But that argument, at the least, is premature. The Supreme Court in *Rasul* instructed the *district court* to determine in the first instance the merits of Detainees' claims. Only the government's legal arguments for a summary dismissal of those claims are at issue in this appeal; a determination about the merits must be left on remand to the district court. Detainees unquestionably have alleged sufficient facts from which it

could be shown they are entitled to relief under the Geneva Conventions. *See Rasul*, 124 S. Ct. at 2698 n.15. That is all they were required to show at this stage to avoid dismissal.

6. The Detainees' Other International And ATS Claims Are Enforceable In Federal Court.

1. The Court should also reject the government's erroneous argument that the Optional Protocol and the ILO treaty are silent with respect to the detention of child combatants and that they do not create private rights enforceable through habeas. To the contrary, Article 6 of the Optional Protocol requires the United States to ensure that children, even voluntary combatants, "are demobilized or otherwise released from service" and to "accord to these persons all appropriate assistance for their physical and psychological recovery, and their social reintegration."[15] Both treaties plainly create individual rights in children that are self-executing; and, therefore, enforceable through habeas. *See United States v. Pink*, 315 U.S. 203, 230 (1942).

2. The district court erred in interpreting *The Paquete Habana*, 175 U.S. 677, 699 (1900) to mean that customary international law is inapplicable because

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15 The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, S. Treaty Doc. No. 106-37, 2000 WL 3336607 (May 25, 2000); s*ee also id.* Preamble, art. 7; International Labour Organization's Worst Forms of Child Labour, No. 182, S. Treaty Doc. No. 106-5, 1999 WL 33292717, art. 3(a).

the Detainees have Fifth Amendment and some have Geneva Convention rights. *See* 355 F. Supp. at 481. To the contrary, *Paquete Habana* stands for the proposition that customary international law norms may be disregarded only where there is a "distinct exemption in a treaty or other public act of the government." 175 U.S. at 711. Because the Geneva Conventions and public law do not exempt those norms, Detainees' customary international law claims should not have been dismissed.

3. The government's only basis for its argument that the District Court should have dismissed Detainees' ATS claims is that the ATS and APA do not provide a waiver of sovereign immunity. However, as Detainees established (Br. 74-75), the Court in *Rasul* held that the ATS explicitly confers the privilege of suing under § 1350, and by necessity superceded Judge Randolph's opinion dismissing Detainees' ATS claims on the grounds of sovereign immunity. Additionally, as detailed in the initial brief (Br. at 74-75), the APA exceptions to sovereign immunity are not applicable here.[16]

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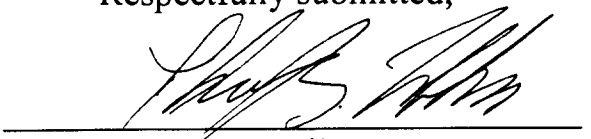
16 The government says it knows of "no authority" to support the Detainees' appeal of the district court's stay order and argues that, in any event, the stay was warranted to protect it from the "harm" of discovery (Gov't Reply 69-72). However, there is ample precedent for the appealability of the stay order. *Dellinger v. Mitchell*, 442 F.2d 782, 788 (D.C. 1971); *McSurely v. McClellan*, 426 F.2d 664, 668 (D.C. Cir. 1970); *see also Carmichael v. White*, 163 F.3d 1044, 1045 (8th Cir. 1998); *Rojas-Hernandez v. Puerto Rico Electric Power Auth.*, 925 F.2d 492, 493-95 (1st Cir. 1991). Moreover, the Supreme Court has rejected the argument that subjecting the government

CONCLUSION

For the foregoing reasons, the government's motion to dismiss should be denied in its entirety. A year after the Supreme Court ordered it – and more than three and a half years after they were deprived of their liberty – the Detainees are entitled to consideration by the district courts of "the merits of [their] claims."

Respectfully submitted,



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to the normal burden of litigation discovery would harm the Executive's ability to wage war on terrorism. *Hamdi*, 124 S. Ct. at 2649.

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

I certify that, in accordance with Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), the foregoing Reply Brief for the Guantanamo Detainees is proportionally spaced, has a typeface of 14 point and contains 6900 words (which does not exceed the applicable 7,000 word limit authorized by this Court in its Order of May 18, 2005).

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CERTIFICATE OF SERVICE

I certify that today, June 28, 2005, I served the foregoing Reply Brief for the Guantanamo Detainees on the government by causing copies to be hand-delivered to the Court Security Officer for hand-delivery to the following counsel of record for the government:

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