IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RIDOUANE KHALID, Petitioner, v. GEORGE WALKER BUSH, et al., Respondents.	)	Civil Action No. 1:04-cv-1142 (RJL)
LAKHDAR BOUMEDIENE, et al., Petitioners, v. GEORGE WALKER BUSH, et al., Respondents.	)	Civil Action No. 1:04-cv-1166 (RJL)

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW PURSUANT TO COURT'S DECEMBER 2, 2004 ORDER

TABLE OF CONTENTS

Pursuant to the invitation of the Court at the December 2, 2004, oral argument, respondents respectfully submit this supplemental memorandum to address certain issues in connection with their motion to dismiss or for judgment as a matter of law. Respondents will address the following matters herein: (i) the appropriate standard by which the Court should evaluate the instant motion; (ii) whether aliens detained at wartime outside the sovereign United States can obtain habeas relief under 28 U.S.C. § 2241(c)(1) in the absence of any showing of constitutional or other cognizable rights; (iii) the unprecedented nature of the fact-intensive judicial review of enemy combatant status that petitioners propose; (iv) collateral estoppel arguments newly raised by petitioners after regular briefing closed; (v) the lack of any applicable waiver of sovereign immunity permitting petitioners' ATS claims and the incongruity of trying to shoehorn those claims into the APA; (vi) the hypothetical allegations of torture made by petitioners and why they do not save petitioners' claims; and (vii) whether Article I, § 8, cl. 11 of the Constitution authorizes Congress to legislate in the area of wartime detention of enemy combatants, and if so, what effect, if any, that provision has on the issues on the present motion.[1]

I. RESPONDENTS' MOTION MUST BE GRANTED IF THERE IS NO VIABLE THEORY ADVANCED BY PETITIONERS UPON WHICH THEY COULD OBTAIN RELIEF FROM THIS COURT

In their reply brief, respondents made clear that they filed a motion to dismiss or for judgment as a matter of law, coupled with a response to the merits of the habeas petitions, pursuant to the procedures set forth in the habeas statute. See Reply at 20-21 n.23. Nevertheless,

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[1] Earlier briefing is cited herein as follows: "Response" means Respondents' Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support, filed Oct. 4, 2004. "Opp." means Petitioners' Memorandum in Opposition to Respondents' Motion to Dismiss, filed Nov. 5, 2004. "Reply" means Respondents' Reply Memorandum in Support of Motion to Dismiss or for Judgment as a Matter of Law, filed Nov. 16, 2004.

at oral argument petitioners persisted in trying to pigeonhole the motion under consideration as one pursuant to Rule 12(b)(6) or 12(c) of the Federal Rules of Civil Procedure or a "converted" motion for summary judgment under Rule 56 – provisions whose very applicability in habeas is debatable.[2]

Contrary to petitioners' suggestion, the Court is not constrained to assume that the allegations in the petitions are true or borrow from other aspects of the Rule 12(b)(6) framework. That construct simply does not fit the habeas corpus procedure outlined by statute and rule and followed so far in these cases, and it is particularly ill-suited where, as here, substantive review, if any, is on an administrative record without further factual development in this Court. Habeas procedure contemplates the following sequence of events: The petitioner files an application (or petition) for a writ of habeas corpus. 28 U.S.C. § 2242; Rules 2, 3 of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules").[3] The respondent then

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[2] Compare Browder v. Director, Ill. Dep't of Corrections, 434 U.S. 257, 269 n.14 (1978) (stating in dictum that a motion "explicitly based on" Rule 12(b)(6) was not an appropriate motion in a habeas case), with Tomoney v. Warden, S.C.I. Graterford, No. Civ. A. 01-0912, 2002 WL 1635008 (E.D. Pa. July 17, 2002) (rejecting argument that response that was "the functional equivalent of a Rule 12(b)(1) and 12(b)(6) motion to dismiss" was inappropriate under Browder following the enactment of the § 2254 Rules). Of course, this Court need not determine the extent to which various types of motions under Rule 12(b) are applicable to habeas, because there is no motion under Rule 12(b) that is before the Court. The combined response and motion respondents filed is well within the norm of habeas practice. See White v. Lewis, 874 F.2d 599, 603 (9th Cir. 1989) (approving general motion to dismiss as vehicle to "show cause by written response" why writ of habeas corpus should not issue, and noting that "responding to a habeas petition with a motion to dismiss is common practice"); Ukawabuto v. Morton, 997 F. Supp. 605, 608-09 (D.N.J. 1998) ("The answer to a habeas petition . . . . should respond in an appropriate manner to the factual allegations of the petition and should set forth legal arguments in support of the respondent's position, both the reasons why the petition should be dismissed and the reasons why the petition should be denied on the merits.").

[3] Although these are not § 2254 cases, the Court has discretion to apply the Habeas Rules to the extent appropriate, as many other courts have done. See Habeas Rule 1(b) (pre-Dec. 1,

"make[s] a return certifying the true cause of the detention." 28 U.S.C. § 2243; see also Habeas Rule 5 (referring to "answer" that "must address the allegations of the petition"). At that point, "[t]he court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." 28 U.S.C. § 2243. If the petition contains no viable basis upon which the relief that is sought (i.e., release) can be granted, it is inescapable that "dispos[ing] of the matter as law and justice require" means granting judgment as a matter of law to respondents, i.e., dismissing the petition.

That is precisely the posture in which these cases come before the Court. Petitioners filed their petitions. The Court (Green, J.) ordered that "pursuant to 28 U.S.C. § 2243, Respondents shall file with the Court and serve on Petitioners' counsel in all coordinated cases . . . responsive pleadings showing cause why Writs of Habeas Corpus and the relief sought by Petitioners should not be granted." Coordination Order Setting Filing Schedule et cet., dated Sept. 20, 2004, at 8. The Court also ordered respondents to file factual returns (what is included in "answers" under the Habeas Rules). Respondents have filed the Response and factual returns for all petitioners before the Court, which together "certify[] the true cause of the detention." 28 U.S.C. § 2243.

2004) ("In applications for habeas corpus in cases not covered by subdivision (a), these rules may be applied at the discretion of the United States district court."); Habeas Rule 1(b) (post-Dec. 1, 2004) ("The district court may apply any or all of these rules to a habeas corpus petition not covered by Rule 1(a)."); Castillo v. Pratt, 162 F. Supp. 2d 575, 577 (N.D. Tex. 2001); Ukawabutu v. Morton, 997 F. Supp. 605, 608 n.2 (D.N.J. 1998); Wyant v. Edwards, 952 F. Supp. 348, 352 (S.D. W. Va. 1997).

On December 1, 2004, amended versions of the Habeas Rules adopted by April 26, 2004, Order of the Supreme Court took effect. The 2004 amendments apply to proceedings, such as these, that were already pending on December 1, 2004, "insofar as just and practicable." Supreme Court Apr. 26, 2004, Order, ¶ 3. We do not discern any difference between the old and new versions of the Habeas Rules that is material to any issue before the Court, but for the Court's information we cite both versions in parallel.

Naturally, since the Response and factual returns demonstrate that petitioners are not entitled to the relief they seek, respondents incorporated into the Response a motion to dismiss or for judgment as a matter of law. See Habeas Rule 5, 1976 Adv. Comm. Note (respondent's answer to petition "'may demonstrate that the petitioner's claim is wholly without merit'") (quoting Developments in the Law – Federal Habeas Corpus, 83 Harv. L. Rev. 1083, 1178 (1970)). Thus, issue has been joined and the record is complete, and it is for the Court to determine whether – in light of the myriad legal flaws in petitioners' theories of relief, the military administrative process afforded petitioners, and the record demonstrating that they are lawfully held – there is any viable basis on which petitioners may proceed further on their claims.

II. HAVING FAILED TO ESTABLISH CONSTITUTIONAL RIGHTS, PETITIONERS CANNOT SALVAGE THEIR HABEAS CLAIMS BY INVOKING 28 U.S.C. SECTION 2241(C)(1)

Petitioners now appear to have largely backed away from their original contentions that the United States Constitution endows them with constitutional rights that this Court is obligated to vindicate in habeas. Instead, they take refuge in 28 U.S.C. § 2241(c)(1), arguing that they can proceed in this case even without demonstrating that their detention violates any provision of the Constitution or any law or treaty of the United States. See Opp. at 10, 26-27. More specifically, petitioners contend that because they are "in custody under or by color of authority of the United States," 28 U.S.C. § 2241(c)(1), they may prevail on the merits of their petitions by establishing that the government has deprived them of their liberty in violation of the "common law of habeas corpus" – an undefined concept that finds no support in any case cited by petitioners. As explained previously, petitioners' argument is without merit. See Reply at 7-9.

The writ of habeas corpus certainly has its origins in the common law, see, e.g., McCleskey v. Zant, 499 U.S. 467, 477-78 (1991), but petitioners make an extraordinary leap in logic by suggesting that those common-law roots mean the Judiciary is empowered today to order detainees released based on a subjective, judicially-defined notion of arbitrariness (i.e., a common law due process standard), without any showing of an underlying constitutional or statutory violation. Indeed, petitioners do not identify any substantive common law due process standard that would provide the contours for the exercise of such judicial power, and none of the cases they cite supports the notion that release can be ordered absent a constitutional, statutory, or treaty basis warranting relief. See United States v. Villato, 2 U.S. 370 (C.C.D. Pa. 1787) (granting habeas relief to Spanish-born prisoner charged with treason, on the ground that prisoner had never become a citizen of the United States under any statutory law of the United States or Pennsylvania); Sommersett v. Stewart, 20 How. St. Tr. 1, 79-82 (K.B. 1772) (granting habeas relief to slave because detention was not "allowed or approved by the law of England" and not expressly authorized by "positive law").

Moreover, petitioners' reliance on Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807), is misplaced. Contrary to petitioners' suggestion, Bollman does not support the sweeping proposition that courts may grant habeas relief based on the common law of habeas corpus without regard to positive sources of law. Instead, Bollman merely stands for the well-established doctrine that courts may turn to the common law in order to define the terms in the habeas statute. Id. at 93. The Supreme Court has repeatedly affirmed this concept, relying on the common law to define the terms "custody" and "habeas corpus" for purposes of 28 U.S.C.

§ 2241(c).[4] Using the common law in this fashion to clarify the scope and meaning of undefined terms in the habeas statute is clearly distinguishable from relying on the common law (or, as petitioners seem to propose, making up new common law) as a substantive basis to determine the legality of custody. In fact, Bollman expressly recognized this very distinction: "The reasoning from the bar, in relation to it, may be answered by the single observation, that for the meaning of the term habeas corpus, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law." Id. at 93-94 (emphasis added). For this reason, any contention that the Court could fashion its own common law due process standard in order to determine the legality of the custody in these cases should be rejected. The legality of the detentions must be measured against the Constitution and written laws of the United States.[5] See generally Preiser v. Rodriguez, 411 U.S.475, 484 (1973) ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that

[4] See, e.g., Peyton v. Rowe, 391 U.S. 54, 59 (1968) (explaining that because the habeas statute does not "define the terms habeas corpus or custody . . . recourse must be had to the common law") (internal quotations omitted); Jones v. Cunningham, 371 U.S. 236, 238 (1963) (stating that because the habeas statute "does not attempt to mark the boundaries of 'custody' nor in any way other than by use of that word attempt to limit the situations in which the writ can be used . . . this Court has generally looked to common-law usages and the history of habeas corpus both in England and in this country" in order to define "the situations in which the writ can be used").

[5] To hold otherwise would require the Court to formulate a substantive federal common law of due process for alien enemy combatants detained outside the sovereign territory of the United States, contrary to the reasoning of Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), and its progeny. See Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 640-41 (1981) ("The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law . . . nor does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts.").

custody, and that the traditional function of the writ is to secure release from illegal custody.") (emphasis added).

In any event, even assuming petitioners could challenge the legality of their detention based on a common law standard of due process, it certainly must be true that such a standard could not entitle petitioners to any additional process beyond the requirements imposed by the Due Process Clause of the Fifth Amendment. As the Supreme Court has explained, the "Due Process Clause of the Fifth Amendment, later incorporated into the Fourteenth, was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown. The liberty preserved from deprivation without due process included the right generally to enjoy those 'privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.' " Ingraham v. Wright, 430 U.S. 651, 672-73 (1971) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)) (emphasis added); see Dent v. West Virginia, 129 U.S. 114, 124 (1889) (explaining that the concept of "due process of law" was based on English common law "designed to secure the subject against the arbitrary action of the crown" and "in this country the requirement is intended to have a similar effect . . . that is, to secure the citizen against any arbitrary deprivation of his rights"). Because the Due Process Clause embodies "at least" those common law procedures traditionally deemed necessary before depriving a person of life, liberty, or property, petitioners cannot claim entitlement to any additional process under the historical common law of habeas corpus. And, here, because the Combatant Status Review Tribunals ("CSRTs") provide petitioners with process that more than satisfies the Due Process Clause of the Fifth Amendment, any claim that petitioners could raise

under a common law due process standard must necessarily fail. See Response at 30-42; Reply at 13-19.

III. SUBSTANTIVE JUDICIAL REVIEW OF MILITARY DETERMINATIONS RELATING TO ENEMY COMBATANT STATUS WOULD BE UNPRECEDENTED

During the December 2, 2004, oral argument, the Court inquired as to whether there were any cases in which the judiciary engaged in a substantive review and evaluation of the Military's decision to seize and detain a non-citizen as an enemy combatant. See Tr. at 46:7-47:5; 49:4-14; 54:11-17. Respondents are unaware of any cases in which the courts have exercised substantive review of such a determination. The leading cases on the exercise of judicial review of military detention of enemy combatants before the decision in Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004), which concerned detention of a U.S. citizen, including cases cited by petitioners' counsel at oral argument, agree that judicial review is limited to the question of whether the Military has the authority to detain or charge an enemy combatant, and not whether the Military's decision is correct or otherwise supported by the facts.[6]

In Ex parte Quirin, 317 U.S. 1 (1942), eight German nationals were arrested by U.S. authorities after they landed in the United States by submarine, discarded their military clothing, and proceeded with a plan to sabotage U.S. munitions factories. Id. at 20-22. The President issued a proclamation that appointed a military commission to try the Germans for violations of the rules of war. Id. at 22-23. The Germans filed a petition for writ of habeas corpus in federal

[6] Hamdi certainly does not champion substantive evidentiary review of the military's enemy combatant classification decisions. The plurality in that case opined only that in the absence of a military classification determination meeting the requirements of the Due Process Clause, courts addressing habeas petitions by U.S. citizens would be required to provide the appropriate process in court. See 124 S. Ct. at 2651.

district court, which was denied. Before the court of appeals reached a judgment, the Supreme Court granted certiorari. Id. at 19-20. Although the Court found that it had the authority to determine whether the Constitution or other U.S. law prohibited trials by military commission, it declined to address whether there was a factual basis for the military's detention and trial of the petitioners. The Court specifically refrained from considering petitioners' allegation that they "had no intention to obey the [sabotage] orders given them by the officer of the German High Command." Id. at 25 n.4. As the Court clearly stated, "We are not here concerned with any question of the guilt or innocence of petitioners." Id. at 25. In Quirin, judicial review was strictly limited to whether the President had the authority to create the military commissions and whether the petitioners were charged with violations of the laws of war. See also Ex Parte Milligan, 71 U.S. 2 (1866) (judicial review of conviction by military commission limited to whether commission had jurisdiction to hear charges against petitioner).

This narrow scope of judicial review of military determinations was explained further in Application of Yamashita, 327 U.S. 1 (1946), a case cited by petitioners' counsel in support of their position that courts have engaged in substantive review of the merits of a military judgment. See Tr. at 49:18-23. In Yamashita, a Japanese General sought to have the Supreme Court review the Philippines' denial of a writ of habeas corpus after he was tried by a U.S. military commission and sentenced to death for violations of the law of war. Id. at 5-6. The Supreme Court limited its review to whether the military commission had the authority to detain and convict the petitioner, whether the allegations against him constituted a crime that the commission was authorized to try, and whether the actions of the commission violated any applicable law. Id. at 25. The Court specifically declined to review the evidence against petitioner. See id. at 17 ("We

do not here appraise the evidence on which petitioner was convicted."). Indeed, the Court further explained the limited scope of the courts' review of the substance of military judgments that it expressed in Quirin:

> We also emphasized in Ex parte Quirin, as we do here, that on application for habeas corpus we are not concerned with the guilt or innocence of the petitioners. We consider here only the lawful power of the commission to try the petitioner for the offense charged. In the present cases it must be recognized throughout that the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court. They are tribunals whose determinations are reviewable by the military authorities either as provided in the military orders constituting such tribunals or as provided by the Articles of War. Congress conferred on the courts no power to review their determinations save only as it has granted judicial power 'to grant writs of habeas corpus for the purpose of an inquiry into the cause of the restraint of liberty.' The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. 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. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions.

Id. at 344-45 (internal citations omitted) (emphasis added). Thus, as in Quirin, the Yamashita Court specifically declined to enter into an intensive fact-based inquiry into whether the petitioner was guilty of the crimes for which he was accused. The Court recognized that such an inquiry is properly left to the province of the Executive and the Military, who are alone authorized to review their own judgments. See also Johnson v. Eisentrager, 339 U.S. 763, 786 (1950) ("It is not for us to say whether these prisoners were or were not guilty of a war crime, or whether if we were to retry the case we would agree to the findings of fact or the application of the laws of war made by the Military Commission."); Ludecke v. Watkins, 335 U.S. 160, 171-72

(1948) ("The fact that hearings are utilized by the Executive to secure an informed basis for the exercise of summary power does not argue the right of courts to retry such hearings, nor bespeak denial of due process to withhold such power from the courts. Such great war powers may be abused, no doubt, but that is a bad reason for having judges supervise their exercise, whatever the legal formulas within which such supervision would nominally be confined.").

In In re Territo, 156 F.2d 142 (1946), also cited by petitioners' counsel, see Tr. at 49:18-23, a United States citizen was captured while fighting for the Italian army and held as a prisoner-of-war. Id. at 142-43. He filed a habeas petition in district court, which was summarily dismissed, and he appealed to the Ninth Circuit. Id. The Ninth Circuit limited its review to whether the petitioner was legally captured and detained as a prisoner-of war. Specifically, the court found that petitioner's citizenship and alleged involuntary conscription into the Italian army, as well as the cessation of active hostilities with Italy (without a treaty of peace), did not affect his status as a prisoner-of-war. Id. at 145-48. Consistent with the Supreme Court's limited review in Quirin and Yamashita, the Ninth Circuit in Territo also did not engage in a substantive review of the underlying facts of the petitioner's capture to determine whether the military's determination that it needed to detain him was accurate or in error.[7]

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[7] During oral argument, petitioners' counsel also cited Ex parte Endo, 323 U.S. 283 (1944), as a "useful analog" to the intensive substantive judicial review of the Military's detention of enemy combatants that petitioners propose be exercised in these cases. See Tr. at 49:18-23. On the contrary, Endo did not even present a factual dispute for the Court to review. In Endo, a Japanese-American United States citizen – not an enemy combatant – was interned in California by the War Relocation Authority, a civilian agency, and sought relief by filing a petition for writ of habeas corpus in federal district court. 323 U.S. at 285. The government conceded that the petitioner was not detained on any charge and that she was not even suspected of disloyalty. Rather, petitioner had been granted leave clearance but continued to be detained as part of a step-by-step evacuation program. Id. at 294-95. In addition to addressing a question of proper territorial jurisdiction, the Court determined that, pursuant to applicable Executive Orders which

Thus, as these cases demonstrate and contrary to petitioners' arguments, any substantive judicial review of whether the Military has correctly classified an alien as an enemy combatant is wholly unprecedented. Whether the Military has made an accurate determination of enemy combatant status for a given petitioner, based on an intensive review of the facts surrounding his circumstances of capture and the best available intelligence, is a decision properly left to the Executive. The role of the Court, if any, in reviewing whether an alien is properly detained as an enemy combatant is severely constrained.

IV. PETITIONERS' NEWLY RAISED COLLATERAL ESTOPPEL ARGUMENTS DO NOT SAVE THEIR GENEVA CONVENTIONS CLAIMS

In regular briefing, respondents argued that petitioners' purported claims under the Geneva Conventions fail as a matter of law because the Conventions do not give rise to privately, judicially enforceable rights, and even if they did, they do not extend protections to combatants in petitioners' circumstances. See Response at 67-70 & n.80; Reply at 30-40. After regular briefing closed and three days before oral argument, petitioners introduced a new argument: that respondents should be collaterally estopped from litigating certain issues pertaining to the Geneva Conventions in these cases, on the basis of the decision in Hamdan v. Rumsfeld, Civ. A. No. 04-CV-1519 (JR), 2004 WL 2504508 (D.D.C. Nov. 8, 2004), on appeal, No. 04-5393 (D.C. Cir.).[8] In Hamdan, Judge Robertson enjoined further proceedings of a military commission that

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authorized detention of citizens to protect against espionage or sabotage, detention of citizens such as petitioner who are indisputably loyal to the United States was illegal. Id. at 302. Thus, the Court considered only the legality of the Executive's authority to detain petitioner, and was not even presented with the opportunity to undertake a substantive evaluation of the factual basis of petitioner's detention.

[8] Petitioners raised the collateral estoppel issue by filing in this case a joinder attaching a brief originally filed in two of the cases coordinated before Judge Green. See Joinder in the

had been convened to try detainee Salim Ahmed Hamdan for violations of the laws of war on the grounds that certain elements of the military commission's procedures were inconsistent with the Uniform Code of Military Justice. The petitioners before the Court, of course, are not slated to undergo trial by military commission, and are being detained purely on the basis of their enemy combatant status, a matter expressly not reached in Hamdan. Hamdan, 2004 WL 2504508, at *16.

While petitioners are of course free to argue to this Court that any aspect of Hamdan they perceive relevant is instructive as persuasive (albeit non-binding) authority, their collateral estoppel arguments are wholly without merit. First, as discussed below, as a matter of law, nonmutual collateral estoppel cannot be applied against the Government. United States v. Mendoza, 464 U.S. 154 (1984). Second, Hamdan is on appeal. Third, even if both the clear rule of Mendoza and the pending appeal are disregarded, petitioners have failed to identify any rulings actually and necessarily made in Hamdan that would be preclusive on any material issues presently before this Court.

A. There is No Nonmutual Collateral Estoppel Against the Government

As petitioners concede, under United States v. Mendoza, 464 U.S. 154 (1984), "nonmutual offensive collateral estoppel generally may not be asserted against the Government."

Petitioners' November 26, 2004 Supp. Mem. in Opposition to Motion to Dismiss in Abdah v. Bush, No. 04-CV-1254, filed Nov. 29, 2004 (hereinafter "Joinder"); Petitioners' Supplemental Memorandum in Opposition to Motion to Dismiss, filed Nov. 26, 2004, in Abdah and Anam (hereinafter "Supp. Mem."). Although the text of the Joinder speaks only of the Boumediene petitioners, we assume petitioners intended to raise the collateral estoppel issue on behalf of petitioner Khalid as well.

Supp. Mem. at 4. The only issue before this Court, therefore, is whether the application of collateral estoppel petitioners propose somehow falls under some exception to Mendoza.

In Mendoza, a Filipino national argued that the government's administration of a naturalization statute violated his constitutional rights, and sought, on the basis of an earlier decision against the government in a case brought by similarly situated Filipino nationals, to preclude the government from litigating the constitutional issue. Mendoza, 464 U.S. at 155. The Supreme Court reversed the Ninth Circuit, which had allowed nonmutual collateral estoppel against the government based on the outcome of a case-by-case test. The Court reasoned that the government is different in kind than any private litigant, and that allowing nonmutual collateral estoppel against the government "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue," would distort the Government's calculus of when to take appeals, and would hamper the Government's flexibility in making policy choices, for example, across successive administrations. Id. at 159-62. In sum, "[t]he conduct of government litigation in the courts of the United States is sufficiently different from the conduct of private civil litigation in those courts so that what might otherwise be economy interests underlying a broad application of collateral estoppel are outweighed by the constraints which peculiarly affect the government." Id. at 162-63.

Petitioners urge two reasons for departing from Mendoza. First, they argue that "Hamdan and Petitioners for all practical purposes are the same party," trying to recast this as a case of mutual rather than nonmutual collateral estoppel. They insist that "[t]heir cases present the same threshold legal issues . . . . to the same court, under the same habeas statute, and against the same party." Supp. Mem. at 6. But those commonalities – of issues, forums, applicable statutes, and

opponents – have nothing to do with whether petitioners are the "same party" or in privity with Hamdan. Indeed, in every collateral estoppel situation, by definition, the issues must be the same and the party against whom estoppel is sought must be the same.[9] If sameness of issues and opponents created privity between the party seeking to apply collateral estoppel and his counterpart in the earlier action (and therefore supplied mutuality where there otherwise is none), the crucial distinction between mutual and nonmutual collateral estoppel upon which Mendoza is based would be rendered meaningless. Petitioners also claim that they are in privity with Hamdan because the government has alleged that they are all members of al Qaeda.[10] However, even if petitioners could be heard to invoke their al Qaeda affiliation to their perceived advantage this one time despite denying it repeatedly in every other context,[11] Circuit precedent clearly provides that common membership in an organization does not create privity taking the case outside Mendoza. Am. Fed'n of Gov't Employees v. FLRA, 835 F.2d 1458, 1462-63 (D.C. Cir. 1987) (holding that two similarly situated locals of the same union were not in privity with each

[9] See Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 327 n.7 (1979) (party against whom estoppel is sought must be same); Nuclear Energy Inst., Inc. v. EPA, 373 F.3d 1251, 1303 (D.C. Cir. 2004) (cases must present identical issues).

[10] Surely petitioners would resist loudly if the Government sought to have them held estopped on the basis of a court ruling adverse to other members of al Qaeda. Yet, mutual collateral estoppel being a two-way street, that is the necessary and inevitable corollary of their claim that they are in privity with other members of al Qaeda so as to make them the "same party" for collateral estoppel purposes.

[11] See, e.g., Boumediene First Amended Petition ¶ 38 (alleging that Boumediene petitioners were "not members of the al Qaeda terrorist network"); Khalid Petition ¶ 33 (Khalid not member of "al Qaeda armed forces").

other, and therefore attempts by one local to collaterally estop the government on the basis of prior litigation involving the other local were nonmutual and barred by Mendoza).[12]

Second, petitioners contend that, even if Hamdan and petitioners are not the same party or in privity with one another, this Court is free to disregard Mendoza on the grounds that the considerations underlying it allegedly are not present here. Supp. Mem. at 6-8. However, while the Mendoza Court did mention the three considerations, among others, that petitioners cite as the basis for the holding there, nothing in Mendoza suggests that it intended to establish a fact-bound balancing test, or that the rule against nonmutual collateral estoppel was limited to cases in which those considerations already have manifested themselves in some tangible way. See Mendoza, 464 U.S. at 159-62; see also United States v. Alaska, 521 U.S. 1, 13 (1997) (reaffirming Mendoza and declining invitation to "develop an exception" for category of cases where "policy considerations underlying this rule" allegedly do not apply). The free-wheeling selective application invited by petitioners would lead to judicial anarchy and vitiate the benefits of the Mendoza rule. Indeed, petitioners' proposed case-specific analysis seems like an only slightly varied reincarnation of the discredited approach the Ninth Circuit took in Mendoza,

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[12] Petitioners rely on Rudder v. District of Columbia, Civ. No. 92-2881(CRR), 1994 WL 495767 (D.D.C. Sept. 6, 1994), which involved a use of res judicata, not collateral estoppel, against private litigants, not the Government, and therefore did not implicate the Mendoza rule. To the extent Rudder may be read to suggest that privity on the side of the party invoking preclusion can be inferred merely from sameness of challenged practices, opponents, and counsel, we respectfully suggest that its reasoning is unsound and should not be followed by this Court at all, and certainly not extended to create a gaping exception to the Mendoza rule. As discussed in text, sameness of issues and opponents is inherent in the heartland of collateral estoppel cases. Indeed, petitioners' theory flies in the face of Mendoza itself, where the opponent obviously was the same (the federal government), the issues were identical (see Mendoza, 464 U.S. at 157 n.2), Mendoza's interests were precisely aligned with those of his forebears in the prior case, and yet the Supreme Court found mutuality crucially lacking.

under which the availability of nonmutual collateral estoppel against the government turned on whether there was "'record evidence' indicating that there was a 'crucial need' . . . for a redetermination of the [] question." Mendoza, 464 U.S. at 162 (quoting Mendoza v. United States, 672 F.2d 1320, 1329-30 (9th Cir. 1982), rev'd, 464 U.S. 154 (1984)). The Supreme Court rejected that approach because "the standard announced by the Court of Appeals for determining when relitigation of a legal issue is to be permitted is so wholly subjective that it affords no guidance to the courts or to the government." Id. at 162. The subjective standard proposed by petitioners here suffers from the same intolerable unpredictability.

Petitioners candidly admit that the primary case they cite for this part of their argument bears "facts that make the case distinguishable." Supp. Mem. at 7. Specifically, in Sturmont-Vail Regional Med. Center v. Bowen, 645 F. Supp. 1182 (D.D.C. 1986), the plaintiff urged that the government should be bound on the basis of a ruling by the D.C. Circuit. Id. at 1192 (citing St. Mary of Nazareth Hosp. Ctr. v. Heckler, 760 F.2d 1311 (D.C. Cir. 1985)). As Sturmont-Vail recognized, "'Mendoza does not support the right asserted by defendants to refuse to apply the legal rules enumerated in a circuit court decision in subsequent cases within the same circuit.'" Id. (quoting Stieberger v. Heckler, 615 F. Supp. 1315, 1359 (S.D.N.Y. 1986) (emphasis in both originals)). In this case, a decision of the D.C. Circuit is not at issue. Of course, holdings of the Court of Appeals, if and when they issue, have the force of binding precedent to the extent applicable, on all parties in litigation within the Circuit, just as in Sturmont-Vail, and without any need to resort to collateral estoppel analysis. In the meantime, the decision of any one District Judge within the Circuit does not bind any other District Judge confronted with the same issue. Threadgill v. Armstrong World Indus., Inc., 928 F.2d 1366, 1371 & n.7 (3d Cir. 1991).

B. The Pending Appeal Militates Heavily Against Collateral Estoppel

The Government has appealed Hamdan and asked for expedition, which the Court of Appeals has granted. Briefing closes on January 10, 2005, and oral argument has been set for March 8, 2005, before a panel consisting of Judges Randolph and Roberts and Senior Judge Williams.[13] Petitioners apparently contend that the pending appeal has no effect on their request for collateral estoppel, citing a passing statement in a footnote in Blinder, Robinson & Co. v. SEC, 837 F.2d 1099, 1104 n.6 (D.C. Cir. 1988).[14] However, they ignore the more substantial discussion in the sole case Blinder cites, in which the Court of Appeals noted that "[t]he pendency of an appeal . . . does not automatically diminish the preclusive effects of a prior adjudication," but went on to stress that "[a]ccording preclusive effect to a judgment from which an appeal has been taken, however, risks denying relief on the basis of a judgment that is subsequently over-turned. Consequently, care should be taken in dealing with judgments that are final, but still subject to direct review." Martin v. Malhoyt, 830 F.2d 237, 264 (D.C. Cir. 1987) (emphasis added).[15] This Court has "broad discretion"[16] in managing the issues before it to avoid

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[13] Petitioners in Hamdan have petitioned the Supreme Court for a writ of certiorari before judgment. Of course, the folly of applying nonmutual collateral estoppel on the basis of a district court ruling that is currently undergoing review is equally apparent whether that review is to be conducted by the Court of Appeals or by the Supreme Court.

[14] We assume petitioners inadvertently omitted the word "not" when they said that "The fact that the Government has appealed Judge Robertson's decision does negate its preclusive effect." Supp. Mem. at 4.

[15] In Martin the Court of Appeals mentioned the possibility of "defer[ring] consideration of the preclusion question until the appellate proceedings addressed to the prior judgment are concluded, provided they are moving forward with reasonable dispatch and will not be long delayed." 830 F.2d at 265. Here, since there are independent grounds preventing collateral estoppel – namely, the binding Mendoza rule, see supra Part IV.A; and the lack of a match between any rulings actually and necessarily made in Hamdan and any issues ripe for judicial

stepping onto a precipice by assigning preclusive effect to a ruling that may shortly be reversed or vacated.

C. Assuming Arguendo That Collateral Estoppel Could Theoretically Apply, the Rulings Actually and Necessarily Made in Hamdan Are Not Applicable to Issues Before This Court

Even if Mendoza did not outright bar nonmutual collateral estoppel against the Government as a matter of law, and even if the pending appeal of Hamdan were disregarded, petitioners' arguments are for naught, because Hamdan does not affect any material issue in the instant cases on which this Court is presently called upon to rule.

In this Circuit, three conditions must be satisfied before collateral estoppel can be invoked: "(1) [T]he issue must have been actually litigated, that is contested by the parties and submitted for determination by the court. (2) [T]he issue must have been actually and necessarily determined by a court of competent jurisdiction in the first trial. (3) Preclusion in the second trial must not work an unfairness." Jack Faucett Assocs., Inc. v. AT&T, 744 F.2d 118, 125 (D.C. Cir. 1984); see also United States v. Alaska, 521 U.S. 1, 13-14 (1997) (indicating that "necessary" in this context means the prior court "attach[ed] controlling legal significance" to its determination of the issue).

Petitioners appear to contend that Hamdan settles in their favor the question of whether Articles 13, 17, 25, 29, 30, 34-37, 41, 71, 72, 76, and 118 of the Geneva Convention Relative to

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resolution in this case, see infra Part IV.C – it would be equally if not more appropriate to reject petitioners' collateral estoppel arguments at the present time.

[16] Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 331 (1979) ("trial courts [have] broad discretion to determine when [nonmutual offensive collateral estoppel] should be applied").

the Treatment of Prisoners of War[17] ("GPW") are privately and judicially enforceable in this action. See Supp. Mem. at 2-3. A simple examination of Hamdan reveals that it does no such thing. First, the Hamdan court made clear at the outset that it was not addressing whether there is any private right of action under the GPW; rather, "[t]he Convention is implicated in this case by operation of the statute that limits trials by military tribunal to 'offenders . . . triable under the law of war.'" Hamdan, 2004 WL 2504508, *9 (citing 10 U.S.C. § 821). Of course, petitioners in the cases before this Court are not being tried by military commission and the cited statute has no application here.[18] Instead, they are attempting to assert the GPW offensively through a private right of action, exactly the posture avoided in Hamdan. Second, the Hamdan court did not address the panoply of articles of the GPW relied upon by petitioners, but rather confined its ruling to Articles 5 and 102, the only ones that were pertinent, id. at *9 ("Articles 5 and 102 . . . are dispositive of Hamdan's case"), *10 ("insofar as it is pertinent here, the Third Geneva Convention is a self-executing treaty" (emphasis added)). Since the court simultaneously said that "'[s]ome provisions of an international agreement may be self-executing and others non-self-executing,'" id. at *9 (citing Restatement (Third) of Foreign Relations Law of the United States § 111 cmt. h), its ruling on GPW Articles 5 and 102 cannot reasonably be read to necessarily embrace the other articles cited by petitioners.

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[17] Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[18] In Hamdan, the sole issue before Judge Robertson was the validity of trying Hamdan by military commission. With regard to the very different question before this Court, the Hamdan court acknowledged that Hamdan "may be detained for the duration of hostilities in Afghanistan if he has been appropriately determined to be an enemy combatant." Id. at *16; see also id. *16 n.18 (noting that "Hamdan does not currently challenge his detention as an enemy combatant in proceedings before this Court").

Thus, the private judicial enforceability of GPW Articles 13, 17, 25, 29, 30, 34-37, 41, 71, 72, 76, and 118 was not even "actually litigated" in Hamdan, let alone "actually determined," still less "necessarily determined." Jack Faucett, 744 F.2d at 125; see also United States v. Alaska, 521 U.S. at 13 (collateral estoppel "only precludes relitigation of issues of fact or law necessary to a court's judgment," i.e., issues to which the court "attach[ed] controlling legal significance" (emphasis in original)). Issues that "simply are not precisely the same as those decided in [the prior case]" cannot be deemed "actually and necessarily determined" in the prior case. Nuclear Energy Inst., Inc. v. EPA, 373 F.3d 1251, 1303 (D.C. Cir. 2004). Accordingly, petitioners' bid to have Hamdan preclude any litigation of those issues in these cases (to the extent they have even been properly placed before this Court[19]) skirts basic principles of collateral estoppel.

Nor was it "actually and necessarily determined" in Hamdan that the above-cited provisions "apply to al Qaeda-linked Guantanamo detainees." The GPW limits the applicability

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[19] It is not even clear any issues under the cited provisions of the Third Geneva Convention have been duly raised in the cases before this Court. Of course, the Boumediene petitioners rigorously contest that the GPW covers them at all. See Boumediene and El-Banna Petitioners' Supplemental Reply and Opposition (filed Nov. 5, 2004) at 26 & Ex. O; Joinder at 1-2 ("The law of war does not, therefore, apply to them . . . ."). Beyond that, all of the citations on pages 2-3 of the Supp. Mem. regarding, for example, "physical or mental torture or other forms of coercion," denial of "adequate or ethical medical care," denial of "the full panoply of rights to religious observance," or "failing to allow Petitioners to send and receive communications from their family and others," are either pure hearsay (e.g., newspaper stories or inflammatory innuendo in so-called "reports") about treatment of unidentified detainees, or "upon information and belief" allegations by petitioners in one of the other detainee cases, not before this Court. The petitions before this Court, however, either do not make such allegations at all, or make them so vaguely and at such a level of generality as to be largely meaningless. Thus, the incongruity in petitioners' proposed version of collateral estoppel is twofold: they seek to bar respondents from defending against claims that have not even been properly raised in these cases, on the basis of rulings that were not even made in the prior case.

of those provisions to persons belonging to organizations that meet four primary criteria, including a command organization, fixed distinctive emblems or uniforms, the carrying of arms openly, and conduct of operations in accordance with the laws of war. See GPW art. 4(A)(2); United States v. Lindh, 212 F. Supp. 2d 541, 557-58 (E.D. Va. 2002). The Hamdan court did not even inquire into whether al Qaeda meets these criteria, let alone issue an actual and necessary finding on that issue, and it is both common knowledge and the subject of an express Presidential finding – subject to deference by the Judiciary – that al Qaeda does not meet these criteria. While the Hamdan court did construe the GPW to require that a military tribunal, rather than the President, decide whether al Qaeda meets the Article 4(A)(2) criteria – a ruling that the Government strenuously disputes in the pending appeal – it is gross overstatement to suggest that the court's ruling on who decides whether al Qaeda meets the prerequisites for POW protections is tantamount to a "necessary" ruling that al Qaeda does in fact satisfy the prerequisites for POW protections.[20]

V. NO WAIVER OF SOVEREIGN IMMUNITY PERMITS PETITIONERS' ALIEN TORT STATUTE CLAIMS

Our prior briefing in these cases has demonstrated that the Alien Tort Statute ("ATS") claims asserted by in the Khalid petition[21] must fail not only because the ATS does not waive the Government's sovereign immunity, but also because several key exceptions to the waiver of

[20] Further, these petitioners are hardly well-suited to demand a determination on that question since they insist they are not affiliated with al Qaeda. See supra note 11.

[21] The Boumediene petition does not assert ATS claims. Of course, these arguments would apply to any contemplated ATS claim in Boumediene.

immunity provided in the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, render that waiver inapplicable to petitioner's ATS claims. See Response at 53-65; Reply at 21-26.

That the APA's waiver of sovereign immunity does not extend to tort claims asserted by a petitioner through the ATS is further made unquestionably clear by the last clause of § 702, which provides that the APA's waiver of immunity does not

> confer[] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 702(2). As noted in the 1976 legislative history of § 702, which resulted in the current waiver of sovereign immunity expressed in the APA, this clause is

> concerned with situations in which Congress has consented to suit and the remedy provided is intended to be the exclusive remedy. For example, in the Court of Claims Act [10 Stat.612], Congress created a damage remedy for contract claims with jurisdiction limited to the Court of Claims except in suits for less than $10,000. The measure is intended to foreclose specific performance of government contracts. In the terms of the proviso, a statute granting consent to suit, *i.e.*, the Tucker Act, "impliedly forbids" relief other than the remedy provided by the Act. Thus, the partial abolition of sovereign immunity brought about by this bill does not change existing limitations on specific relief, if any, derived from statutes dealing with such matters as government contracts, as well as patent infringement, tort claims, and tax claims.
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> . . . .
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> Th[e] language [of § 702(2)] makes clear that the committee's intent to preclude other remedies will be followed with respect to all statutes which grant consent to suit and prescribe particular remedies. The proviso as amended also emphasizes that the requisite intent can be implied as well as expressed.

House Rep. No. 94-1656, at 12-13 (1976), reprinted in 1976 U.S.C.C.A.N. 6121, 6133 (footnotes omitted) (emphasis added).

In the area of tort claims against the Government, Congress has consented to suit for such claims, but has forbidden relief on such claims such as is sought by petitioner. The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, grants consent to suit, i.e., provides a

waiver of sovereign immunity, for claims against the Government for torts committed by federal employees acting within the scope of their employment. The FTCA's consent to suit, however, is subject to a number of express and implicit exceptions and exclusions that bar petitioner's tort claims and prevent application of the APA waiver of sovereign immunity.

The FTCA expressly excludes from its waiver of sovereign immunity claims "arising out of combatant activities of the military . . . during time of war." See 28 U.S.C. 2680(j). Here, the military's detention of petitioners as enemy combatants under the exercise of the President's Commander-in-Chief powers and authority under the AUMF during this ongoing war with al Qaeda and its supporters are undoubtedly "combatant activities" falling within the FTCA's exclusion. See Response at 6-19 (detention of enemy combatants is fundamental incident of war and of use of force to subdue and incapacitate the enemy); see generally Koohi v. United States, 976 F.2d 1328, 1332-36 (9th Cir. 1982) (discussing § 2680(j) exception). The FTCA also expressly excludes from its waiver of sovereign immunity claims "arising in a foreign country." See 28 U.S.C. § 2680(k). This exclusion bars tort claims arising on military bases and embassies under U.S. control overseas, see MacCaskill v. United States, 834 F. Supp. 14, 16 (D.D.C. 1993), aff'd, 24 F.3d 1464 (D.C. Cir. 1994), and thus, in Guantanamo Bay, which is in Cuba. See Response at 22-23 (Guantanamo Bay is outside of U.S.); Smith v. United States, 507 U.S. 197, 201-04 (1993) (FTCA bars tort claims arising in Antarctica); see also Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2754 (2004) (repudiating doctrine that § 2680(k) inapplicable where wrongful conduct occurs in U.S. but has operative effect overseas and holding exception bars claims "based on any injury occurring in a foreign country, regardless of where the tortious act or omission occurred").

By these explicit exclusions from the waiver of sovereign immunity regarding tort claims, the FTCA "expressly . . . forbids the relief which is sought" by petitioner for alleged torts associated with his detention and thereby renders the APA's waiver of sovereign immunity in § 702 inapplicable. Cf. Neighbors for Rational Development, Inc. v. Norton, 379 F.3d 956, 960-965 (10th Cir. 2004) (APA waiver does not apply to quiet title claim pertaining to Indian trust land where other statute [28 U.S.C. § 2409a] waiving immunity for quiet title claims excludes from its waiver claims pertaining to such lands); Robishaw Engineering, Inc. v. United States, 891 F. Supp. 1134, 1146-47 (E.D. Va. 1995) (noting that statute [28 U.S.C. § 1498] waiving sovereign immunity only for certain types of patent claims and providing only a damages remedy represents Congressional judgment as to types of claims that may be brought, thus expressly or implicitly forbidding other claims for relief regarding patents).

Furthermore, the FTCA only provides a waiver of immunity for damages; it does not waive sovereign immunity for equitable or injunctive relief for tort claims against the Government. See Women Prisoners of the District of Columbia Dep't of Corrections v. District of Columbia, 899 F. Supp. 659, 666 (D.D.C. 1995) (noting that while injunctive relief to prevent torts may be available under the common-law against actors not protected by sovereign immunity, the FTCA does not waive sovereign immunity for equitable relief against the federal government); 28 U.S.C. § 1346(b); see also Hatahley v. United States, 351 U.S. 173, 182 (1956) (court lacked power under FTCA to issue injunction). The FTCA, thus, "impliedly forbids" the type of prospective injunctive relief sought by petitioner in Khalid with respect to a tort claim

against the Government.[22] Cf., e.g., Sharp v. Weinberger, 798 F.2d 1521, 1523 (D.C. Cir. 1986) (APA waiver of immunity for equitable relief does not apply to actions for specific performance of a contract because the waiver, by its terms, is "inapplicable if 'any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought,' and the Tucker Act [28 U.S.C. § 1491(a), permitting damages and very limited injunctive relief incident thereto] and Little Tucker Act [28 U.S.C. § 1346(a)(2), permitting damages] impliedly forbid such relief.").[23]

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[22] The FTCA's implicit proscription against equitable relief is also consistent with enactments respecting potential liability of foreign persons and entities for torts. For example, the Torture Victims Protection Act, 28 U.S.C § 1350 note, provides for potential liability of individuals for acts of torture committed under color of foreign law, but permits liability only for damages. A foreign government is subject to the jurisdiction of U.S. courts for claims for money damages only for torts occurring in the U.S. or for torture and related acts against U.S. nationals committed under the auspices of states designated as state sponsors of terrorism (subject to certain conditions). See 28 U.S.C. §§ 1604, 1605 (a)(5), (7). These statutes only reinforce the FTCA's implicit proscription on equitable relief against the federal government for tort claims, demonstrating that in area of torts committed by individuals acting under color of state authority, Congress has consistently limited permissible potential relief to money damages.

[23] The relevance of the FTCA's implied and express proscriptions to the scope of the APA's waiver of immunity is not diminished by United States Information Agency v. Krc, 989 F.2d 1211 (D.C. Cir. 1993). In that case, the Court of Appeals, before affirming the grant of summary judgment for the government on the district court's alternate ground, distinguished Sharp and construed the FTCA's exclusion of tort claims for "interference with contract rights" (28 U.S.C. § 2680(h)) as not necessarily barring injunctive relief. Id. at 1216-17. The Court of Appeals rested this distinction in part on its sense that "the relief [plaintiff] does seek would impose a far lesser burden upon the Government than would an equitable action for breach of contract." Id. at 1216. That relief was not detailed in the opinion, but would appear to consist of withdrawal of certain inter-agency communications – something akin to the vacatur of agency action that would ordinarily be available upon a demonstration that the action is arbitrary and capricious, irrespective of any tort allegations. In contrast to Krc, however, the burden and intrusion threatened by the equitable relief sought in the instant case are qualitatively different, and orders of magnitude greater, than in either Krc or Sharp. Petitioners seek a broad, general injunction that necessarily foreshadows continuous judicial oversight and monitoring of all aspects of DoD's detention facility at Guantanamo, in an area – conditions of confinement abroad of alien enemy combatants – into which the Judiciary has never before inserted itself. See Opp. at 45. Having deliberately chosen in the FTCA not to expose the United States to equitable remedies on tort theories, and to preserve sovereign immunity for tort claims either "arising out

Given that the FTCA existed at the time § 702 was amended to its current form in 1976, see 28 U.S.C. 1346(b) (1976), the legislative history of § 702, quoted above, contemplated these express and implied exclusions limiting application of the APA's waiver of immunity in its statement that § 702 does not abrogate express or implied limits on specific relief "derived from statutes dealing with . . . tort claims." House Rep. No. 94-1656, at 12-13 (1976), reprinted in 1976 U.S.C.C.A.N. 6121, 6133, The APA does not "confer[] authority" to override FTCA's implicit proscription against equitable relief for alleged torts or its express proscriptions on the type of tort claims raised by petitioner. Thus, the APA's waiver of immunity simply cannot apply, and petitioner's ATS claims fail.

VI. PETITIONERS' HYPOTHETICALS REGARDING TORTURE NEITHER IMPEACH THE DUE PROCESS PROVIDED BY COMBATANT STATUS REVIEW TRIBUNALS NOR GIVE RISE TO COGNIZABLE CLAIMS UNDER THE ALIEN TORT STATUTE

Significant discussion occurred at oral argument regarding petitioners' suggestion that evidence obtained through "torture" was used in the CSRT proceedings to determine anew a detainee's status as an enemy combatant. This suggestion was wholly without foundation,[24] and

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of the combatant activities of the military or naval forces . . . during time of war," "arising in a foreign country," or, as here, both, it would be anomalous to infer that Congress intended nevertheless to allow such claimants to use those same claims as the basis for obtaining judicial supervision of military activities and operations.

[24] As noted by respondent's counsel at argument, the only specific complaint of significant mistreatment pertaining to the seven petitioners in the cases before this Court, is contained in the CSRT record pertaining to one of the petitioners and did not involve anything approaching torture. Rather, one petitioner complained that he suffered injury to a finger during a non-interrogation incident, i.e., an incident that did not give rise to any statements or any evidence. That petitioner's allegations were forwarded by the CSRT to JTF-GTMO command channels for further consideration and action. See Respondents' Factual Return to Petition for Writ of Habeas Corpus by Petitioner Mustafa Ait Idir (filed Oct. 27, 2004 in Boumediene), Exhibit A, Encl. (1) (Unclassified Summary of Basis for Tribunal Decision) ¶ 6, Encl. 3 (Summarized Detainee

petitioners' allegations of mistreatment cannot salvage either their claims that they have been deprived of "due process" under the habeas statute or their claims under the ATS.

A. The CSRTs Provide Due Process

As emphasized at argument, the United States abhors torture, and, indeed, is a party to treaties that prohibit torture and reflect the longstanding law and policy of the United States neither to practice nor condone torture under any circumstances. For example, the United States is a State Party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Nov. 20, 1994, Treaty Doc. 100-20, 1465 U.N.T.S. 85, 23 I.L.M. 1027. While the CAT was ratified by the U.S. Senate with the express reservation that its articles are not self-executing, and thus do not provide petitioners with judicially enforceable rights, see S. Exec. Rep. 101-30, at 31 (1990); 136 Cong. Rec. S17486-01, S17491-92 (Oct. 27, 1990); Declarations and Reservations at http://www.ohchr.org/english/countries/ratification/9.htm#reservations; see also Reply at 30, the United States has enacted multiple statutes and regulations effecting its policy against torture, including those providing criminal sanctions against torture.[25] Consistent with that policy, in the context of the government's detention and treatment of enemy combatants at Guantanamo Bay, any credible allegations of mistreatment, are investigated and, as appropriate, punished and corrected, as published reports establish.[26]

Statement) at 8.

[25] See 18 U.S.C. §§ 2340-2340B, as amended by Pub. L. No. 108-375, 118 Stat. 1811 (Oct. 28, 2004) (making torture a criminal offense); see also 8 U.S.C. § 1231 note (noting policy against removal of persons to a country likely to torture); 8 C.F.R. § 208.17 (immigration context: regarding deferral of removal to country likely to torture).

[26] Examples of such investigations and corrective actions or punishments taken are available at http://www.defenselink.mil/news/detainee_investigations.html, or have been

Petitioners nevertheless question the constitutionality of the process that has been afforded them based on hypothetical sets of horribles paraded at argument insinuating that CSRT panels rely solely on evidence obtained coercively. The implicit premise, presumably, is that such evidence is not reliable, and any process that relies on such evidence cannot comport with due process. Yet even assuming petitioners, as enemy aliens without connections to the United States, have due process rights under our Constitution (they do not), petitioners fail to identify any structural flaw in the CSRT procedures that compels, or even invites, reliance on unreliable evidence. To the contrary, the CSRTs can take appropriate account of the reliability of the evidence available to them – including, where applicable, allegations that evidence was derived coercively – in the course of making the very sensitive determinations with which they are charged.

As discussed in the Response, the CSRTs consist of tribunals of commissioned officers not "involved in the apprehension, detention, interrogation, or previous determination of status of the detainee," see CSRT Order ¶ e; Response at 38-39, who make a decision regarding a detainee's status afresh, by a majority vote, and based on a preponderance of the evidence. In addition, a detainee has the right to testify, call and question reasonably available witnesses, and submit documentary evidence, and to facilitate the process and presentation of evidence, the detainee is presented with an unclassified summary of the evidence tending to demonstrate he is an enemy combatant and is given the assistance of a personal representative and, as needed, an interpreter. See Response at 33-35. In addition, the CSRT Recorder is obligated to search

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reported in the media, see http://news.orb6.com/stories/ap/20041105/guantanamo_abuse.php (Associated Press story).

government files for, and provide to the CSRT any "evidence to suggest that the detainee should not be designated as an enemy combatant." Id. at 34. The CSRTs issue written decisions articulating the basis for their decisions, and those decisions undergo a legal sufficiency review by a higher authority, empowered to return the record to the tribunal for further proceedings, if appropriate. Id. at 35.

To be sure, in making determinations regarding whether aliens detained by military forces should be classified as enemy combatants, the CSRTs are "not bound by the rules of evidence as would apply in a court of law." CSRT Implementation Memorandum Encl. (1) ¶ G(7). That much is clear from Hamdi. The plurality in that case cited the military exigencies in concluding that due process would not demand the application of formal evidentiary rules even in the case of an American citizen detained as an enemy combatant. See Hamdi, 124 S. Ct. at 2648-49. But, in considering nontraditional forms of evidence, such as hearsay, the CSRT members are instructed to take into account the "reliability" of the evidence "in the circumstances." See, e.g., CSRT Implementation Memorandum Encl. (1) ¶ G(7). And, importantly, the members of the CSRT are bound by oath to examine the evidence before them "impartially" and in light of their "professional knowledge, best judgment, and common sense," and to be guided by their "concept of justice."[27] See CSRT Implementation Memorandum Encl. (8), p. 2. These instructions adjure

[27] In full, the oath provides:

> Do you [the Tribunal member] swear (affirm) that you will faithfully perform your duties as a member of this Tribunal; that you will impartially examine and inquire into the matter now before you according to your conscience, and the laws and regulations provided; that you will make such findings of fact as are supported by the evidence presented; that in determining those facts, you will use your professional knowledge, best judgment, and common sense; and that you will make such findings as are appropriate according to the best of your understanding

CSRT members to take appropriate account of the "common sense" notion that statements obtained by severe pain and suffering can be unreliable. And as neutral decisionmakers, CSRT members have discretion to decide how much weight, if any, to accord evidence before them.[28] The sworn duty of the CSRT members, combined with the other procedural protections afforded detainees, are more than adequate to account for allegations that evidence is of questionable provenance or weight, for whatever reason, to the extent such issues may ever credibly arise.

Of course, the standard of reliability that must guide military commanders in judging whether to use force to repel a threatened attack, or to take other defensive measures such as detaining enemy combatants who would otherwise return to the fight,[29] is not even remotely the same standard that a trial court judge would apply in determining whether evidence should be put before a jury in a criminal case. The criteria for and determinations of combatant status strike at

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> of the rules, regulations, and laws governing this proceeding, and guided by your concept of justice (so help you God)?

See CSRT Implementation Memorandum Encl. (8), p. 2.

[28] While a presumption exists in favor of the genuineness and accuracy of the government's evidence in the CSRT, the presumption is rebuttable. See CSRT Implementation Memorandum Encl. (1) ¶ G(11). Thus, a detainee has the opportunity to provide evidence or testimony regarding any factor casting doubt on the evidence, and the CSRT can accord the evidence any weight it may be due.

[29] No logical distinction can be drawn among the various options for deploying military force in appraising the intelligence or information sources permitted to guide such deployments. If our military commanders obtained information that described a specific, imminent threat of attack, there is no provision of law that would impede the President and the commanders from neutralizing that threat with military force. And because it has long been recognized that the war power includes not only the power to use lethal force when necessary, but also to capture and detain combatants until hostilities have passed, see Response at 9-10 (collecting authorities), the range of information that may be considered by military commanders in determining whom to detain is no more limited.

the heart of the Military's ability to conduct war successfully and implicate the safety of the Nation's troops and, ultimately, its citizens, as well as the safety and support of allied and coalition forces and countries. Given that the goal of enemy combatant detention is not to sanction or punish but rather to determine whether an individual falls within the class of persons who may properly be prevented from serving the enemy or continuing the fight against the U.S. and its allies, see Response at 8-19, it is an inherent and perhaps inescapable fact – an incident of the nature of war – that military officials entrusted to divide friend from foe in wartime may, from time to time, have no choice but to rely on information that does not meet the justifiably high standard for admission into evidence in a criminal trial. This may be especially the case in the context of an unconventional war waged against a secretive and unorthodox enemy such as al Qaeda, in which information requiring action may come from other governments and a multitude of intelligence sources.

These factors, along with the unique nature and setting of the enemy combatant status determination, involving quintessentially military judgments made for the purpose of waging war successfully and representing a core exercise of the Commander in Chief authority, necessarily and appropriately circumscribe the role of a court in reviewing any determination of the combatant status of detainees, even if detainees could claim the protections of the Constitution, which they cannot. See Response at 43-51; Reply at 19-20; see supra § III. The Executive has a unique institutional capacity to determine whether intelligence reports and evidence gathered during military operations is sufficiently reliable to guide the use of military force (including the task of determining who must be treated as enemy combatants), while the Judiciary – well-trained to make judgments about evidentiary standards in formal court proceedings – lacks

corresponding institutional competence, experience, or accountability to make such military judgments at the core of the war-making powers. See Curran v. Laird, 420 F.2d 122, 130 (D.C. Cir. 1969) (en banc) ("It is – and must – be true that the Executive should be accorded wide and normally unassailable discretion with respect to the conduct of the national defense and the prosecution of national objectives through military means.").

The rule proposed by petitioners – in which courts would be required to reconsider and reweigh the evidentiary basis regarding an individual's enemy combatant status and second-guess the judgment of military commanders on the issue – would severely hamstring the Executive's conduct of national defense. See Johnson v. Eisentrager, 339 U.S. 763, 779 (1950) (noting that litigation by enemy combatants over the propriety of their detention could result in "a conflict between judicial and military opinion highly comforting to the enemies of the United States"). In the unconventional war in which the country is currently engaged, against a secretive and unorthodox enemy, classified intelligence information from foreign sources often must necessarily be considered, whatever weight it might be assigned. Petitioners' approach would necessarily require a thorough excavation of the circumstances surrounding the provenance of such information, which may well incline foreign sources to decline further cooperation with the United States, to this country's severe detriment. See CIA v. Sims, 471 U.S. 159, 175-77 (1985). Moreover, petitioners' approach would regularly require the judiciary to intrude deeply into the military's decision-making process for classifying enemy combatants, given the stated tactic of the enemy to allege mistreatment and torture to judicial authorities regardless of whether such

treatment actually occurred,[30] and could require military commanders to return a known, hostile combatant to the enemy's front lines. The judicial role petitioners envision would trench upon separation of powers concerns, potentially damage the Executive's ability to obtain cooperation and information from other nations, and ultimately impair the Military's ability to wage this war successfully.

In addition, searching judicial inquiry based upon allegations of mistreatment or torture with the purpose of addressing whether such information could legitimately be considered in CSRT proceedings would essentially result in detainees obtaining private, judicial enforcement of the CAT in the absence of implementing legislation, in the face of Congress's specific declarations that the CAT is not self-executing. See supra at p. 28. No provision of law enacted by Congress to implement the CAT requires, or even permits, the type of judicial intervention petitioners demand.

For these reasons, petitioners' hypotheticals regarding evidence obtained by "torture" do not redeem their claims with respect to the CSRT process.

B. Petitioners' Hypotheticals Regarding Torture Do Not Give Rise to Cognizable Claims under the Alien Tort Statute

Just as the broad hypothetical allegations of petitioners regarding torture made at argument do not impeach the due process provided in the CSRT proceedings, such allegations do not give rise to cognizable claims for injunctive relief under customary international law through the ATS, for the reasons explained in respondents' Reply at 26-30, 43-44. This is in addition to

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

the fact that no applicable waiver of sovereign immunity exists for such claims. See Response at 53-65; Reply at 21-26; supra Section V.

At argument, however, petitioners' counsel incanted the term "jus cogens" in an apparent attempt to argue that it provides the basis for an ATS claim by petitioners. Jus cogens ("compelling law") refers generally to peremptory norms of customary international law extensively and uniformly practiced and recognized by the international community as a whole that reach a status such that no derogation from the norm is permitted. Cf. Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988) (describing the doctrine of jus cogens, while noting that the parties produced "no authority for this assertion that a peremptory norm of international law operates domestically as if it were a part of our Constitution"). In this case, however, there exists a treaty, the CAT, addressing and consistent with the norm against torture argued by petitioner. The existence of that treaty, part of "the supreme Law of the Land" pursuant to Article VI of the Constitution, weighs strongly against recognizing any customary international law cause of action through the ATS for petitioners.

As noted supra, the CAT is not self-executing, see supra p. 28, and Congress has not chosen to provide implementing legislation to permit a claim for injunctive relief against the sovereign based on a tort such as torture in the circumstances of these cases. Petitioners, therefore, can take no refuge in the ATS to find a tort claim against the government independent of treaty in this context.[31] See Reply at 29-30; see also Sosa v. Alvarez-Machain, 124 S. Ct.

[31] While jus cogens has been described as prevailing over treaties, see Comm. of U.S. Citizens, 859 F.2d at 935-36, that is in the context of treaties inconsistent with the jus cogens norm, which is not the case here. In other words, even if petitioner was correct that a jus cogens norm against torture exists, it is the prohibition on torture that is jus cogens; a petitioner's right to assert a claim for injunctive relief with respect to alleged torture, in the face of a treaty on the

2739, 2766 n.21 (2004) (noting that a "policy of case-specific deference to the political branches" can counsel against availability of relief in the federal courts under the ATS).

VII. THE MILITARY'S POWER TO DETAIN ENEMY COMBATANTS IS NOT DISPLACED BY CONGRESS'S AUTHORITY TO "MAKE RULES CONCERNING CAPTURES ON LAND AND WATER"

At the December 2, 2004, oral argument, the Court raised questions about the applicability and effect of Article I, § 8, cl. 11 of the Constitution, which gives Congress the authority "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." The provision regarding "Rules concerning Captures on Land and Water" has been consistently applied in the context of captured property. See, e.g., Kirk v. Lynd, 106 U.S. 315 (1882) (real property captured and condemned in Civil War); The Prize Cases, 67 U.S. (2 Black) 635 (1862) (ships captured during Civil War); Brown v. United States, 12 U.S. (8 Cranch) 110 (1814) (British-owned timber seized at outset of War of 1812); Morrison v. United States, 492 F.2d 1219, 1225 & n.7, 1226 & n.9 (Ct. Cl. 1974) (money seized in Vietnam War). The Government is not aware of any cases in which the clause has been construed as a basis or potential basis for legislation pertaining to the capture and detention of enemy combatants in war.[32]

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subject that is not self-executing, is not jus cogens.

[32] As the Court noted at oral argument, the Supreme Court cited art. I, § 8, cl. 11 in Ex parte Quirin, 317 U.S. 1 (1942), a case dealing with the trial of enemy combatants. However, that reference merely appears in a list in which the Court exhaustively catalogued all of the powers granted to Congress relating generally to provision for the common defense. Id. at 25-26. As such, the reference should not be construed as a holding that art. I, § 8, cl. 11 specifically embraces the subject matter of capture and detention of enemy combatants. Nor does Johnson v. Eisentrager, 339 U.S. 763 (1949), embrace that construction, although there as well, the clause is cited in passing as part of a general discussion of war powers. Id. at 788.

The understanding of Art. I, § 8, cl. 11, as pertaining to the capture of enemy property, rather than individuals, is also supported by the historical origins of the clause. The term "capture" was defined in the contemporary law of war as "[t]he taking of property by one belligerent from another or from an offending neutral." See 1 Bouvier's Law Dictionary 422 (Francis Rawle ed., 3d rev. ed., Vernon Law Book Co. 1914) (1839). The subject clause evolved from Article IX of the Articles of Confederation (U.S. 1781), giving Congress the power "of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated," which relates only to the capture of property. Moreover, Justice Story in his seminal commentary described Article I, § 8, cl. 11, as giving Congress the power to "authorize the seizure and condemnation of the property of the enemy within, or without the territory of the United States," and made no reference to the capture of persons. 2 Joseph Story, Commentaries on the Constitution of the United States § 1177, at 91-92 (Charles C. Little & James Brown 1851) (1833).

While Article I, § 8, cl. 11 of the Constitution may not concern any authority of Congress to regulate the capture and detention of enemy combatants, Congress has in this case granted the President in the Authorization for Use of Military Force the authority to use "all necessary and appropriate force against those nations, organizations or persons" responsible for the "acts of treacherous violence" perpetrated on September 11, 2001. 115 Stat. 224. As confirmed by the Supreme Court in Hamdi, "the capture, detention and trial of unlawful combatants, by 'universal agreement and practice' are 'important incidents of war.'" Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) (plurality) (quoting Ex parte Quirin, 317 U.S. 1, 28 (1942)); see Response at 6-13.

Thus, whatever the scope of Congress's authority to regulate prize captures or captured combatants, in this case, it has authorized the President's detention of enemy combatants in the war against al Qaeda and its supporters.

Finally, as a practical matter, even if Art. I, § 8, cl. 11 were interpreted to give Congress some authority to enact statutes dealing with the capture of individuals who are enemy combatants (as opposed to property owned by the enemy), the fact that Congress has not supplemented the statutory Authorization for Use of Military Force already held sufficient in Hamdi by additionally prescribing detailed rules governing detention of enemy combatants cannot possibly mean that the Military is simply rendered powerless to detain enemy combatants in the absence of such rules. Such a construction would defy common sense. It would nullify the very "Military Force" that Congress "Authoriz[ed]" the Executive to "Use." See 115 Stat. 224. And it would be antithetical to the long line of Supreme Court cases upholding detention of enemy combatants – with or without detailed congressionally adopted rules – as an inherent incident of war, including most recently in Hamdi.

CONCLUSION

For the foregoing reasons as well as those expressed in prior briefing, respondents respectfully request that their motions to dismiss or for judgment as a matter of law be granted, that writs of habeas corpus not issue, and that all relief requested by petitioners be denied.

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Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

BRIAN D. BOYLE
Principal Deputy Associate Attorney General

DAVID B. SALMONS
Assistant to the Solicitor General

DOUGLAS N. LETTER
Terrorism Litigation Counsel

ROBERT D. OKUN
Assistant United States Attorney
Chief, Special Proceedings Section

/*s*/ Terry M. Henry
JOSEPH H. HUNT (D.C. Bar No. 431134)
VINCENT M. GARVEY (D.C. Bar No. 127191)
TERRY M. HENRY
LISA A. OLSON
JAMES J. SCHWARTZ
PREEYA M. NORONHA
ROBERT J. KATERBERG
ANDREW I. WARDEN
NICHOLAS J. PATTERSON
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W. Room 7144
Washington, DC 20530
Tel: (202) 514-4107
Fax: (202) 616-8470

Attorneys for Respondents