IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAKHDAR BOUMEDIENE, *et al.* Petitioners, v. GEORGE WALKER BUSH, *et al.* Respondents.	Civil Action No. 04-CV-1166 (RJL)
JAMIL EL-BANNA, *et al.* Petitioners, v. GEORGE WALKER BUSH, *et al.* Respondents.	Civil Action No. 04-1144 (RJR)

BOUMEDIENE AND EL-BANNA PETITIONERS' SUPPLEMENTAL REPLY AND OPPOSITION TO THE GOVERNMENT'S "RESPONSE TO PETITIONS FOR WRIT OF HABEAS CORPUS AND MOTION TO DISMISS OR FOR JUDGMENT AS A MATTER OF LAW"

Dated: November 5, 2004

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Pursuant to the Court's October 12, 2004, Order, Petitioners[1] hereby reply to and oppose Respondents' Response to Petitions For Writ of Habeas Corpus and Motion to Dismiss or For Judgment as a Matter of Law ("Respondents' Br.").[2] Petitioners join in, and hereby incorporate by reference, all portions of the joint Opposition to Respondent's Motion to Dismiss or for Judgment as a Matter of Law (filed on this date in Abdah et al. v. Bush et al. (No. 04-1254(HHK) and in this case) which relate to claims raised by the Boumediene and El-Banna Petitioners in their First Amended Petitions for Writ of Habeas Corpus (respectively "Boumediene Writ" and "El-Banna Writ"), and submit this Supplemental Opposition to present the unique facts concerning their arrests in Bosnia, The Gambia, and Zambia and the following arguments in opposition to the Respondents' Br.: (1) Petitioners are not "enemy combatants," a term that has no legally recognized significance in either U.S. domestic or international law; (2) the law of war does not apply to Petitioners, and (3) Petitioners are entitled to fundamental Constitutional protections under *Rasul v. Bush,* 124 S. Ct. 2686 (2004).

I. INTRODUCTION

This Supplemental Opposition presents the facts related to Petitioners' seizure and internment by U.S. forces under circumstances which Respondents cannot support, and which never should have occurred. Six were abducted in Bosnia immediately after a court there ordered their freedom. Three were seized in Africa. None carried a weapon, and all were thousands of miles from any battlefield and in the custody of governments cooperative with the U.S. until immediately before U.S. troops bound, gagged and shipped them to Guantanamo. The

[1]The Petitioners in these cases were detained by U.S. forces thousands of miles from the battlefields of Afganistan. They include six Algerian-Bosnians seized in Bosnia and their wives; a Palestinian and an Iraqi (both permanent residents of the U.K.) seized in Gambia; and a British-Zambian citizen, seized in Zambia. All are detained at Guantanamo Bay. All are identified in Section II below. In this Supplemental Opposition, the use of the collective term "Petitioners" refers to all nine men interned at Guantanamo Bay, Cuba. The term "Boumediene Petitioners" refers to the six men seized in Bosnia; and the term "El-Banna Petitioners" refers to the three men seized in Africa.

[2] Petitioners' Supplemental Reply and Opposition is referred to hereafter as the "Supplemental Opposition."

prospect that U.S. troops could enter a friendly foreign country and, in the dark of night, abduct and hold *incommunicado* citizens of that country, without charges, without any process, and in violation of universal norms of international and U.S. domestic law is difficult to fathom in the 21st century. That the United States should be the perpetrator of such abhorrent conduct is anathema to the founding principles of this republic and to our longstanding values as a people guided by the rule of law.

Respondents assert this precise conduct is within the authority of, and subject to, the unreviewable discretion of the Executive, and ask the Court to dismiss the Petitions. In the context of these Petitioners, Respondents' position borders on the frivolous. This Court should deny Respondents the relief they have requested.

II. BRIEF SUMMARY OF FACTS

A. Boumediene Petitioners

The Boumediene Petitioners are five Algerian-Bosnian citizens, and one Algerian citizen with permanent Bosnian residency (Mr. Lahmar). Mr. Nechle worked for the Red Crescent in its Bihartch office, where he lived with his wife, Badra Baouche. (*See* Baouche Aff. at ¶¶ 4-5, attached hereto as *Ex.* A.)[3] Mr. Lahmar, a professor of Arabic language, worked for the Islamic Centre of the High Saudi Arabian Committee in Sarajevo where he lived with his wife, Emina Lahmar. (*See* Lahmar Aff. at ¶¶ 3-4, attached hereto as *Ex.* B.) He is the father of two children.[4] Mr. Ait Idir worked in the Sarajevo office of Taibah, a humanitarian organization, and lived in Sarajevo with his wife, Sabiha Delic Ait Idir and their three children. (*See* Delic Aff. at ¶ 1, attached hereto as *Ex.* C.) Mr. Boumediene has two children with his wife, Abassia Bouadjmi,

[3] The affidavits attached as exhibits hereto were submitted in support of the Boumediene Petitioners' Petition and Amended Petition for a Writ of Habeas Corpus.

[4] Mrs. Lahmar was pregnant with the couple's child when Mr. Lahmar was taken into custody in Bosnia. (*See* Lahmar Aff. at ¶ 8, attached to Amended Petition.)

and worked in the Sarajevo offices of the Red Crescent. (*See* Bouadjmi Aff. at ¶¶ 3-5, attached hereto as *Ex.* D.) Mr. Boudella was a social worker employed by Human Appeal and is a father of seven who lived in Sarajevo with his wife, Emina Planja.[5] (*See* Planja Aff. at ¶¶ 1, 5, attached hereto as *Ex.* E.) Mr. Belkacem is married to Anela Kobilica, and the father of two children. (*See* Kobilica Aff. at ¶ 1, attached hereto as *Ex.* F.)

In October, 2001, each was taken into custody, reportedly at the request of the United States, in Bosnia-Herzegovina ("B-H"), by B-H authorities, on order of the B-H Federation Supreme Court in connection with suspicions that they were planning to attack the United Kingdom and U.S. Embassies in B-H. *See generally, Boudella v. Bosnia and Herzegovina*, Nos. CH/02/8679; CH/02/8689; CH/02/8690; CH/02/8691, H.R. Chamber for B-H (Oct. 11, 2002) ("H.R. Chamber Decision"), attached hereto as *Ex.* G. Petitioners were hundreds of miles from the battlefield of Afghanistan in October 2001; none of them ever were involved in any way in the United States' military campaign there, or in activities related to the attacks of September 11, 2001.

After being held by Bosnian authorities for three months, the Supreme Court of the Federation of B-H, on the recommendation of the Bosnian federal prosecutor, ordered the release of all six from custody, stating:

> [The] Office of the Federal [sic] prosecutor has with document no. KT-115/01 from 17 January 2002 informed [the] investigative judge that [his] opinion is that there are no further reasons or circumstances based upon which this measure for ensuring [the] presence of [the] accused in criminal procedure was ordered. Therefore [,] the measure of the detention can be terminated to all accused persons and they can be released from detention.
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> Reviewing [the] suggestion of [the] Deputy Federal prosecutor and [the] status of [the] investigation [sic] case, [the] investigative judge agreed with this suggestion and *since the reasons based*

[5] Mr. Boudella is also married to Nada Dizdarevic.

> *upon which [the] detention was ordered and extended, article 189, para [.] 1 and 2 of the Law of Criminal Procedure, do not exist any more, it has been decided as in declaration of this decision.*

Decision and Order of the Supreme Court of the Federation of B-H, No-Ki-1001/01 (Sarajevo, Jan. 17, 2002) (J. Eterovic) (emphasis supplied), attached hereto as *Ex.* H.

In the early morning hours of January 18, 2002, despite the ruling of the B-H Supreme Court, and while family members (who knew of the Supreme Court order through B-H media) watched in horror, Petitioners were not freed, and instead were seized by U.S. forces, who bound, gagged and transported them to Guantanamo Bay. *See* H.R. Chamber Decision at ¶¶ 53-55; *see also* Boudella Statement to Combatant Status Review Tribunal ("CSRT") at 12-13. Petitioners' pre-dawn abduction by U.S. forces, in contravention of the order of Bosnia's highest court, was the subject of protest by international human rights groups and the many people in Sarajevo who witnessed it, and international media attention.[6]

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[6] *See e.g.*, Peter Finn, *U.S. Troops Seize 6 Terror Suspects Freed by Bosnia*, The Washington Post, Jan. 18, 2002 ("Three hundred family members, friends and other supporters of the six suspects gathered in a sign of solidarity with the detained men."); Amra Hadziosmanovic, *Six Terror Suspects Detained in Bosnia Handed Over to the U.S.*, Agence France Presse, Jan. 18, 2002 ("As the hooded prisioners were taken from the jail in two police vehicles, about 100 people from Sarajevo's Muslim community blocked the road calling for the six to be released but police forced their way through. . . . the Bosnian Helsinki Committee for Human Rights [ ] described the move Friday as a drastic violation of human rights. [The Head of the Committee] told AFP that the transfer was made 'under strong pressure from the United States,' and that the Muslim-Croat authorities had made the 'shameful decision' in light of the court ruling."); Alexander S. Dragicevic, *U.N. Human Rights Office Calls for Action Against Handover of Six Algerians,* Associated Press, January 22, 2002) ("The handover came a day after the country's highest court ruled that authorities lacked enough evidence to justify their detention or extradition. 'The Bosnian legal system proved itself to be working well up until early Friday morning,' [Madeline] Rees [the head of the Sarajevo office of the United Nations Commissioner for Human Rights] said . . . adding that 'some sanction must be forthcoming against those individuals or at least those in the government who breached that order.'"); Aida Cerkez-Robinson, *Handover of Algerians Protested*, Canada News, Jan. 25, 2002, *available at* http://www.canoe.ca/CNEWSAttak0201/25.algerians-ap.html ("About 100 supporters of six Alterian terrorism suspects in U.S. custody protested in Bosnia on Friday, kneeling in the snow to pray for the men and demanding to know where they had been taken."); Letter from Javier Zuniga, Amnesty Int'l to United States Ambassador Bond, M2 Presswire, Jan. 21, 2002 ("Amnesty International yesterday called upon the Bosnian authorities not to transfer the six Algerian men to US custody unless guarantees were obtained that they would not be tried before military commissions and that they would not face the death penalty. . . . The organization reiterates its strong belief that the Military Order, establishing the special military commissions, is in violation of international standards guaranteeing the right to a fair trial and freedom from discrimination – in particular provisions enshrined in the International Covenant on Civil and Political Rights. Consequently the organization is calling on you to do everything within your power to heed our concerns."). The Boumediene Petitioners' abduction by U.S. forces was such a significant event in Bosnia that it appears in the BBC's historic chronology of that country's "key events," along with the 1914 assassination of Archduke Ferdinand in Sarajevo that precipitated WWI. *See Timeline: Bosnia-Hercegovina A Chronology of Key Events*, BBC News UK Edition, Sept. 22, 2004, *available at* http://news.bbc.co.uk/1/hi/world/europe/country-profiles/1066981.stm.

The Respondents transported Petitioners by aircraft to Guantanamo[7], where they have been interned in cages for nearly three years.[8] According to recently released British detainees, the Bosnian Algerians have received particularly brutal treatment in Guantanamo at the hands of their American captors:

> By Bosnians we mean six Algerians who were unlawfully taken from Bosnia to Guantanamo Bay. They told us how they had won their court case in Bosnia. As they walked out of court, Americans were there and grabbed them and took them to Camp X-Ray, January 20, 2002. They arrived five days after us. They were treated particularly badly. They were moved every two hours. They were kept naked in their cells. They were taken into interrogation for hours on end. They were short shackled for sometimes days on end.[9] They were deprived of their sleep. They never got letters, nor books, nor reading materials. The Bosnians had the same interrogators for a while as we did and so we knew the names which were the same as ours and they were given a very hard time by those. They told us that the interrogators said if they didn't cooperate that they could ensure that something would happen to their families in Algeria and Bosnia. They had dual nationality. They had families in Bosnia as well as in Algeria.

See Composite Statement: Detention in Afghanistan and Guantanamo Bay by Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed ("Composite Statement"), ¶ 300, *available at* http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf. Consistent with those reports, during his CSRT proceeding, Mr. Ait Idir told the Tribunal that he had been beaten by guards and sustained an injury to his head and a broken finger as a result. *See* Ait Idir Statement to CSRT at 8.

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[7] Based on certain public accounts of the transport, there is reason to believe the plane may have landed in the United States *en route* to Cuba. Petitioners have submitted a Freedom of Information Act request for information concerning Petitioners' precise itinerary from Bosnia to Guantanamo. *See Ex.* I.

[8] *See* Jeffrey Toobin, *Inside the Wire: Can an Air Force colonel help the detainees at Guantanamo?*, The New Yorker, Feb. 8, 2004, at A1 (detainees are held in seven-by-eight foot cells made of steel mesh painted lime green); David Rose, *Operation Take Away My Freedom: Inside Guantanamo Bay on Trial,* Vanity Fair, Jan. 2004 (guards pass cells every thirty seconds, there is no air conditioning and the lights stay on all night).

[9] *See* Composite Statement, ¶ 183, *available at* http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf. ("Short shackling means that the hands and feet are shackled together forcing you to stay in an uncomfortable position for long hours. . . . Being held in the short shackled position was extremely painful [,] but if you tried to move [,] the shackles would cut into your ankles and wrists.").

In September 2002, the B-H Human Rights Chamber Court, established pursuant to the Dayton Peace Accords, heard the applications of Petitioners Boudella, Boumediene, Nechle, and Lahmar, claiming that allowing U.S. forces to abduct them from Bosnia violated the European Convention on Human Rights.[10] It found, consistent with the Supreme Court's order, that "there was no justification under Article 5 paragraph 1 of the [European] Convention [on Human Rights] for the respondent parties B-H and the Federation of B-H to keep the applicants in detention after the order of the Supreme Court to release the applicants from pre-trial detention entered into force in the early evening of 17 January 2002 . . . ." H.R. Chamber Decision at ¶ 230.

On April 9, 2002, the Bosnian Supreme Court issued a decision suspending the criminal proceedings against Boudella, Boumediene, Nechle, and Lahmar. *Id.* at ¶ 42.[11] On November 4, 2004, counsel for the Boumediene Petitioners learned that the Bosnian Federal Prosecutor had *dismissed* the criminal proceedings against Messrs. Belkacem, Ait Idir and Boudella.[12]

Petitioners commenced this proceeding immediately after the U.S. Supreme Court's June 28, 2004, rulings in *Rasul* and *Hamdi*. In July, 2004, the Respondents announced they would conduct CSRTs for each detainee at Guantanamo to review their prior determination that each is

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[10] Specifically, they alleged that their expulsion violated Art. 1 (providing procedural safeguards with respect to expulsion of aliens); 3 (prohibiting expulsion of nationals); 5 (right to liberty and security); 8 (right to respect for private and family life; and that delivering them into U.S. custody amounted to potential violations of Article 2 (limiting use of death penalty); 3 (prohibition of torture); and 6 (right to a fair trial). *See* J. David Yeager, *The Human Rights Chamber for Bosnia and Herzegovina: A Case Study in Transnational Justice*, 14 Int'l Legal Persp. 44, 51 (2004). The Human Rights Chamber court found, *inter alia*, that Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina had violated Article 1, Protocols 6 and 7 to the Convention on Human Rights by (i) failing to seek assurance from the United States that the death penalty would not be imposed; and (ii) failing to provide the required procedural protections relating to expulsion of aliens. *See id.* Petitioners' delivery into the hands of U.S. Stabilization Force ("SFOR") troops violated the laws of Bosnia-Herzegovina, as it incorporates the European Convention on Human Rights. The SFOR Mandate, under which U.S. SFOR troops operate in Bosnia, requires that "SFOR soldiers shall respect local laws." Unlawfully abducting the Petitioners violated B-H law and the SFOR mandate. *See* SFOR Mission, as stated on the website of the SFOR in Bosnia Herzegovina, *available at* http://www.nato.int/sfor/organisation/mission.htm.

[11] The Boumediene Petitioners expect to receive an English version of that order shortly and will supply it to the Court as soon as possible.

[12] The Boumediene Petitioners will provide the Court confirmation of the dismissal as soon as it is received.

an "enemy combatant." In August 2004, Petitioners applied for a Temporary Restraining Order to enjoin the Respondents from holding their CSRTs. Petitioners' application was denied.

Following an initial status conference, Respondents agreed to file returns on Petitioners' writs, stating the factual bases for the detentions, by the week of October 18; that agreement was incorporated into this Court's Coordination Order of September 20, 2004. Despite the fact that Respondents have interned Petitioners for nearly three years, and presumably had a basis to seize and transport the Petitioners away from their families to Cuba in January 2002, Respondents failed to respond to the Petitions of Messrs. Lahmar, Ait Idir, Nechle, and Boudella by October 22. Respondents sought to excuse their failure to comply with the Court's Order by suggesting they needed more time to locate evidence requested by the detainees, *see* Respondents' Status Report on the Submission of Factual Returns to Petitions For Writ of Habeas Corpus at 1-2. However, as this Court recognized, such information could not possibly have formed the basis for Respondents' determination three years ago that Petitioners should be seized and interned. *See* Order Setting Final Deadline for Submission of Factual Returns, Oct. 29, 2004. This Court ordered Respondents—again—to submit all factual returns by November 3.

Respondents have now filed partial returns for all Petitioners. Those returns confirmed Respondents' prior determinations that each Petitioner is an enemy combatant. All Petitioners continue to claim they are wrongfully interned, and charges have been filed against none.

B. El-Banna Petitioners

Petitioner El-Banna is approximately 44 years old. He is married and has five children, all of whom are British citizens. (*See* Sunnrqrout Aff. at ¶ 1, attached hereto as *Ex.* J.) He is a Palestinian who relocated to the United Kingdom approximately ten years ago. At the time of his arrest, he was a permanent resident of the United Kingdom. *Id.*

Petitioner Al-Rawi is approximately 34 years old. His family moved from Iraq to the United Kingdom when Petitioner Al-Rawi was 16 years old and has lived there ever since. At the time of his arrest, he was a permanent resident of the United Kingdom. (*See generally,* Sayyadi Aff., attached hereto as *Ex.* K.)

Petitioner Mubanga is a 32-year old citizen of the United Kingdom and the Republic of Zambia ("Zambia"). (*See* Statement of Constance Mubanga, In the Royal Courts of Justice, Queen's Bench Division, at ¶ 1, attached hereto as *Ex.* L.)

In November 2002, Petitioners El-Banna and Al-Rawi set out on a business trip to The Gambia, where they planned to establish a mobile peanut oil processing facility. (*See* Peirce Aff. on Behalf of Jamil El-Banna at ¶ 5, attached hereto as *Ex.* M; Peirce Aff. on Behalf of Bisher Al-Rawi at ¶ 5, attached hereto as *Ex.* N; Sayyadi Aff. at ¶ 4.) Their plans for the business venture had received full advance approval from Gambian authorities, and all appropriate registration had been obtained. (*See* Peirce Aff. on Behalf of Jamil El-Banna at ¶ 5; Peirce Aff. on Behalf of Bisher Al-Rawi at ¶ 5.) As they attempted to leave the United Kingdom for The Gambia, they were detained for questioning by British authorities, allegedly in connection with a battery charger that Petitioner Al-Rawi sought to transport to Gambia. After three days, they were released when the reason for the detention proved to be erroneous.[13] (*See* Peirce Aff. on Behalf of Jamil El-Banna at ¶ 3; Peirce Aff. on Behalf of Bisher Al-Rawi at ¶ 3.) On November 4, 2002, British authorities released Messrs. El-Banna and Al-Rawi, and they were cleared for travel to The Gambia. *Id.*

Upon their arrival in The Gambia, however, they were taken into custody, allegedly at the request of either British and/or U.S. authorities, once again allegedly based on suspicions related

[13] *See* Respondents' Factual Return to Petition for Writ of Habeas Corpus by Petitioner Jamil El-Banna. Although the battery charger was never in Petitioner El-Banna's possession, the Government concedes that the device was a battery charger and "believed the detainee's rendition of the facts concerning the electronic device."

to Petitioner Al-Rawi's possession of a battery charger. Petitioners El-Banna and Al-Rawi were held for one month in The Gambia and interrogated there by U.S. agents. (*See* Peirce Aff. on Behalf of Jamil El-Banna at ¶¶ 5-7; Peirce Aff. on Behalf of Bisher Al-Rawi at ¶¶ 5-7.) During that period, a Petition for a Writ of Habeas Corpus was filed in the U.K. on behalf of El-Banna and Al-Rawi. (*See* Peirce Aff. on Behalf of Jamil El-Banna at ¶ 23; Peirce Aff. on Behalf of Bisher Al-Rawi at ¶ 23.)

Subsequently, in violation of international law and the domestic laws of the United States, including the 1931 Extradition Treaty between the United States and the United Kingdom, Petitioners El-Banna and Al-Rawi were wrongfully transported to Afghanistan,[14] (*see* Peirce Aff. on Behalf of Jamil El-Banna at ¶¶ 11, 23; Peirce Aff. on Behalf of Bisher Al-Rawi at ¶¶ 11, 23), against their will, during which time they were beaten and jailed in an underground cell in total darkness for approximately three weeks.[15] Thereafter, they were transported to Guantanamo. (*See* Peirce Aff. on Behalf of Jamil El-Banna at ¶ 24; Peirce Aff. on Behalf of Bisher Al-Rawi at ¶ 24.)

In the fall of 2002, Petitioner Mubanga was seized by local government officials and jailed during a visit to Zambia, where he is a citizen. He was detained on false charges of motor vehicle theft by local authorities, (*see* Statement of Constance Mubanga at ¶ 5), allegedly at the request of the United States. In violation of international law and the domestic laws of the United States, including the 1931 Extradition Treaty between the United States and the United Kingdom, Petitioner Mubanga was transported to Guantanamo. *Id.* at ¶ 11.

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[14] They were transported despite the fact that a *habeas corpus* petition was pending on their behalf in the British courts. (*See* Peirce Aff. at ¶ 23.)

[15] Extradition Treaty between the United States of America and Great Britain, Dec. 22, 1931, U.S.-U.K., 1947 Stat. 2122.

Each Petitioner was in a country in Africa located thousands of miles from the battlefield of Afghanistan when he was taken into custody. There is no evidence that suggests Petitioners were involved in any way in the United States' military campaign in Afghanistan, or in any activities related to the attacks of September 11, 2001. None of the factual returns makes such an allegation against any Petitioner. None of the Petitioners possessed a weapon of any sort. Respondents illegally transported Petitioners by aircraft to Guantanamo, where they have been held for two years in cells measuring six by eight feet.[16]

Petitioners filed Petitions for Writs of Habeas Corpus in the District Court for the District of Columbia in July, 2004. The Amended Petition contests both the fact of the Petitioners' incarceration, as well as their inhumane treatment, which violates international law, the law of the United States, and the Uniform Code of Military Justice. On July 22, 2004, the El-Banna Petitioners filed a Motion for the Immediate Issuance of a Writ of *Habeas Corpus* Pursuant to 28 U.S.C. § 2243 or, in the Alternative, an Order to Show Cause. That motion was granted and an Order issued the next day, July 23, 2004.

In August 2004, Petitioners sought a temporary injunction to enjoin the Government from holding their CSRTs. Following oral argument, Petitioners' application was denied.

Respondents determined that each of the El-Banna Petitioners is an enemy combatant. Each Petitioner participated in the CSRT process despite the fact that Petitioners' counsel advised Petitioners El-Banna and Al-Rawi on September 1, 2004, in writing, not to participate in the CSRT, and so advised Petitioner Mubanga on September 2, 2004. Inexplicably, counsel's letters were not delivered to Petitioners until *after* their CSRTs had taken place.

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[16] *See* Ex. 4 to El Banna Petitioners' Motion for the Immediate Issuance of a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2243 or, Alternatively, to Issue an Order to Show Cause; *Suspect at Guantanamo Attempts Suicide,* Associated Press, Aug. 26, 2003; Note 7, *Supra.*

Further, the personal representative assigned to Mr. El-Banna for his CSRT proceeding disagreed with the Tribunal's determination that Mr. El-Banna is an "enemy combatant." S*ee* Respondents' Factual Return to petition for Writ of Habeas Corpus by Petitioner Jamil El-Banna. The CSRT record reflects that Mr. El-Banna's personal representative objected to the determination on the ground that there is insufficient evidence to conclude that Mr. El-Banna is an enemy combatant. Indeed, the Tribunal required Respondents to submit additional evidence on two separate occasions before the Tribunal finally reached its decision.

Petitioners continue to maintain their innocence, deny any links with al Qaeda, and claim they are wrongfully imprisoned. Charges have never been filed against these civilian prisoners.

III. ARGUMENT

Respondents cannot have it both ways. On the one hand, Respondents contend that, in the "global war on terror," the Executive's Article II war power and the law of war allows them to detain Petitioners indefinitely, without charge. Simultaneously, Respondents seek to label Petitioners as "enemy combatants," a term they give a malleable definition, and one without any recognized legal significance in U.S. or international law. In so doing, Respondents hope to deny Petitioners the rights any human would have under those very laws of war if, in fact, the law of war applied here. The laws of war do not apply to Petitioners who were forcibly held in and removed from Bosnia, an ally of the United States, or arrested and detained in The Gambia or Zambia, hundreds of miles from the hostilities in Afghanistan and with no connection to those or any other declared hostilities. Even if the law of war did apply, Respondents could not unilaterally exempt Petitioners from the protections afforded them under that body of law.

Ignoring the decision of the Supreme Court in *Rasul*, Respondents continue to assert that Petitioners have no substantive rights in these *habeas* proceedings, including certain fundamental rights afforded by the Constitution. Respondents are wrong, and their unrelenting resistance to

the Supreme Court's mandate confesses a fundamental disregard for the rule of law. The Court should compel Respondents to respond adequately to the Petitions, and deny Respondents' Motion to Dismiss.

A. Petitioners Are Not "Enemy Combatants"

In a calculated attempt to evade the reach of both international and domestic law, the Respondents have conjured up a sub-category of humans whom they assert are not entitled to any protections whatsoever. Having labeled these men as "enemy combatants," Respondents transported them to Guantanamo solely to shield their treatment of those men from the basic right of judicial review under U.S. domestic and international law. Under Respondents' rubric, so-called enemy combatants, neither charged with nor convicted of any crime, receive fewer protections than mercenaries, spies, or saboteurs. Like their failed attempt to avoid all judicial oversight, Respondents' Orwellian enemy combatant anti-category is nothing more than a transparent attempt to avoid their legal obligations.[17]

Respondents' entire argument, however, is based upon a false premise—that these Petitioners fall into its new category of "enemy combatants," and thus the Executive has inherent authority to detain them. Respondents, in effect, seek to create from whole cloth the source of their authority to detain Petitioners. But the Respondents' arguments for these Petitioners are misplaced:

> Petitioners proceed as if the actions of the Military in *zones of active hostilities, and in preventing aliens from returning to battle* with the means and intent to bring fresh harm to United States and coalition forces, are no less amenable to searching review by the courts that routine actions of administrative agencies. . . .

[17] Perhaps not since *Dred Scott* has a branch of the federal government had the temerity to assert the existence of a category of human beings fully under the control of the U.S. government, yet not entitled to even the most fundamental legal protections of life and liberty.

> On a fundamental level, Petitioners' objection to the Executive's power to *capture and detain alien enemy combatants in foreign territory during on-going hostilities* is flatly inconsistent with the historical understanding of the President's role as Commander in Chief of the Armed Forces . . .

Respondents' Br. at 1-2.

But Respondents absolute disregard for Petitioners' right to liberty extends far beyond simply seeking to create a category of person and to identify a location where their conduct would be unchallenged and unreviewable. Respondents further seek to imbue their "enemy combatant" definition with a chameleon-like ability to adapt to Respondents changing needs. Indeed, Respondents seek to virtually redefine their concept in order to detain Petitioners. *Cf.* March 21, 2002, News Briefing on Military Commission by William J. Haynes II, General Counsel of the Department of Defense (Guantanamo detainees are "enemy combatants that we *captured on the battlefield* seeking to harm U.S. soldiers or allies")[18] *with* Dec. 12, 2002, Memorandum from William J. Haynes II ("An 'enemy combatant' is an individual who, *under the laws and customs of war*, may be detained for the duration of an armed conflict. In the current conflict with al Qaida [sic] and the Taliban, *the term includes a member, agent, or associate of al Qaida or the Taliban*")[19] *and* Deputy Secretary of Defense Paul Wolfowitz's July 7, 2004, Order Establishing Combatant Status Review Tribunal ("July 7 Wolfowitz Order") ("For purposes of this Order, the term 'enemy combatant' shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. *This includes any person who has committed a*

[18] News Briefing by William J. Haynes II, General Counsel of the Department of Defense, Department of Defense News Briefing on Military Commissions (Mar. 21, 2002), *available* at http://www.defenselink.mil/transcripts/2002/t03212002_t0321sd.html.

[19] Memorandum from William J. Haynes II, General Counsel, Department of Defense, to Members of the ASIL-CFR Roundtable, (Dec. 12, 2002), *available at* http://www.cfr.org/pub5312/william_j_haynes/enemy_combatants.php#

belligerent act or has directly supported hostilities in aid of enemy armed forces").[20] As recently as August 16, 2004, the Government represented to Judge Kollar-Kotelly that, with respect to the question whether detainees can "lawfully be held as enemy combatants," the "hostilities from which these individuals were taken are still ongoing . . ." and "the military is due a great deal of deference . . . in what I would say is an unprecedented challenge to the military's ability to hold individuals who were *taken from an area of hostilities*. . . ." *See* Transcript of Motions Hearing before Honorable Colleen Kollar-Kotelly, United States District Judge, at 72, lines 7-21; 74, lines 7-12 Aug. 16, 2004, (No. 02-828) (emphasis supplied). In stark contrast with the broad definition of enemy combatant proffered in the July 7, Wolfowitz Order, to be used for the CSRT proceedings, Respondents, in their open-court statements on August 16, proffered a significantly more narrow definition declaring they consider enemy combatants to be only those individuals detained by the military in an area of hostility, *i.e.*, Afghanistan. This facile manipulation of a definition central to Petitioners continued plight as detainees—whether to justify, post-hoc, Respondents' internment of Petitioners, or to gain a litigation advantage—should not be tolerated by this Court.

Commenting on the Government's oblique definition of the term, Justice O'Conner observed in *Hamdi,* that "[t]here is some debate as to the proper scope of [the] term ['enemy combatant'], and *the Government has never provided any court with the full criteria that it uses in classifying individuals as such.* It has made clear, however, that for the purposes of this case, the 'enemy combatant' that it is seeking to detain is an individual who, it alleges, was 'part of or supporting forces hostile to the United States or its coalition partners' in Afghanistan *and who*

[20] Memorandum for the Secretary of the Navy, Paul Wolfowitz, Deputy Secretary of Defense, Order Establishing Combatant Status Review Tribunal, 1 (Jul. 7, 2004).

'*engaged in an armed conflict against the United States there.*'" 124 S. Ct. at 2639 (emphasis supplied).

Respondents define the categories of persons who fall under the definition of enemy combatant in the context of the "war on terror."[21] In effect, Respondents contend that an enemy combatant is any person, regardless of location, who the Executive labels as being a threat to U.S. national security or as "supporting," however tenuously, unintentionally, or involuntarily, others who Respondents contend pose such a threat. Respondents' argument that the global war on terror can exist in a legal sense without state actors—a position Petitioners' contest—has far reaching consequences. According to Respondents, the Executive has unreviewable, *carte blanche* authority to detain non-citizens, any place outside of the U.S., at any time—in total disregard to the laws applicable in the United States or other implicated countries, such as The Gambia and Bosnia-Herzegovina. Moreover, once detained and labeled as enemy combatants, Respondents contend such detained persons have no discernible rights.

The Supreme Court in *Hamdi*, in the context of a citizen enemy combatant, flatly rejected the Government's assertion of such an unbounded war power: "[a] state of war is not a blank check for the President when it comes to the rights of the nation's citizens." 124 S. Ct. at 2650. In *Hamdi*, the Supreme Court affirmed the Government's authority, pursuant to Congress's 2001 Authorization for the Use of Military Force ("AUMF"), to detain combatants in the Afghanistan war, for the duration of that conflict, to prevent them from taking up arms again against U.S. forces. *See id.* at 2642. *Hamdi's* narrow holding, however, does not support Respondents' assertion of an unfettered right to detain any non-citizen, anywhere, who is not engaged in a war

[21] Respondents' Br. at 15.

against the United States.[22] U.S. forces abducted the Boumediene Petitioners upon their court-ordered release from a Sarajevo prison in 2001. Bosnia was not then and is not today, a zone of active hostilities, nor is Africa. Petitioners are not enemy combatants, and the laws of war do not apply to them.[23]

1. The Term "Enemy Combatant" Has No Legal Significance Under U.S. Law.

Respondents refer to Petitioners as enemy combatants, and use that term 93 times throughout their brief. Respondents' repeated incantation of that phrase, however, cannot imbue it with legal relevance and cannot obscure the facts that the universally accepted preconditions to the application of the law of war are absent here. The phrase enemy combatant appears only once in *Ex parte Quirin*. *See* 317 U.S. 1, 31 (1942).[24] There, the Supreme Court used the term to mean enemy belligerent, or soldier, and it distinguished between such lawful and unlawful combatants:

> By universal agreement and practice the *law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants.* Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which tender their belligerency unlawful. . . .
>
> The spy who secretly and without uniform passes the military lines of a belligerent *in time of war*, seeking to gather military information and communicate it to the enemy, *or an enemy combatant who without uniform comes secretly through the lines*

[22] Nor does it mean that the Executive may detain persons for reasons other than preventing them from returning to battle, *i.e.*, for interrogation purposes. *See Hamdi* 124 S.Ct. at 2641 ("indefinite detention for the purpose of interrogation is not authorized").

[23] Indeed, when this Court first learned of the unique circumstances of the Boumediene Petitioners' case, it recommended that the parties meet to attempt to negotiate a resolution of this case. Petitioners' attempt to follow the Court's suggestion, however, was flatly rejected by the Government.

[24] The *Quirin* petitioners were Nazi saboteurs engaged in undercover operations in the United States against U.S. targets. The Supreme Court held that, because their actions breached the laws of war, they were "unlawful belligerents" or "unlawful combatants," and as such, could, under applicable international and domestic law, properly be denied a civil trial with a jury and instead subjected to the authority of a military tribunal. *See id.* at 31, 35.

> *for the purpose of waging war by destruction of life or property,* are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.

Id. at 30-31 (emphasis supplied). This short passage from *Quirin*—a case Respondents cited seven times—by way of its general illustration of the distinct classes and treatment of persons during wartime, shows exactly why Petitioners cannot be enemy combatants, or even unlawful combatants. The predicate to assignment of such status—the existence of a war between the United States and Bosnia, or between the United States and The Gambia—does not exist. *See infra*, § B.3. The Boumediene Petitioners are civilians who were living lawfully within the borders of a U.S. ally when they were seized. The El-Banna Petitioners are British citizens who were seized while lawfully present in countries friendly to the U.S.

The Supreme Court has used the term enemy combatant in only two cases since *Quirin*, and, in both instances, the Court used the term synonymously with the term enemy belligerent. *See In re: Yamashita*, 327 U.S. 1, 11 (1946) ("the trial and punishment of enemy combatants *who have committed violations of the law of war* is thus not only a part of the conduct of war operations as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war") (emphasis supplied); *Madsen v. Kinsella* 343 U.S. 341 (1952) (quoting *Yamashita*); *see also* Donna R. Newman, *The Jose Padilla Story*, 48 N.Y.L. Sch. L. Rev. 39, 52-53 (2004) ("In fact, a reading of *Quirin*, *Colepaugh*, *Territo*, and *Yamashita* shows that the Supreme Court's use

of the term 'enemy combatant' is synonymous with the term 'enemy soldier.'" (quotation omitted)).[25]

Quirin, Yamashita and Kinsella show the Supreme Court consistently uses the term enemy combatant to mean enemy solider, and that an enemy soldier who violates the laws of war is an unlawful combatant. Peaceable foreign nationals like Petitioners cannot be enemy combatants. At least one district court has observed that a foreign national, arrested, charged with, and convicted of a terrorist act, cannot be an enemy combatant. Convicted "shoe bomber," Richard Reid, is a British national and *admitted* member of al Qaeda who was taken into custody by the United States in Boston after he attempted to detonate an explosive device aboard a transatlantic flight. During his sentencing hearing, Judge Young said:

> We are not afraid of any of your terrorist co-conspirators, Mr. Reid. We are Americans. We have been through the fire before. There is all too much war talk here. And I say that to everyone with the utmost respect.
>
> Here in this court, where we deal with individuals as individuals and care for individuals, as individuals, as human beings we reach out for justice.
>
> *You are not an enemy combatant. You are a terrorist. You are not a soldier in any war. You are a terrorist.* To give you that reference, to call you a soldier gives you far too much stature. Whether it is the officers of government who do it or your attorney who does it, or that happens to be your view, you are a terrorist. And we do not negotiate with terrorists.

Transcript of Sentencing Hearings, Jan. 30, 2003 (J. Young), at 53-54, No. CR. A. 02-10013-WGY (emphasis supplied).[26] Certainly Petitioners, who have never been charged with any crime by the United States, who adamantly deny any association with al Qaeda, and who never have

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[25] *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956) (approving trial by Military Commission of German spy, who committed an "offense of unlawful belligerency"); and *In re Territo*, 156 F.2d 142 (9th Cir. 1946), (involving a U.S. citizen, captured in an Italian Army uniform on the "field of battle," and deemed properly held by the United States as a prisoner of war).

[26] Mr. Reid received a life sentence. He was never detained at Guantanamo.

taken up arms against the United States, cannot be deemed enemy combatants at Respondents' whim.

2. The Term Enemy Combatant Has No Legal Significance Under International Law

Contrary to Respondents' assertions, there is no: (i) "historical precedent" for the use of the term enemy combatant, *see* Respondents' Br. at 1; (ii) "200-plus years of history" concerning the rights of enemy combatants, *see* Respondents' Br. at 2; or (iii) history of "enemy combatant status proceedings." *See* Respondents' Br. at 2.

Respondents have fabricated the concept of enemy combatant as part of an unprecedented and improper effort to evade domestic judicial review and compliance with international law. Indeed, apparently not satisfied with the strictures inherent in their initial creation, Respondents also have attempted to force additional, more refined categories such as "alien enemy combatant"[27] and "citizen enemy combatant."[28] None of these terms has any recognized meaning or usage as a matter of international law.

There is no express definition of the term enemy combatant under international law. Before Respondents began using that term here, it was rarely seen in international law.[29] The language of The Hague and Geneva Conventions is instructive.

"Enemy" is a term of art under international humanitarian law and means "adverse party."[30] The Hague Convention, Geneva III, Geneva IV and the two Protocols to the Geneva

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[27] *See* Respondents' Br. at 46.

[28] *See* Respondents' Br. at 10.

[29] The term is not used once in any of the relevant international humanitarian law conventions. *See generally* (1) Convention Respecting the Laws and Customs of War Land, Oct. 18, 1907, 36 Stat. 2277, T.S. 539, 1 Bevans 631 ("*The Hague Convention*"); (2) Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 SST 3316; T.I.A.S. 3364; 75 U.N.T.S. ("Geneva III"); (3) Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, ("*Protocol I*"); (4) Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 6 U.S.T. 3516; T.I.A.S.; 75 U.N.T.S. 135 ("*Geneva IV*"); (5) Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977 ("*Protocol II*") (collectively the "law of war"). Respondents' claims applies to Petitioners.

Conventions, use the word "enemy" to refer to the adverse party in an armed conflict.[31] The designation of "enemy" does not, standing alone, qualify (or disqualify) an individual with respect to the availability of legal rights.

The term "combatant" is recognized by international humanitarian law and has a specific legal meaning, *see* Article 43(2) of Protocol I, which reflects the meaning of the term under that body of law.[32] "Combatants" are characterized by their "*right to participate directly in hostilities*," which means that combatants may take up arms and engage in battle without being subject to the criminal sanctions that would apply to civilians for the same acts.[33] This so-called "combatant's privilege" does not extend to war crimes—acts in violation of the laws of war—or crimes against humanity.[34] Combatants also constitute legitimate military targets. Under The Hague Convention and the Geneva Conventions, armed forces (as well as certain other armed groups satisfying certain criteria as to conduct in war and organization, which would exclude terrorist organizations, such as al Qaeda), have "combatant" status and usually qualify as POWs.[35] There is no specific category of "terrorist" in the above Conventions, and, unless the alleged terrorist operates also as a member of the armed forces of similar protected groups, a terrorist would not qualify as a prisoner of war.[36]

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[30] *See* Jean de Preux, *Geneva Convention III Relative to the Treatment of Prisoners of War: Commentary* 50 (Jean S. Pictet ed., ICRC 1960) ("the term 'enemy' identifies any adversary during an 'armed conflict which may arise between two or more High Contracting Parties' pursuant to the first paragraph of Article 2 (10) Geneva III)" ("Preux"). In Protocol I, the term 'enemy' (used only in Articles 13, 23, 41, and 65) is almost completely eclipsed by the use of the term "adverse Party." *See generally* Protocol 1.

[31] *See* Protocol I.

[32] *See* Protocol I, art. 43(2) ("Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) *are combatants, that is to say, they have the right to participate directly in hostilities*.") (emphasis supplied).

[33] Protocol I, art. 43(2).

[34] Knut Dörmann, *The Legal Situation of "Unlawful /Uunprivileged Combatants,"* 85 Int'l Rev. Red Cross 45 (2003) ("Dörmann").

[35] *See*, Hague Convention, art. 1, 3; Geneva III, art. 4 (defining POW status); Protocol I, art. 44(1).

[36] For example, under Geneva III, if a soldier commits a terrorist act, he does not lose POW status; however, he could be prosecuted for the crime of terrorism. *See* Geneva III, art. 4. If such persons claim POW status, they must be treated consistent with the requirements of Geneva III, art. 5. A civilian terrorist cannot be a POW.

By definition, any combatant captured during a war or armed conflict is considered an "enemy" by the adverse party determining that combatant's legal status. Therefore, the term enemy combatant has the same meaning as combatant under international humanitarian law—and such combatants are entitled to the protections available under those laws.

Respondents repeatedly have referred to persons interned at Guantanamo as "unlawful combatants."[37] The term "unlawful combatant" is typically used to refer to a person who engages directly in hostilities without being entitled to do so under the law of war. An appropriate use of the term unlawful combatant would, for example, describe civilians who engage in hostilities without being part of a *levée en masse*.[38] It also would include combatants (including spies) who, like the *Quirin* defendants, breach universally accepted norms of international law, such as carrying weapons openly or distinguishing themselves from the civilian population by displaying visible insignia.[39] Although the term unlawful combatant has appeared more often in recent international law literature, it is not used in the Geneva Conventions themselves, and is merely a term of legal scholarship.[40]

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[37] *See, e.g.,* News Briefing by Donald H. Rumsfeld, Secretary of Defense, and General Richard B. Myers, Chairman, Joint Chiefs of Staff, (Jan. 11, 2002) *available at* http://www.defenselink.mil/transcripts/2002/t0111200_t0111sd.html; Gerry J. Gilmore, *Rumsfeld Visits, Thanks U.S. Troops at Camp X-Ray in Cuba*, Am. Forces Info. Serv., Jan. 27, 2002, *available at* http://www.defenselink.mil/news/Jan2002/n01272002_200201271.html.

[38] *See* Dörmann at 46.

[39] Under Protocol I, art. 44(3) a combatant who conducts himself in this manner forfeits POW status, but only if the combatant is apprehended in *flagrante delicto*. Past behavior does not disqualify a combatant for POW status, so long has he was in compliance with the laws of war when detained. *See* Protocol I, art. 44(5); *see also* Yves Sandoz, Christophe Swinarski & Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of August 12, 1949*, (Martinus Nijhoff 1987).

[40] *See* Dörmann at 46 ("Whereas the terms combatants, prisoners of war and civilians are generally used and defined in the treaties of international humanitarian law, the terms unlawful combatant, unprivileged combatants, [and] belligerent do not appear in them. They have, however, been frequently used at least since the beginning of the last century in the legal literature, military manuals and case law.").

B. The Laws Of War Do Not Apply To Petitioners And Respondents Lack Authority To Detain Them

In their brief, Respondents state, for the first time, that Petitioners are not being detained pursuant to the President's Military Order of November 13, 2001.[41] *See* Respondents' *Br.* at 7 & n.6. Rather, Respondents' most recently assert that Petitioners have been detained pursuant to the(i) the President's inherent Article II authority as Commander in Chief; (ii) AUMF; and (iii) international law of war. *See id.* None of these sources provide Respondents with the authority to detain the Petitioners, however, and Respondents' internment of them is, therefore, unlawful.

1. Article II of the United States Constitution Does Not Provide Executive Authority to Detain Petitioners

Presumably based on information provided by Respondents, the Boumediene Petitioners originally were detained in the territory of a friendly nation in the course of a criminal investigation by Bosnian authorities unrelated to warfare or the conflict in Afghanistan. Similarly, the El-Banna Petitioners were detained in African countries in no way involved in the conflict in Afghanistan. Respondents' unfounded assertion of Article II authority, *see* Respondants' Br. at 8, seeks to characterize Petitioners as falling within the category of persons detained in connection with the hostilities in Afghanistan. Respondents mistakenly rely on *Quirin* and *Johnson v. Eisentrager*, 339 U.S. 763 (1950), cases involving, respectively, admitted and convicted unlawful combatants taken into custody during World War II, for the proposition that they may detain Petitioners indefinitely. Respondents are wrong.

The very passages from *Eisentrager* and *Quirin* cited in Respondents' brief (*see* Respondents' *Br.* at 8-9), illustrate that, the Supreme Court consistently looks to the law of war in construing the scope of the Executive's war powers—a doctrine that applies only in the

[41] *See Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism,* 66 Fed. Reg. 57,833 (Nov. 13, 2001).

context of hostilities between states.[42] *See infra*, § B.3. Additionally, both cases cited by Respondents refer to the President's authority to employ forces to defeat the "enemy." As discussed above, the term enemy has a precise definition under the laws of war and means adverse party in an armed conflict. *See supra*, § III.A.2. Indeed, Respondents themselves draw on the laws of war to limn the scope of Executive authority:

> It is axiomatic that this war power includes the power not only to use lethal force when necessary against enemy forces engaged in hostilities against the United States, but also to subdue and incapacitate the enemy by lesser means of capturing and detaining individuals who are part of or support those enemy forces, or who have committed a belligerent act or directly supported hostilities. *The "universal agreement and practice" under "the law of war" holds that lawful and unlawful combatants are "subject to capture and detention."* *Quirin*, 317 U.S. at 30-31; *see also Eisentrager*, 339 U.S. at 786 ("This Court has characterized as 'well-established' the 'power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, . . . enemy belligerents, [and] prisoners of war.'") (quoting *Duncan v. Kahanamoku*, 327 U.S. 304, 313-14 (1946)).

Respondents' Br. at 9.

Respondents have failed to show any authority to suggest that the President's war powers include authority to detain civilians lawfully residing in a country which is at peace with, and an ally of, the United States, based on allegations unrelated to war. That is not surprising; such authority does not exist. The rationale for the power to detain is totally absent here: because the Petitioners were not involved in a war, detaining them cannot serve the intended purpose of preventing them from returning to war.

Respondents' linguistic sleight of hand notwithstanding, the fact that allies during wartime historically have transferred prisoners of war (or in Respondents' evolving lexicon,

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[42] *See, e.g.*, William Winthrop, Military Law and Precedents 1211 (1896) ("Rights and Obligations of Warfare in general. The conduct of war between civilized belligerents is required by modern usage to be governed by certain general principles—such as the following: I. That war is waged against the State as a belligerent only, and not against the individual citizens or subjects. Except where unavoidable, the course of legitimate operations, private individuals and non-combatants are not to be involved in injury to life, person, or property.").

"enemy combatant detainees") among themselves is of no moment here. Respondents cannot point to a single authority to justify the indefinite Executive detention of foreign nationals of an ally, who were not involved in a war, for the simple reason that there is none. Respondents' actions are, in the words of Bosnian Judge Vlado Adamovic, "an extra-legal procedure."[43]

2. The AUMF Does Not Provide Executive Authority to Detain Petitioners

On September 18, 2001, a Joint Resolution of Congress authorized President Bush to use force against the "nations, organizations, or persons" that "planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or [that] harbored such organizations or persons in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." *Authorization for Use of Military Force*, Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001) ("AUMF"). Three weeks later, on October 7, 2001, the United States initiated a military campaign against the Taliban government of Afghanistan, which had harbored and aided the al Qaeda terrorist network. The AUMF authorized the President to use force against a limited class of persons: those involved in the planning and execution of the September 11 attacks.

The Supreme Court in *Hamdi* looked to the laws of war to guide its analysis, and narrowly interpreted the scope of authority granted by the AUMF:

> The AUMF authorizes the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001, terrorist attacks. There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals *falling into the limited category we are considering, for the duration of the*

[43] Daniel Williams, *Hand-Over of Terrorism Suspects to U.S. Angers Many in Bosnia*, WASH. POST, Jan. 31, 2002, at A18, http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A64634-2002Jan30&notFound=true.

> *particular conflict in which they were captured*, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use. . . .
>
> Certainly we agree that *indefinite detention for the purposes of interrogation is not authorized [by the AUMF]*. Further, we understand Congress' grant of authority for the use of "necessary and appropriate force" to *include the authority to detain for the duration of the relevant conflict*, ***and our understanding is based on longstanding law-of-war principles***. . . . The United States may detain, for the duration of the hostilities, individuals legitimately determined to be Taliban combatants who "engaged in armed conflict against the United States."

124 S. Ct. at 2640, 2641-2 (internal quotations omitted) (emphasis supplied).

Each of the Petitioners denies having any involvement with any aspect of the attacks of September 11. Even the bald allegations reportedly made against the Boumediene Petitioners in Bosnia—for violations of Bosnian law and in connection with which no evidence was offered to justify their continued detention in Sarajevo—were wholly unrelated to the September 11 attacks.[44] To the extent Respondents rely on the AUMF to justify their internment of Petitioners, they have acted beyond the authority granted by Congress.

Respondents' post-hoc expansion of the definition of the term enemy combatant in the July 7, Wolfowitz Order does not change that conclusion. The Wolfowitz Order defines an enemy combatant as:

> [A]n individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

[44] The partial CSRT record Respondents have filed relating to Mr. Lahmar and Mr. Nechle suggests those reported allegations never were raised during nearly three years of interrogation. *See* Lahmar Statement to CSRT at 3; Nechle Statement at 1.

July 7, Wolfowitz Order at 1. The order lacks any geographic or temporal limit, and speaks broadly of the activities triggering enemy combatant status such as "supporting," without defining that term or specifying that any actions (whether by the supporter or the suportee) necessarily must be aimed against the United States. In theory, Respondents' definition of "supporting" includes providing legal counsel to individuals suspected of involvement with al Qaeda.[45] Such unfettered exercise of Executive power is not authorized—explicitly or implicitly—by the AUMF.

3. The Laws of War Do Not Provide Authority to Detain Petitioners.

Respondents' rhetorical declaration of a "war on terror," like the "war on drugs," or "war on poverty," does not establish the existence of a state of war for the purposes of international law, and does not trigger the Geneva Conventions that form the centerpiece of the laws of war.[46] As a matter of international law, for a state of war to exist, at the very least there must be actual hostilities between two High Contracting Parties or parties claiming to represent High Contracting Parties.[47] A unilateral declaration of war against a class of persons (*i.e.*, alleged terrorists) that has no connection with and does not purport to represent any other country, in the absence of actual hostilities, is not sufficient to create this condition.

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[45] *See e.g.*, Unclassified Summary of Basis for Tribunal Decision (Boumediene) at 1(where act of helping to finance legal counsel for person alleged to be an al Qaeda associate was cited by the Tribunal as a ground for its determination that Mr. Boumediene properly was determined to be an enemy combatant).

[46] *See International Humanitarian Law and Terrorism: Questions and Answers*, May 5, 2004, *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/html/5YNLEV?OpenDocument; *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts;* Report prepared by the ICRC for the 28th International Conference of the Red Cross and Red Crescent, Geneva, December 2-6, 2003, *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5XRDCC; Geneva III, art. 2(1) and Geneva IV, art. 2(1) (Conventions apply "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them" and in "all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance"); *see also, Hamdi*, 124 S. Ct. at 2641.

[47] A "High Contracting Party" is a signatory to the conventions, and, therefore, must be a state. There is no legal authority that would allow Al Qaeda to be interpreted as a High Contracting Party. *See also* Christopher Greenwood, *International Law and the "War Against Terrorism,"* 78 International Affairs 301, 314 (2002).

In support of their Supplemental Reply and Opposition, Petitioners submit the Declaration of Professor Wolff Heintschel von Heinegg, Dean of the Faculty of Law, Europa-Universität Viadrina Frankfurt (Order), and former Charles Stockton Professor of International Law of The Naval War College.[48] Professor Heintschel von Heinegg's Declaration sets forth his unequivocal opinion—based on years as a recognized law of war scholar—that the law of war does not apply to Petitioners.

While the Afghanistan conflict qualifies as a war, there were no hostilities in or involving the United States and Bosnia-Herzegovina, when Petitioners were detained in 2001, and none in The Gambia or Zambia in 2002. Nothing suggests Petitioners were detained in connection with the hostilities in Afghanistan. The Boumediene Petitioners' arrest, detention, and release properly was dealt with by the Bosnian courts as a Bosnian criminal matter, consistent with Bosnian and international law.

The Petitioners were neither "members of enemy forces,"[49] nor "seized in combat"[50] by the United States; those are bald assertions made by Respondents without any supporting facts.[51] The Boumediene Petitioners were seized by U.S. forces from the federal police of Bosnia-Herzegovina when the U.S. was not at war with either Bosnia-Herzegovina or Algeria. The El-Banna Petitioners also were taken into custody by local authorities. Petitioners were not "captured," as Respondents claim.[52]

The fact that neither The Gambia, Zambia or Bosnia is at war with the United States does not mean that the U.S. had no recourse with respect to the Petitioners if it, in fact, had evidence

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[48] *See* Heinegg Declaration, attached hereto as *Ex.*O.
[49] *See* Respondents' Br. at 67.
[50] *See id.*
[51] *See also id.* at 9 ("individuals who are part of or support those enemy forces, or who have committed a belligerent act or directly supported hostilities"); and *id.* at 50 ("removal of an alien from the field of battle").
[52] *See id.* at 15.

that Petitioners planned to engage in a terrorist attack against an American target. The U.S. could have extradited Petitioners, and tried them in a U.S. court. Pursuant to 18 U.S.C. § 3184, whenever an extradition treaty exists between the United States and any foreign government, any judge of the United States or authorized magistrate judge may issue a warrant for arrest upon a complaint charging the individual with having committed, within such a foreign country, a crime covered by the treaty with that foreign country. The Respondents have acknowledged the existence of an extradition treaty between the United States and Bosnia, and as set forth *supra* at § II.B, there is an extradition treaty between the U.K. and U.S.[53] In the event that Respondents actually contend the Petitioners were involved in a plot against U.S. interests, a finding that the Petitioners are unlawfully detained would not hamstring Respondents' future efforts to thwart terrorists, or weaken its efforts to protect national security. *See, e.g., U.S. v. Reid, supra.*

a. *Petitioners Are Entitled to the Protections of International Human Rights Law.*

Despite Respondents' efforts, the fact that Petitioners are civilians who are not subject to the laws of war and who, therefore, cannot be classified as prisoners of war or combatants (whether lawful, unlawful or enemy) does not mean that Petitioners have no rights. By detaining Petitioners without charge for nearly three years, Respondents have breached applicable and enforceable human rights law.

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[53] U.S. Department of State, Treaties in Force 28, 323 (2003), *available at* http://www.state.gov/documents/organization/24227.pdf (last accessed Nov. 2, 2004); *In the Matter of the Extradition of Muhamed Sacirbegovic* 1 (S.D.N.Y. 2003) http://news.findlaw.com/cnn/docs/bosnia/sacirbegovic31703cmp.pdf (last accessed Nov. 2, 2004) ("There is an Extradition Treaty in force between the Government of the United States of America and the Government of Serbia, signed on May 17, 1902, . . . which treaty applies to Bosnia and Herzegovina . . . as successor states to the former Yugoslavia."). *See also* U.S. GAO, Combating Terrorism: Department of State Programs to Combat Terrorism Abroad 4 (Sep. 2002), http://www.gao.gov/new.items/d021021.pdf ("[The Department of] State uses extradition treaties to bring terrorists to trial in the United States and cooperates with foreign intelligence, security, and law enforcement entities to track and capture terrorists in foreign countries."

Under the International Covenant on Civil and Political Rights adopted by General Assembly Resolution of the United Nations 2200A, December 1966 ("*the ICCPR*"),[54] Petitioners are entitled to the right to a fair trial[55] and the right to due process of law.[56]

The American Declaration of the Rights and Duties of Man ("*the American Declaration*"),[57] guarantees to Petitioners an enforceable right "to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law," *see* Art. 8, to not be subject to arbitrary arrest or detention, *see* Art. 9, and "to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him," *see* Art. 10.[58]

b. *Even if The Court Determines That the Laws of War Apply to the Petitioners, Respondents Have Violated the Protections Afforded Petitioners Under Those Laws.*

Assuming *arguendo* that the laws of war apply to Petitioners, and they do not, Respondents' determination of Petitioners' legal status must comport with the laws of war, *i.e.*, the Geneva Conventions and the Hague Convention. Under the Geneva Conventions, a person is

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[54] The ICCPR provides for certain minimum civil liberties to be afforded by states to their citizens and all persons under their sovereign power. It entered into force Mar. 23, 1976, and was signed by the U.S. on September 8, 1992.

[55] ICCPR arts. 14 and 15.

[56] ICCPR arts. 14 and 15.

[57] American Declaration Of The Rights And Duties Of Man (Approved by the Ninth International Conference of American States, Bogotá, Colombia, 1948), *available at* http://www.iachr.org/Basicos/basic2.htm. The American Declaration is binding on all member states of the Organization of American States ("OAS") by virtue of the OAS Charter, which incorporates the American Declaration. The U.S. ratified the OAS Charter on June 15, 1951. Ratification was subject to the following reservation, only: "That the Senate give its advice and consent to ratification of the Charter with the reservation that none of its provisions shall be considered as enlarging the powers of the Federal Government of the United States or limiting the powers of the several states of the Federal Union with respect to any matters recognized under the Constitution as being within the reserved powers of the several states." *See* Chapter of the Organization of American States, Apr. 30, 1940, 119 U.N.T.S. 48; *see also Report on Terrorism and Human Rights by the Inter-American Commission on Human Rights*, ¶ 38, October 22, 2002, *available at* http://www.iachr.org/Terrorism/Eng/part.a.htm#A.%20%20%20%20%20%20%20%20The%20International%20Law%20Against%20Terrorism.

[58] *See id.*

either a "combatant" or a "civilian."[59] A civilian engaging in hostile acts (*i.e.*, an "unlawful combatant") is subject to criminal prosecution. A civilian may lose a substantial part of the privileges he or she normally enjoys under Geneva IV for engaging in hostilities that constitute a "threat to the state," under Article 5 of Geneva IV.[60] However, even such unprivileged persons must be treated humanly and must be granted a fair trial.[61] In addition, such persons also enjoy minimum guarantees under Article 75 of Protocol I, which is regarded as customary international law, and is binding on the United States.[62] Those guarantees include the right "to be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist," unless detention is for a penal offence (Article 75(3)) and also the right to a fair trial, being the right to be tried by "an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure" (Article 75(4)).

Importantly, under the Geneva Conventions:

> Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third [Geneva] Convention, a civilian covered by the Fourth [Geneva] Convention, or [] a member of the medical personnel of the armed forces who is covered by the First [Geneva]

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[59] *See Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict,* 27 (Cambridge University Press 2004) ("Dinstein"); Andreas Götze, *Fragen der Anwendbarkeit des humanitären Völkerrechts unter besonderer Berücksichtigung der sogenannten, Nationalen Befreiungskriege,* [Questions of Applicability of Humanitarian Law with Special Regard to So Called National Liberation Wars] 104 (Peter Lang Europäischer Verlag der Wissenschaften 2002) ("Götze"); *see also* Georg Nolte, *Guantanamo und Genfer Konventionen: Eine Frage der 'lex lata' oder 'de lege ferenda'? [Guantánamo and Geneva Conventions: A question of 'lex lata' or 'lege ferenda'?],* in Krisensicherung und Humanitärer Schutz [Crisis Management and Humanitarian Protection] 396 (Horst Fischer, Ulrike Froissart, et al. eds., Berliner Wissenschafts-Verlag 2004) ("Nolte") (discussing assignment of categories in the context of Guantanamo); Hans-Peter Grasser, *Acts of Terror, Terrorism and International Humanitarian Law,* 84 Int's Rev. Red Cross 547, 568; Jordan J. Paust, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int'l L.J. 503, 511 (2003) ("Paust"); Michael Kurth, *Der völkerrechtliche Status der Gefangenen von Guantanamo Bay* [The status of detainees in Guantánamo Bay according to public international law] Zeitschrift für Rechtspolitik 404, 406 (2002 ("Kurth").

[60] *See id.*

[61] *See* Geneva IV, art. 5: "In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be."

[62] *See* Dinstein at 33; *see also* Protocol I, art. 45(2)-(3); Section II *infra.*

> Convention. There is no intermediate status; *nobody in enemy hands can be outside the law.*

Preux (emphasis supplied).[63]

Respondents fail to substantiate their assertion that Petitioners are combatants within the meaning of the laws of war, and never expressly state a contention as to whether Petitioners are lawful or unlawful combatants in the Afghanistan conflict.

If the Court finds that the laws of war apply, then, at a minimum, it must classify Petitioners as "civilians" under the Fourth Geneva Convention, and Petitioners are due the protections consistent with those afforded civilians in wartime. The Fourth Geneva Convention applies to all persons who are not protected by the other three 1949 Geneva Conventions who "find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[64] Additionally, the Fourth Geneva Convention provides interned "protected persons" a number of procedural and other protections. While the Fourth Geneva Convention permits a Party to limit an individual's rights in the interest of national security,[65] this provision does not extend to the Convention's prohibitions against inhumane treatment and its guarantee of rights to fair and regular trial, which are non-derogable.

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[63] The International Criminal Tribunal for the former Yugoslavia recently adopted this interpretation. *See Prosecutor v. Delalic*, No. IT-96-21-T, ¶ 271 (Int'l Crim. Trib. For Former Yugoslavia Trial Chamber II Nov. 16, 1998) *available at* http://www.un.org/icty/celebici/trialc2/judgment/cel-tj981116e.pdf.

[64] *See* Geneva IV, art. 4. Geneva IV may not operate to protect Petitioners, as they may fail the nationality test. (*See* Geneva IV, art. 4(2)) "Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are."). This issue has not been raised by Respondents. However, Protocol I , art. 75 still applies.

[65] Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favor of such individual person, be prejudicial to the security of such State. *See* Geneva IV, art. 5.

Respondents have repeatedly represented that they will treat all detainees "in a manner consistent with the principles of the Geneva Conventions of 1949,"[66] "within the spirit of the Geneva Conventions,"[67] and that the "core principles" of the Conventions should be observed.[68] The Conventions' "core principles" necessarily include those rights that in all circumstances are non-derogable and, therefore, must include minimal procedural rights. Respondents have breached the rights afforded by these provisions,[69] despite their public representations.

Notwithstanding Respondents' claims to the contrary, *see Respondents' Br.* at 67, a finding by this Court that the laws of war apply would not supplant Petitioners' rights under international human rights law. By their very nature, those laws remain in full force and effect and apply to all persons, even during war. Even if the Petitioners were determined to be unlawful combatants, thus losing their privileges under the Third and Fourth Geneva Conventions, they would still retain the fundamental protections of human rights law, which include protection from arbitrary detention.

IV. PETITIONERS ARE ENTITLED TO FUNDAMENTAL CONSTITUTIONAL PROTECTIONS UNDER RASUL

Rasul expressly held that detainees interned at Guantanamo have Constitutional rights that this Court, through the exercise of its *habeas corpus* jurisdiction, may protect:

> Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they

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[66] Press Release, The White House, "Fact Sheet: Status of Detainees at Guantanamo (February 7, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html; Press Briefing, Ari Fleischer, White House Press Secretary, Statement by the Press Secretary on the Geneva Convention, May 7, 2003, *available at* http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html; Press Briefing, Scott McClellan, White House Press Secretary (June 22, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/06/print/20040622-3.htm; Press Release, White House, Text of a letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, (Sept. 20, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/09/print/20020920-4.html.

[67] *Bush reconsiders prisoners' rights*, BBC News, Jan. 29, 2002 at 2 (as per http://www.bbcnews.co/uk/Jan292002 at 10:08 GMT.

[68] *Id* at 2.

[69] *See, e.g.*, Respondents' Br. at 17-18 (citing "Administrative Review Procedures to assess at least annually whether each enemy combatant at Guantanamo Bay [. . .] should be released . . . "). That procedure breaches Geneva IV, art. 43(I), which, as quoted in the text, requires such review to take place at least twice a year.).

> have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). *Cf. United States v. Verdugo-Urquidez*, 491 U.S. 259, 277-78 (1990) (Kennedy, J., concurring), and cases cited therein.

124 S. Ct. at 2698, n.15 (emphasis supplied). Justice Kennedy's concurrence in *United States v. Verdugo-Urquidez*, which states the holding of that case,[70] endorses Justice Harlan's famous concurrence in *Reid v. Covert*: "The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every place." *Verdugo*, 494 U.S. 259, 277 (Kennedy, J., concurring) (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring) (emphasis in original). The framework for analyzing where and when the Constitution applies extraterritorially, set forth by Justice Kennedy in *Verdugo*—and applied by him in his *Rasul* concurrence—focuses on pragmatic considerations. Justice Kennedy's analysis requires a case-by-case consideration of the context in which the right will be applied. For example, in *Verdugo*, he noted that courts should determine whether the application of a particular constitutional provision would be "impracticable and anomalous." *Id.* at 278. Accordingly, with respect to the application of the Fourth Amendment right at issue in *Verdugo* (search of the Mexican residence of a Mexican national by U.S. agents), Justice Kennedy stated that it would be impractical, due to the "absence of local judges or magistrates available to issue warrants, the differing and perhaps

[70] "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgements on the narrowest grounds' . . . " *Marks v. United States*, 430 U.S. 185, 193 (1977) (quotation and citation omitted). If anything, *Verdugo* establishes that the Constitution *does* apply abroad. When Justice Kennedy's vote is added to the dissenters, there are five votes for this proposition. Petitioners here are not alleging a comparatively weaker Fourth Amendment violation, such as the violation at issue in *Verdugo*; rather they are alleging fundamental Constitutional violations that go to the heart of our American form of Government.

unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials . . . ." *Id.*

Here, no such considerations weigh against Petitioners' ability to avail themselves of the fundamental protections of the U.S. Constitution. The potential for conflict with the laws of another sovereign resulting from application of the Constitution in Guantanamo is entirely absent, since only U.S. law applies there.[71] Similarly, there is no need here to rely on or cooperate with officials of another sovereign, or to consider potentially divergent cultural values, because Guantanamo is "in every practical respect a United States territory." *Rasul*, 124 S. Ct. at 2700 (Kennedy, J., concurring).

More importantly, the reasons for extending the reach of the fundamental protections of the Fifth Amendment to Guantanamo are stronger than were the reasons for extending the Fourth Amendment to protect a Mexican citizen from a warrantless search carried out in Mexico in

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[71] *Rasul*, 124 S. Ct. at 2698 (holding federal habeas corpus statute, 28 U.S.C. § 2241, applicable in Guantanamo Bay and prisoners interned there may bring claims of violation of the Constitution, laws or treaties of the United States); *id.* at 2700 (Kennedy, J., concurring) (explaining that "[i]n a formal sense, the United States leases the Bay; the 1903 lease agreement states that Cuba retains 'ultimate sovereignty' over it. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T.S. No. 418. At the same time, this lease is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. 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.") (quotation omitted)); *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot on other grounds*, 113 S. Ct. 3028 (1993) (finding substantial likelihood that alien detainees in Guantanamo Bay have due process rights); *Haitian Ctrs. Council v. McNary*, 823 F. Supp. 1028 (E.D.N.Y. 1993), *vacated by settlement* (finding same on the merits after full bench trial); *United States v. Lee*, 906 F.2d 117 (4th Cir. 1990) (holding 18 U.S.C. §§ 2241, 2244, 7, and 3238, criminalizing aggravated sexual abuse and abusive sexual contact, applicable in Guantanamo Bay); *United States v. Rogers*, 388 F. Supp. 298, 301 (E.D. Va. 1975) (applying 21 U.S.C. §§ 841, 846, relating to cocaine possession and distribution, to U.S. citizen employed in Guantanamo Bay); *Huerta v. United States*, 548 F.2d 343, 344, 346 (Ct. Cl. 1977) (adjudicating breach of contract and takings clause claims by Cuban national for loss of property situated on Guantanamo), *cert. denied*, 434 U.S. 828 (1977); 48 Fed. Reg. 28,460-64 (June 22, 1983) (stating Endangered Species Act, 16 U.S.C. § 1538, applies in Guantanamo Bay); Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, Art. IV, T.S. No. 426 (providing, *inter alia*, that "fugitives from justice charged with crimes or misdemeanors amendable to United States law, committed within said areas, taking refuge in Cuban territory, shall on demand, be delivered up to duly authorized United States authorities"); Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 43-44 (2004) (stating "[i]n recent decades, the United States has exercised criminal jurisdiction over both citizens and aliens at Guantanamo, to the exclusion of Cuban law. The practice has been to bring civilian criminal defendants to the United States for prosecution, where they receive full constitutional protection."); Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 91 AM. J. INT'L. L. 93, 117-18 (1997) (citing a 1994 United States declaration of its right to use radio frequencies in Guantanamo Bay, included in the Final Acts of the Kyoto Plenipotentiary Conference).

Verdugo. The Petitioners have lived in mesh cages for three years. They have been beaten, shackled, deprived of sleep, endlessly interrogated, and endured threats against their families. They have been degraded. All this has occurred on Respondents' instructions, in a "place that belongs to the United States," and to which the "'implied protection' of the United States," extends. *Rasul*, 124 S. Ct. at 2700 (quotation omitted). The Petitioners' most fundamental rights, their freedom, dignity, and possibly even their lives, are at stake.

The "cases cited" in Justice Kennedy's concurrence, known as the *Insular Cases*, hold that fundamental constitutional rights extend by their own force to "unincorporated" territories. *See e.g., Downes v. Bidwell*, 182 U.S. 244, 265 (1901).[72] The *Insular Cases* guarantee fundamental constitutional rights in territories where the United States possesses governing authority; it is the exercise of exclusive jurisdiction and control, rather than nominal sovereignty, that obligates the Unites States to recognize fundamental rights. *See, e.g., Examining Bd. Of Engin'rs, Architects, & Surveyors v. Flores de Otero*, 426 U.S. 572 (1976) (holding under the *Insular Cases* that the fundamental constitutional right to equal protection applies to citizens and aliens alike within the unincorporated territory of Puerto Rico); *Canal Zone v. Scott*, 502 F.2d 566, 568 (5th Cir. 1974) ("[N]on—citizens and citizens of the Untied States resident in such territories are treated alike, since it is the territorial *nature of the Canal Zone and not the*

[72] "Whatever may be finally decided by the American people as to the status of these islands and their inhabitants,--whether they shall be introduced into the sisterhood of states or be permitted to form independent governments, -- it does not follow that in the meantime, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property. This has been frequently held by this court in respect to the Chinese, even when aliens, not possessed of the political rights of citizens of the United States. *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Fong Yue Ting v. United States*, 149 U.S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; *Lem Moon Sing*, 158 U.S. 538, 547, 39 L. ed. 1082, 1085, 15 Sup. Ct. Rep. 962; *Wong Wing v. United States*, 163 U.S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977. We do not desire, however, to anticipate the difficulties which would naturally arise in this connection, but merely to disclaim any intention to hold that the inhabitants of these territories are subject to an unrestrained power on the part of Congress to deal with them upon the theory that they have no rights which it is bound to respect." *See id.* at 283.

citizenship of the defendant that is dispositive") (emphasis supplied).[73] *Rasul's* reliance on these cases explains its holding that those in unincorporated territories, like Guantanamo, have rights. That is why the Court held "nothing in *Eisentrager* or in any of our other cases categorically exclude aliens detained in military custody outside the United States from the 'privilege of litigation' in U.S. Courts." 124 S. Ct. at 2698.

Nevertheless, Respondents doggedly and mistakenly cling to *dicta* in *Eisentrager*—a case involving convicted war criminals—for the proposition that the Petitioners have no Fifth Amendment rights.[74] Despite Respondents' overreading of a purely descriptive sentence that mentioned "sovereign territory" in *Eisentrager*, *see* Respondents' Br. at 21, *Eisentrager* concerned territory and control, not sovereignty. *See Verdugo*, 494 U.S. at 266, 271, 274-75.[75] Indeed, as Justice Kennedy wrote in his *Rasul* concurrence:

> The decision in *Eisentrager* indicates that there is a realm of political authority over military affairs where the judicial power may not enter. The existence of this realm acknowledges the

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[73] *See* Brief Amici Curiae of Former U.S. Government Officials in Support of Petitioners, *Rasul v. Bush; 124 S. Ct. 2686 (2004) (No. 03-334)* (providing an in-depth analysis); *Ralpho v. Bell*, 569 F.2d at 607, 618-19 (D.C. Cir. 1977) (holding that Due Process constrained the Micronesian Claims Commission in this adjudication of inhabitants' claims); *United States v. Tiede*, 86 F.R.D. 227, 249-53 (U.S. Ct. of Berlin 1979) (holding that the Constitution guarantees rights to an alien defendant in the American Sector in Berlin).

[74] In light of the Supreme Court's overruling of *Ahrens v. Clark*, 335 U.S. 188 (1948), and its holding in *Rasul v. Bush*, 124 S. Ct. 2686 (2004), it is unclear whether *Eisentrager* remains good law. *See, e.g.*, *Rasul*, 124 S. Ct. at 2701, 2706 (Scalia, J., dissenting) (arguing that *Rasul* effectively overruled *Eisentrager*).

[75] *Rasul* reverses the characterization of Guantanamo Bay in *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003). The D.C. Circuit "rejected the argument—which the detainees make in this case—that with respect to Guantanamo Bay control and jurisdiction is equivalent to sovereignty." *Al Odah*, 321 F.3d at 1143 (citation and punctuation omitted). Whereas the D.C. Circuit claimed that "the Guantanamo detainees have much in common with the German prisoners in *Eisentrager*," because "they are now abroad," *id.* at 1140, the Supreme Court found that the detainees *differed* from the prisoners in *Eisentrager* in that respect. It held that the *Eisentrager* detainees were "at all times imprisoned outside the United States," while Guantanamo detainees "have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control." 124 S. Ct. at 2694. For the *Rasul* Court, this exercise of "exclusive jurisdiction and control" is the crucial marker of sovereign power. *See id.* at 2697 (citing historical evidence that the reach of sovereign power depended not on formal territorial boundaries but on "the exact extent and nature of the jurisdiction or dominion exercised in fact. . ."). *Rasul* thus embraced the notion "of *de facto*" sovereignty" that the D.C. Circuit rejected. 321 F.3d at 1144.

Put differently, the D.C. Circuit's decision hinged on the fact that Guantanamo was not part of the territory of the United States. It was that crucial finding that permitted it to distinguish the leading previous case, *Ralpho*. In *Ralpho*, Congress established a commission to disburse funds for claims against the United States for damages arising out of the World War. "Because Congress intended the Micronesia Trust Territory to be treated as if it were territory of the United States, the court held that the right of due process applied to the commissions actions." *Al Odah*, 321 F.3d at 1144 (citation omitted). Now, however, the Court has said that Guantanamo is like Micronesia in *Ralpho*.

> power of the President as Commander in Chief, and the joint role of the President and the Congress, in the conduct of military affairs. A faithful application of *Eisentrager*, then, requires an initial inquiry into the general circumstances of the detention to determine whether the Court has the authority to entertain the petition ***and to grant relief*** after considering all of the facts presented. ***A necessary corollary of Eisentrager is that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated***. See also *Ex parte Milligan*, 4 Wall. 2 (1866).

Rasul at 2700 (emphasis supplied).

Petitioners' constitutional claims properly are before this Court.

V. CONCLUSION

For the foregoing reasons, the Court should deny the relief requested by Respondents.

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