ORAL ARGUMENT TO BE SCHEDULED

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

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

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

v.

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

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

REPLY/CROSS-APPELLEE BRIEF FOR THE UNITED STATES, ET AL.

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GLOSSARY

APA ..... Administrative Procedure Act

ATS ..... Alien Tort Statute

AUMF ..... Authorization for Use of Military Force

CSRT ..... Combatant Status Review Tribunal

Fourth Geneva Convention ..... Geneva Convention Relative to the Protection of Civilian Persons in Time of War

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

ICRC ..... International Committee of the Red Cross

JA. ..... Joint Appendix

POW ..... Prisoner of War

Third Geneva Convention ..... Geneva Convention Relative to the Treatment of Prisoners of War

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INTRODUCTION AND SUMMARY

Petitioners invite a wholly unprecedented judicial superintendence of the ongoing conduct of a war. Petitioners assert that, even though they have been determined to be enemy combatants through a process that exceeds the traditional procedures for determining the status of captured enemies during a time of armed conflict, they nonetheless have robust Due Process rights to all manner of procedural protections akin to those used in criminal trials in Article III courts,

and that they have a plethora of further judicially-enforceable rights under a host of international treaties. Settled precedent forecloses these arguments. Neither the Constitution itself nor any treaty negotiated by the Executive Branch so hobbles the Executive's traditional ability to capture and hold enemy combatants during ongoing hostilities.

Longstanding decisions of the Supreme Court and this Court make clear that the Constitution does not apply extraterritorially to aliens, particularly during times of war, when the Constitution itself significantly limits the Fifth Amendment rights of United States soldiers. The Constitution does not provide superior rights to those who take up arms against our military. Nor does any kind of amorphous common law due process extend limitations on the Due Process Clause included in the Constitution. Further, petitioners' various efforts to convert Guantanamo Bay to United States sovereign territory are foreclosed by the plain text of the relevant treaties, and in any event petitioners lack any kind of meaningful voluntary connection to the United States.

The Combatant Status Review Tribunal ("CSRT") process would more than satisfy petitioners' putative due process rights. In this context, the content of any such rights would be profoundly shaped by the historical treatment of enemy combatants. The CSRT procedures cannot be evaluated by comparison to Article

III criminal trials or the constitutional rights of citizens. The CSRTs meet or exceed the level of process traditionally provided to enemy combatants through proceedings under Article 5 of the Third Geneva Convention and the common law of war. Moreover, most of the omissions in the CSRT process about which petitioners complain are equally missing from Article 5 hearings and the Army regulations that plurality in Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004), suggested would satisfy the due process rights of a citizen held as an enemy combatant in the sovereign territory of the United States.

The myriad treaties petitioners invoke likewise do not give rise to any judicially enforceable rights. In the final analysis, petitioners, who have received a process that meets or exceeds that traditionally used to evaluate the claims of enemy combatants, are not entitled to anything further under the Constitution or various treaties. They have received a process historically available to captured combatants and tailored to the circumstances of the present conflict. They have received more than what process is due.

ARGUMENT

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

In our opening brief (at 15-29), we showed that the Fifth Amendment does not apply to aliens outside the sovereign territory of the United States; that

Guantanamo Bay, Cuba, which the United States occupies pursuant to a lease, is outside the sovereign territory of this Nation; and that nothing in Rasul v. Bush, 124 S. Ct. 2686 (2004), or any other precedent cited by the district court, implicitly overruled these settled propositions.

In response, petitioners first contend (Br. 17-22) that the federal habeas statute permits them to enforce "common law due process" rights wholly outside of the Constitution. Next, petitioners contend (Br. 22-28) that they are entitled to constitutional due process protection because Guantanamo Bay is presently under United States control. Neither contention has merit.

A. There Is No "Common Law Due Process" Enforceable Through Habeas Corpus

Petitioners err in contending that the federal habeas statute permits them to enforce a "common law right to due process" (Br. 19) wholly untethered to any constitutional, statutory, or regulatory provision. In pertinent part, the habeas statute provides that "[t]he writ of habeas corpus shall not extend to a prisoner unless – (1) He is in custody under or by color of the authority of the United States * * * or (3) He is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c) (emphases added). Petitioners appear to recognize that § 2241(c)(3) authorizes relief only from custody that violates some independent, non-habeas source of positive law. Nonetheless, petitioners stress

that § 2241(c)(1) omits comparable language, predates § 2241(c)(3), and itself codifies an antecedent common law writ.

Petitioners fundamentally misunderstand the text, structure, and history of the habeas statute. To begin with, § 2241(c)(1) on its face makes custody "under or by color of the authority of the United States" a necessary condition for relief under that provision, but even petitioners do not contend that it is a sufficient condition (which would make all federal custody – no matter how lawful – remediable through habeas). To the contrary, § 2241(c)(1) gives courts jurisdiction to order release from federal custody that violates some independent source of positive law. See, e.g., Luther v. Molina, 627 F.2d 71, 76 (7th Cir. 1980) ("Although the writ of habeas corpus is available to any person in federal custody, * * * the purpose of the writ is to provide a means to secure release from illegal detention" – i.e., detention that "contravenes applicable constitutional, statutory or regulatory provisions.") (emphasis added)). Thus, when Congress added § 2241(c)(3) into the habeas statute in 1867, the effect was simply to extend habeas from federal prisoners to state prisoners. See, e.g., Felker v. Turpin, 518 U.S. 651, 659-60 (1996). And although common-law antecedents may inform construction of the habeas statute, the general rule that federal courts are not common-law courts applies with full force in the habeas context, and thus "the

power to award the writ by any of the courts of the United States, must be given by written law." Ex parte Bollman, 8 U.S. (4 Cranch.) 75, 94 (1807) (Marshall, C.J.) (emphasis added).

Petitioners' invocation of a "common law right to due process" rests on pre-Erie understandings that the Supreme Court definitively rejected decades ago. "There is no federal general common law." Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). Modern federal common law is limited either to "express congressional authorization[s] to devise a body of laws directly" or to "interstitial areas of particular federal interest." Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2762 (2004). Petitioners' proposed general federal common law of due process fits into neither category. Moreover, the very idea that there is a general federal common law of due process to remove limits on the due process protections expressly provided in the text of the United States Constitution strains credulity. Indeed, it is hard to imagine a less appropriate use of federal common law than to extend or blur the limits of our founding document.

Finally, petitioners cite no case even remotely suggesting that § 2241(c)(1) authorizes the courts to create a general federal common law of detention, and we are aware of none. Although petitioners erroneously contend that the Supreme Court "did not mention the Constitution" in Bollman (Br. 21), in fact, the Court

granted habeas relief only after concluding as a matter of law that the petitioners had not committed "treason" as defined in the Constitution, which the Court quoted. See 8 U.S. (4 Cranch) at 126 (quoting U.S. Const. Art. III, § 3, cl. 1). In Ex Parte Watkins, 28 U.S. (3 Pet.) 193 (1830) (Marshall, C.J.), the Court stated (in the sentence quoted by petitioners) that the object of habeas corpus "is the liberation of those who may be imprisoned without sufficient cause," but the Court then continued (in the very next sentence, which petitioners omit) that habeas corpus is therefore "in the nature of a writ of error, to examine the legality of the commitment." Id. at 202 (emphasis added). Petitioners quote INS v. St. Cyr, 533 U.S. 289, 302-03 (2001), for the proposition that habeas relief is not limited to "constitutional error." However, that case addressed only the entirely unremarkable use of habeas corpus to challenge, where custody is at issue, the assertedly "erroneous application or interpretation of statutes." Ibid. (emphasis added). Finally, petitioners place great weight on Rasul's statement that they have a "right to judicial review of the legality" of the Guantanamo Bay detentions. 124 S. Ct. at 2693. On its face, however, that statement does not address whether petitioners' underlying claims have merit, a question that the Court reserved expressly. See id. at 2699. Nor does it even remotely suggest, in a case where petitioners have urged primarily constitutional and treaty claims, that habeas also

permits adjudication of claims under an alleged federal common law of due process.

B. Rasul Did Not Alter The Status Of Guantanamo Bay For Purposes of Constitutional Analysis

1. Petitioners all but concede (Br. 22-23) that the Fifth Amendment is inapplicable to aliens outside the sovereign territory of the United States. As we have shown, that proposition rests on longstanding, recently reaffirmed Supreme Court precedent. See, e.g., United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990) ("we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States"); Johnson v. Eisentrager, 339 U.S. 763, 781-84 (1950) (Fifth Amendment has no "extraterritorial application" to aliens); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (Constitution does not "have any force in foreign territory unless in respect of our own citizens"). Petitioners also do not dispute that Guantanamo Bay lies outside United States sovereign territory. As we have shown, the lease governing Guantanamo Bay expressly preserves "the ultimate sovereignty of the Republic of Cuba," see Lease of Lands for Coaling and Naval Stations, art. III, Feb. 23, 1903, U.S.-Cuba, T.S. No. 418 (6 Bevans 1113); courts have construed similar language, in agreements governing the lease of military bases from Bermuda to Newfoundland, not to effect a transfer of sovereignty; and

these decisions are consistent with the longstanding position of the Executive Branch, which is constitutionally entrusted to make determinations of sovereignty. Moreover, in Rasul itself, the Supreme Court described Guantanamo Bay as "a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'" 124 S. Ct. at 2693 (emphasis added).

Instead, petitioners claim support (Br. 23-24) from Rasul's holding that the federal habeas statute applies to areas (such as Guantanamo Bay) where the United States exercises "complete jurisdiction and control," but not ultimate sovereignty. However, the Supreme Court in Rasul addressed only the geographic bounds of 28 U.S.C. § 2241, see 124 S. Ct. at 2698, and it expressly reserved all questions going to "the merits of petitioners' claims," see id. at 2699. Moreover, at every turn, the Court's reasoning was specific to the habeas statute: It held that Eisentrager's implicit construction of the phrase "within their respective jurisdictions," as used in § 2241, was itself implicitly overruled in Braden v. 30th Judicial Court of Kentucky, 410 U.S. 484 (1973). See 124 S. Ct. at 2694-95. It reasoned that habeas corpus must be available to American citizens at Guantanamo Bay, yet the text of § 2241 "draws no distinction between Americans and aliens." Id. at 2696. And it stressed that common-law habeas had traditionally applied not only to the sovereign territory of England, but also to territory "'under the subjection of the

Crown.'" Id. at 2697 (quoting King v. Cowle, 97 Eng. Rep. 587, 598-99 (K.B. 1759)). That reasoning in no way undermines, much less explicitly overrules, the Supreme Court's square rejection of "the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States," Verdugo, 494 U.S. at 269 (emphasis added); see also Eisentrager, 339 U.S. at 778 (Fifth Amendment inapplicable to aliens outside of "territory over which the United States is sovereign" (emphasis added)); Al Odah v. United States, 321 F.3d 1134, 1143 (D.C. Cir. 2003) (for Fifth Amendment purposes, "control is surely not the test"), rev'd on other grounds sub nom. Rasul v. United States, 124 S. Ct. 2686 (2004); Cuban American Bar Ass'n v. Christopher, 43 F.3d 1412, 1425 (11th Cir. 1995) (for constitutional purposes, "[w]e disagree that 'control and jurisdiction' is equivalent to sovereignty"). Indeed, in contrast to Eisentrager's statutory holding, which the Court found undermined by subsequent cases, Eisentrager's constitutional holding has been recently reaffirmed. See Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

Petitioners next assert (Br. 24-25) that Rasul declined to apply the general presumption against extraterritorial application of federal statutes, on the ground that Guantanamo Bay is inside "the territorial jurisdiction" of the United States. From this, petitioners reason that all federal statutes, and even the United States

Constitution itself, must have full application in areas where the United States exercises "complete jurisdiction and control." Petitioners' reasoning is flawed at every turn. To begin with, Rasul did not hold that the presumption against extraterritoriality is generally inapplicable to areas where the United States exercises control but not sovereignty. Under settled law, the presumption against extraterritoriality does govern the asserted application of federal statutes "beyond those areas over which the United States has sovereignty." Foley Brothers v. Filardo, 336 U.S. 281, 285 (1949) (emphasis added). In Rasul, the Court held only that this presumption "has no application to the operation of the habeas statute" in an area like Guantanamo Bay, where the United States has complete jurisdiction and control but not sovereignty. 124 S. Ct. at 2696. The Court did not dispute that such applications of the habeas statute would be extraterritorial, but reasoned instead that such extraterritorial application did not offend longstanding habeas practice presumably codified in § 2241. See id. ("At common law, courts exercised habeas jurisdiction over the claims of aliens detained within the sovereign territory of the realm as well as the claims of persons detained in so-called 'exempt jurisdictions,' where ordinary writs did not run, and all other dominions under the sovereign's control." (emphases added)); see also id. at 2697 n.12 (noting "the 'extraordinary territorial ambit' of the writ at common law"

(emphasis added)). Thus, Rasul changed neither the general presumption against extraterritoriality nor the general rule that sovereignty, not control, determines what counts as extraterritorial application.

More fundamentally, extraterritorial application of the United States Constitution (which was nowhere addressed in Rasul) raises issues far more troubling than the mere extraterritorial application of federal statutes. The "presumption" against statutory extraterritoriality is only that – a presumption against Congress's undoubted authority to decide which of its statutes should be enforced "beyond the territorial boundaries of the United States," and to what extent. See EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991). Extraterritorial application of the Constitution is an entirely different matter. To begin with, extraterritorial application to aliens, as generally mandated by petitioners' reasoning here, would be particularly likely to create legal conflicts and international discord. Moreover, such extraterritorial application of the Constitution would raise additional concerns as well, including (as this case dramatically confirms) the potential for grave interference with the conduct of foreign policy and warmaking by the political branches in general, and by the Executive Branch in particular. And while Congress has undoubted authority to enact legislation with extraterritorial effects, it is far from obvious that the

Constitution – the document that establishes this Nation's government – can apply directly to aliens who lack any connection, territorial or national, to it. As Justice Jackson reasoned for a unanimous Court in Eisentrager: "such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could have scarcely failed to excite contemporary comment. Not one word can be cited." 339 U.S. at 784. Finally, unlike in the case of statutory extraterritoriality, the political branches would be entirely powerless to mitigate any problems by adjusting, through ordinary legislative processes, the geographic scope of the provision at issue. For all of these reasons, there is no reason to accept, and there are compelling reasons to reject, petitioners' implicit assumption that the extraterritorial reach of federal statutes must be coextensive with the extraterritorial reach of the Constitution itself.

Finally, like the district court, petitioners attach dispositive significance to a footnote in Rasul stating that their allegations "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. § 2241(c)(3)." See Br. 25-26 (quoting 124 S. Ct. at 2698 n.15). As explained in our opening brief (at 24-25), this footnote addressed only the jurisdictional sufficiency of petitioners' allegations; the Court in Rasul repeatedly stated that it

was not considering the merits; and petitioners' extravagant reading of the footnote, as implicitly overruling Eisentrager and Verdugo on the inapplicability of the Fifth Amendment to aliens outside of sovereign United States territory, is foreclosed by the familiar and recently reiterated principle that when a "'precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.'" Tenet v. Doe, 125 S. Ct. 1230, 1237 (2005) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)).

2. Petitioners' constitutional position has several flaws even beyond its utter inconsistency with settled precedent. For one thing, it is also inconsistent with longstanding historical practice, a significant consideration in construing the Constitution in general, see, e.g., Mistretta v. United States, 488 U.S. 361, 401 (1989), and the Due Process Clauses in particular, see, e.g., Herrera v. Collins, 506 U.S. 390, 407-08 (1993); Medina v. California, 505 U.S. 437, 445-46 (1992). The practice of capturing and detaining alien enemy combatants in wartime is deeply rooted in this Nation's history, see generally G. Lewis & J. Mewha, History of Prisoner of War Utilization by the United States Army 1776-1945, Dep't of the

Army Pamphlet No. 20-213 1-3 (1955), and is as old as warfare itself, see A. Rosas, The Legal Status of Prisoners of War 44-45 (1976). Moreover, such detentions almost invariably occur in an area firmly controlled by the detaining country – not only for obvious military reasons but also because, in the case of enemy combatants entitled to POW status, the Third Geneva Convention effectively requires it, see Art. 19 ("Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger."). Yet despite this Nation's settled practice of detaining alien enemy combatants in areas that it effectively controls, practiced in every major conflict in our history, until the decision below, no court (other than the court of appeals reversed in Eisentrager itself) had ever asserted that such aliens, even if captured and held abroad, enjoy Fifth Amendment rights to challenge the basis of their detention. The novelty of that proposition, and the late date in our constitutional history in which it was even asserted, as well as the decisiveness with which it was rejected in Eisentrager, are grounds enough to validate the traditional practice.

Moreover, as Eisentrager emphasized, the fact that petitioners seek to invoke Due Process rights against the President's exercise of his war powers underscores the weakness of their claims. The Eisentrager Court emphasized not

only that the Due Process claims were asserted by aliens abroad, but also that they were asserted during a time of war. After surveying the rights of aliens generally, the Court emphasized that "[i]t is war that exposes the relative vulnerability of the alien's status." 339 U.S. at 771. As to aliens with voluntary connections to the United States, the Court emphasized that "disabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage." Id. at 772. The Court went on to survey the precedents indicating the absence of rights for aliens, during time of war, who had no voluntary connection to the United States. See, e.g., id. at 774 ("Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security.") (emphasis added).

The war-time setting of Eisentrager factored into the Court's rejection of the application of the Due Process Clause. The Court explained that the Fifth Amendment itself made the Grand Jury Clause inapplicable to members of our own armed forces "in actual service in time of War or public danger," and it noted more broadly that citizen-soldiers are "stripped of their Fifth Amendment rights." Id. at 783. The Court found it unthinkable that the Due Process Clause would place "enemy aliens in unlawful hostile action against us * * * in a more protected

position than our own soldiers," Id. at 783, but avoided that "paradox" with the observation: "Can there be any doubt that our foes would also have been excepted [by the text of the Fifth Amendment], but for the assumption "any person" would never be read to include those in arms against us?" Id. While later cases, like Verdugo, make clear that the Constitution does not extend to aliens abroad even during peacetime, Eisentrager's emphasis on war-time context cannot be forgotten. Clearly the Due Process Clause should not extend to aliens captured by the United States armed forces in the course of hostilities and detained in an area outside the sovereign territory of the United States, where the "control and jurisdiction" exercised are that of the United States armed forces.

By failing to appreciate the war-time context of Eisentrager and this case, petitioners' constitutional theory brings the Fifth Amendment into stark conflict with Article II. In vesting "[t]he executive Power" in the President (Art. II, § 1, cl. 1), and in designating him as the "Commander in Chief" (Art. II, § 2, cl. 1), Article II authorizes the President to employ the armed forces "in the manner he may deem most effectual to harass and conquer and subdue the enemy," Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850) (emphasis added), without significant interference by the courts. See, e.g., The Prize Cases, 67 U.S. (2 Black) 635, 668, 670 (1863) ("the President is not only authorized but bound to resist force by

force," and "[h]e must determine what degree of force the crisis demands"); Campbell v. Clinton, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring) ("the President has independent authority to repel aggressive acts by third parties * * * and courts may not review the level of force selected"). Moreover, the warmaking power is "a power to wage war successfully," Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934), and "of course * * * includes all that is necessary and proper for carrying these powers into execution," Eisentrager, 339 U.S. at 788. Accordingly, this power necessarily includes "[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants," all of which, "by 'universal agreement and practice,' are 'important incident[s] of war.'" Hamdi, 124 S. Ct. at 2640 (plurality) (quoting Ex parte Quirin, 317 U.S. 1, 28 (1942)).

Although extending limited constitutional rights to citizen enemy combatants might impose only a modest intrusion on the President's warmaking powers, the same cannot be said for extending such rights to alien enemy combatants. As explained by the authors of the majority and dissenting opinions in Rasul, the category of citizen enemy combatants "is not likely to be a numerous group." Hamdi, 124 S. Ct. at 2673 (Scalia, J., joined by Stevens, J., dissenting). In the case of alien enemy combatants, the threat is far more grave. In World War II

alone, the United States detained approximately two million enemy combatants. See G. Lewis & J. Mewha, supra, at 244. That war could not have been prosecuted successfully had each of these detainees enjoyed the Fifth Amendment rights asserted here by petitioners. As Justice Jackson presciently explained, such putative rights would permit captured enemy combatants to continue their fight against the United States in its own courts, quite effectively, at great cost to the Executive Branch and to the Nation. See Eisentrager, 339 U.S. at 779 ("It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home."). Petitioners' constitutional claims thus should be rejected not only based on settled precedent and historical practice, but also to harmonize the Fifth Amendment with Article II, see, e.g., Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 393 (1821), and, even more modestly, to respect the truism that the Constitution "'is not a suicide pact,'" Haig v. Agee, 453 U.S. 280, 309-10 (1981) (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963)).

C. Petitioners' Presence At Guantanamo Bay Is Involuntary

Even if Guantanamo Bay were treated as sovereign United States territory, the Fifth Amendment still would be inapplicable to petitioners. As explained in our opening brief (at 21), aliens "receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." Verdugo, 494 U.S. at 271 (emphasis added); see also id. ("lawful but involuntary" presence does not trigger constitutional protection, absent "previous significant voluntary connection with the United States"). That rule is dispositive here, because petitioners are at Guantanamo Bay involuntarily, and they do not allege any prior "connection" to the United States as the basis for triggering Fifth Amendment protections.

In response (Br. 27-28), petitioners ignore that holding of Verdugo, and instead quote a dictum from Mathews v. Diaz, 426 U.S. 67, 77 (1976), to the effect that the Fifth Amendment extends even to aliens "whose presence in this country is unlawful, involuntary, or transitory." However, Diaz went on to explain that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens," id. at 79-80, and it applied that rule to uphold a statute excluding certain lawful residents from Medicare benefits afforded generally to citizens, see id. at 81-84.

As explained below, the President exercises analogous broad powers over foreign relations and warmaking, and so Diaz affirmatively supports our contention that any due process rights for alien enemy combatants would be less extensive than those afforded to citizens. Moreover, of the two cases cited in Diaz for the proposition that "involuntary" or "transitory" presence can trigger Fifth Amendment rights, one case suggests precisely the opposite, see Wong Yang Sun v. McGrath, 339 U.S. 33, 49-50 (1950) (due process requires deportation hearings "at least for aliens who had not entered clandestinely and who had been here some time"), and the other involved a criminal prosecution in an Article III court, see Wong Wing v. United States, 163 U.S. 228, 238 (1896), a special circumstance that Verdugo itself acknowledged, see 494 U.S. at 271 (citing Wong Wing); id. at 278 (Kennedy, J., concurring) (Fifth Amendment applies when "United States is prosecuting a foreign national in a court established under Article III"). Whatever the constitutional tradition that applies in that context, it has little bearing on the distinct question whether the Fifth Amendment applies to the detention of aliens without prior voluntary connection to the United States as enemy combatants. On that question, Eisentrager and Verdugo both strongly suggest a negative answer, as does historical practice such as the detention of hundreds of thousands of alien enemy combatants within the United States during World War II, see G. Lewis &

J. Mewha, supra, at 90-91. Petitioners' position implies that every one of them, as well as the two million enemy combatants held by the United States during that war outside its sovereign territory, had Fifth Amendment rights – including, at least according to petitioners, rights to demand hearings, lawyers, access to state secrets, and judicial review of the facts surrounding their capture. That proposition is unsupported by precedent, history, or reason.

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

In our opening brief (at 30-32), we demonstrated that, by giving each detainee "notice of the factual basis for his classification" as an enemy combatant and a "fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker" (Hamdi, 124 S. Ct. at 2648 (plurality)), the CSRTs satisfy even the due process requirements for detaining United States citizens as enemy combatants on American soil. We further demonstrated (at 32-35) that the CSRTs afford greater procedural protections than do Army regulations for adjudicating POW status under Article 5 of the Third Geneva Convention, which the Supreme Court cited with approval in Hamdi. We explained (at 36-38) that, by exceeding even the due process requirements for the domestic detention of citizens as enemy combatants, the CSRTs a fortiori exceed the lower due process requirements (if any) that would apply for detaining aliens abroad as enemy combatants. And we

showed (at 38-52) that the putative procedural shortcomings in the CSRTs identified by Judge Green do not violate these due process standards.

In response, petitioners fundamentally take issue with the Supreme Court. They do so because, rather than disputing that the CSRTs afford even greater procedural protections than do the Article 5 tribunals on which the CSRTs were modeled, petitioners instead contend that Article 5 tribunals afford an inappropriate baseline of comparison because (in their view) detention of enemy combatants at Guantanamo Bay assertedly does not implicate "the exigencies of war" (Br. 58). Apart from the obvious falsity of that factual premise, petitioners' quarrel is ultimately with Hamdi itself, where the plurality opinion specifically cited with approval, in discussing the domestic detention of citizens as enemy combatants, the "properly constituted military tribunal[s]" used "to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention." See 124 S. Ct. at 2651 (plurality) (citing Army Regulation 190-8). If the "exigencies of war" would justify the use of Article 5 tribunals to determine the enemy combatant status of one or two American citizens held in this country, then they obviously would also justify the use of more protective CSRTs to adjudicate the status of hundreds of enemy combatant aliens captured and held abroad at Guantanamo Bay during ongoing hostilities.

Petitioners also vastly exceed the demands of even the district court. The district court held that due process requires the government, in order to detain enemy combatants captured and held abroad at Guantanamo Bay, to provide relevant classified information not only to the detainee's personal representative, but also to his chosen lawyer. JA 1272-82. In contrast, petitioners would require the government to afford such access to classified information not only to the detainee's lawyer, but also directly to the person detained as an enemy combatant. Moreover, apart from the failure to afford more widespread access to classified information, the district court identified only two perceived additional defects in the CSRTs, which it held "might" establish due process violations as to three of the 54 petitioner detainees. JA 1282-94. In contrast, petitioners allege no fewer than six independent due process violations, including the failure to provide alien enemy combatant terrorists with access to classified information, lawyers, and a decisionmaker not subject to the military chain of command. Ultimately, petitioners demand something approaching a de novo criminal trial before an Article III court for enemies captured during an armed conflict, which is not remotely consistent with traditional laws and practices of war, and not remotely what the Supreme Court envisioned in Hamdi. To adopt their position would be to

frustrate the President's ability as Commander in Chief to use the defend the citizens of this country.

A. Petitioners' Objections To The CSRT Procedures Are Meritless

1. Access To Classified Information

In our opening brief (at 38-46), we explained that the district court erred in holding that the Executive Branch cannot detain alien enemy combatants and terrorists without giving their lawyers access to classified information bearing on the enemy combatant designations. For all of the same reasons, petitioners err even more obviously in contending (Br. 35-41) that the government must also give classified information to the terrorists themselves. To put it more bluntly, petitioners effectively contend that the armed forces of this Nation cannot constitutionally capture al Qaeda terrorists on a foreign battlefield, and then detain them abroad as enemy combatants, without giving them access to classified information about our sources and methods of intelligence against al Qaeda. Petitioners cite no authority for that startling proposition, which is inconsistent with the conduct of every armed conflict in this Nation's history; inconsistent with Army Regulation 190-8, which specifically permits a tribunal to hold proceedings closed to the detainee (JA 1226-27); and inconsistent with a settled line of precedent from this Court, which permits the Executive Branch to take a wide

range of actions against aliens, even in the United States, based on ex parte consideration of classified evidence, see, e.g., Jifry v. FAA, 370 F.3d 1174, 1183-84 (D.C. Cir. 2004); Holy Land Foundation v. Ashcroft, 333 F.3d 156, 164 (D.C. Cir. 2003); People's Mojahedin Org. of Iran v. Department of State, 327 F.3d 1238, 1242-43 (D.C. Cir. 2003); National Council of Resistance of Iran v. Department of State, 251 F.3d 192, 208 (D.C. Cir. 2001).

Petitioners attempt to distinguish these cases as involving only "de minimis" property rights (Br. 40-41). However, the interests at issue were by no means insignificant; for example, the order in Holy Land blocked all of the assets of a suspected foreign terrorist organization (see 333 F.3d at 159), and the order in Jifry revoked a commercial pilot's license and thus impaired the individual alien's livelihood (see 370 F.3d at 1177). Moreover, petitioners err in attempting to impose a categorical distinction between liberty and property interests. As the Supreme Court recently confirmed, the principle that Congress may "regularly" make rules for aliens "that would be unacceptable if applied to citizens," Mathews v. Diaz, 426 U.S. at 80, applies to liberty interests no less than to property interests. See Demore v. Kim, 538 U.S. 510, 521-22 (2003) (mandatory detention of certain removable aliens). Furthermore, even where the liberty of citizens is at issue, Hamdi itself stressed that "discovery into military operations" would

"intrude on the sensitive secrets of national defense," and it explained that to the extent that such intrusions would be "triggered by heightened procedures," that concern is "properly taken into account in our due process analysis." See 124 S. Ct. at 2648 (plurality). Finally, although petitioners are correct that no case (to our knowledge) has specifically addressed access to classified information in connection with an enemy combatant designation, that is true simply because no alien captured on a foreign battlefield and detained abroad as an enemy combatant has ever before (to our knowledge) asserted a constitutional right of access to classified information.

Petitioners erroneously claim support from Greene v. McElroy, 360 U.S. 474 (1959), and Rafeedie v. INS, 880 F.2d 506 (D.C. Cir. 1989). In Greene, the Supreme Court criticized the ex parte consideration of classified evidence in connection with the revocation of a United States citizen's security clearance. Ultimately, though, the Court expressly declined to address any constitutional question. See 360 U.S. at 508 ("Whether those procedures under the circumstances comport with the Constitution we need not decide."). Similarly, in Rafeedie, this Court did not strike down a statute permitting the exclusion of aliens based on evidence considered ex parte. Instead, it simply directed the district court to consider a constitutional challenge to the statute on remand. See

880 F.2d at 525. Moreover, it specifically instructed the district court to take into consideration, as one critical element of its due process inquiry, "the interests of the Government, on behalf of the public, in summarily excluding terrorists and other undesirables from our shores." See id.

Petitioners also have not shown, despite the assistance of habeas counsel with access to classified information, that the detainees' lack of access to classified information has led to unfair results in petitioners' individual cases. Petitioners discuss the cases of three detainees out of the 54 involved in this litigation (Br. 36-37). The first of these, Mustafa Ait Idr, is not a petitioner in this appeal. Petitioner Mustafa Kurnaz contends that he was denied access to exculpatory information. However, the information was made available to the CSRT (JA 1662) and consisted only of partial, interim conclusions (JA 1676-77). Moreover, as the CSRT explained, more recent evidence "reverse[d] prior assessments" and supported the conclusion that Kurnaz had extensive ties to al Qaeda. JA 1664. Finally, petitioner Abdullah Al Kandari was found to be an enemy combatant based on numerous independent "indicators that he is a member of al Qaida" (JA 1363), as detailed by the CSRT, and not just based on the one piece of evidence highlighted by petitioners.

Petitioners' due process rights, if any, must be measured in relation to the historical rights of enemy combatants. The Article 5 hearings provided in Army Regulation 190-8 represent the outer bounds of traditional process in this context, and those hearings do not entitle the detainee to access to classified information. Historical practice in this area reflects the commonsense judgment that the armed forces need not give enemies access to classified information about the enemy during a war.

Finally, petitioners deny that the question presented is "whether the Constitution mandates giving classified information to accused enemy combatants and their counsel" (Br. 41 n.28). But under petitioners' legal theory, that is the only choice open to the Government here, short of simply releasing the alien enemy combatants captured during an armed conflict and held abroad at Guantanamo Bay. Petitioners do suggest that due process might be satisfied by giving detainees "substitutes for classified documents." Id. The CSRT process does precisely that, both in providing each detainee an unclassified summary of the evidence against him and in assigning to each detainee a personal representative who has access to classified information and has a duty both to "assist the detainee in * * * the presentation of information to the Tribunal" and to "comment upon classified information that bears upon the detainee's status." JA

1200-01. This is more than sufficient, in this sensitive context, to satisfy any due process rights these detainees might have.

2. Neutral Decisionmaker

Petitioners also go beyond the district court in contending that the CSRTs did not provide neutral decisionmakers. However, CSRT members cannot have been involved "in the apprehension, detention, interrogation, or previous determination of status" of the detainees (JA 1187-88) and must swear an oath to discharge their duties faithfully and impartially (JA 1188). These are the same protections historically available in Article 5 hearings, and due process requires nothing more. Furthermore, far from being a rubber-stamp, the CSRT process has led to favorable determinations for 38 detainees.

Petitioners assert that CSRTs cannot fairly adjudicate individual cases because the President and the Secretary of Defense have stated that the detainees are enemy combatants, and "it is not reasonable to expect" that CSRT panel members would "conclude that all their superiors * * * were wrong" (Br. 43). This line of reasoning ignores the fact that the CSRT officers have been given orders, by the Deputy Secretary of Defense and the Secretary of the Navy, to make a "neutral" and independent evaluation of the status of each individual detainee. JA 1187. Accordingly, they can be expected to act as neutral decisionmakers not

by ignoring their place in the chain of command, but by faithfully carrying out the role assigned to them by their superiors. Cf. Yamashita v. Styer, 327 U.S. 1, 5 (1946) (United States Army officers, in defending accused war criminal before military commission, "demonstrated their professional skill and resourcefulness and their proper zeal for the defense with which they were charged"). Petitioners present no evidence that these military officers violated both their oath and their orders. Finally, petitioners' reasoning proves too much, for it would preclude the use of any military tribunal to adjudicate enemy combatant status, because all potential panelists would be remote subordinates of the President and the Secretary of Defense. Petitioners' theory is thus flatly inconsistent with Hamdi's recognition that, even for citizens detained in this country, a "military tribunal" could satisfy the due process requirement of a "neutral decisionmaker." See 124 S. Ct. at 2651 (plurality).

3. Right to Counsel

Petitioners next assert (Br. 43-45) a constitutional right to counsel. However, petitioners present no evidence that aliens captured on a foreign battlefield and held as enemy combatants have ever been given hearings regarding their enemy combatant status with individual representation by counsel. To the contrary, the streamlined procedures set forth in Army Regulation 190-8 – which

the Hamdi plurality thought sufficient even for citizens detained as enemy combatants in this country, see 124 S. Ct. at 2651 – provide no right to counsel.

Petitioners' principal response is the Supreme Court's statement that the detainee in Hamdi "unquestionably has the right of access to counsel in connection with the proceedings on remand." 124 S. Ct. 2652 (plurality). However, that case involved an American citizen detained in this country. Moreover, Hamdi himself had been afforded no administrative process analogous to the CSRTs, and the plurality's statement therefore addressed access to counsel in court proceedings. See id. at 2651-52. Hamdi does not suggest that citizens, let alone aliens held abroad, are entitled to counsel before military tribunals, contrary to historical practice under Article 5 and the common law of war.

Petitioners also contend (Br. 44 n.30) that the Government forfeited this argument by not attempting an interlocutory appeal from a prior district court order on point. However, the cited order held only that petitioners have a right to counsel in proceedings in the district court, not in CSRT proceedings. See Al Odah v. United States, 346 F. Supp. 2d 1, 8 (D.D.C. 2004). The two issues are distinct, which is why the plurality in Hamdi could both state that Hamdi was entitled to counsel on remand and simultaneously favorably cite Army regulations that do not provide for counsel (or a personal representative) in Article 5

proceedings. In any case, there is obviously no duty to attempt interlocutory appeals in order to preserve an issue for subsequent appellate review. See Ciralsky v. CIA, 355 F.3d 661, 668 (D.C. Cir. 2004).

4. Consideration Of Coerced Statements

Petitioners next allege (Br. 45) that the CSRTs "appear" to have relied improperly on information obtained through torture or other forms of coercion. However, the CSRTs were obliged to evaluate the "reliability" of any evidence proffered to them (JA 1189), and petitioners offer no reason to suppose that they failed to do so here.

Petitioners cite only two instances in which CSRTs assertedly relied on information obtained through coercion. The first involves the case of former detainee Mamdouh Habib. Because Habib was released from custody in January 2005, his case is now moot. In any event, as even the district court acknowledged, Habib's CSRT was aware of the relevant torture allegations (against the Egyptian government) and referred them for further investigation. JA 1284. Moreover, petitioners allege that Habib made certain "false confessions" to Egyptian authorities (Br. 46), who assertedly tortured Habib while he was in their custody in Egypt. But as a simple perusal of Habib's classified factual return will confirm, all of the evidence that the CSRT found persuasive in making its determination

was derived not from Egyptian interrogations, but from interviews conducted by United States personnel while Habib was at Guantanamo Bay. The second instance involves detainee Malik Wahab, who does not allege that he was mistreated, but only that another detainee might have been. See Br. 47. Even if true, that allegation would not establish a violation of any personal rights Wahab might have. Cf. Bellis v. United States, 417 U.S. 85 (1974) (defendant may not assert third-party's Fifth Amendment right against self-incrimination). Nor would it undermine the CSRT's conclusion, which was supported by documentary evidence and by Wahab's own admissions. See JA 1561-65.

5. "Enemy Combatant" Definition

As shown in our opening brief (at 49-52), the CSRTs permissibly defined an "enemy combatant" as an individual "who was part of or supporting Taliban or al Qaeda forces" (JA 1187). In a series of oral argument hypotheticals, the district court speculated that this definition could encompass entirely unwitting supporters of al Qaeda, but the court ultimately stated: "The Court can unequivocally report that no factual return by the government in this litigation reveals the detention of a Swiss philanthropist, an English teacher, or a journalist." JA 1288. Petitioners disagree (Br. 49-53), and contend that two of the 54 detainees, Mohammed Daihani and Omar Amin, supported terrorist forces only unwittingly. That

assertion is unsupported by the record and, even if true, would not justify habeas relief for any of the other detainees.

More generally, petitioners err in suggesting that the "enemy combatant" definition encompasses individuals who supported Taliban or al Qaeda forces only unwittingly. Petitioners highlight a statement that the "motive" for such support would be irrelevant, and so conscripts would be covered as enemy combatants. See Br. 51. Motive is different from intent, however, and treating conscripts and volunteers alike as enemy combatants is entirely consistent with the laws of war. It is also consistent with Hamdi, which held that, even for citizens, enemy-combatant hearings may permissibly be "limited" to the question of "the alleged combatant's acts." 124 S. Ct. at 2649 (plurality) (emphasis added).

Petitioners further err in contending that the "enemy combatant" definition is impermissibly overbroad. Detaining members and supporters of hostile armed forces is fully authorized by the President's warmaking powers under Article II, which permit the President to employ our armed forces "in the manner he may deem most effectual to harass and conquer and subdue the enemy," Fleming, 50 U.S. (9 How.) at 615; fully authorized under traditional laws of war, which permit detention of supporters of opposing forces such as engineers, clerks, messengers, scouts, and balloonists, see, e.g., Instructions for the Government of Armies of the

United States in the Field (Lieber Code), Apr. 24, 1863, Art. 15; W. Winthrop, Military Law and Precedents 789 (2d ed. 1920); and fully authorized by the Authorization for Use of Military Force ("AUMF"), which by its terms permits the use of force not only against individuals involved in the September 11 terrorist attacks, but also against all "nations" or "organizations" that "aided" the attacks, and against all persons that "harbored" such individuals or organizations, see AUMF § 2(a), Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001), a class that obviously includes the Taliban and al Qaeda.

Petitioners erroneously attempt to limit these principles by reference to Hamdi and the Third Geneva Convention. In Hamdi, the plurality looked to the AUMF and traditional laws of war in upholding the President's authority to detain individuals who were "part of or supporting forces hostile to the United States" and who had themselves "engaged in an armed conflict against the United States." 124 S. Ct. at 2639-42; see also id. at 2678-80 (Thomas, J., dissenting). However, nothing in Hamdi suggests that the President's detention authority encompasses only those individuals. Petitioners assert that "the Geneva Conventions" permit the detention only of individuals who have taken "a direct part in hostilities" (Br. 55 & n.36). However, that limitation is contained not in the Convention itself, but in a 1977 protocol that the United States expressly refused to ratify.

Finally, petitioners claim that due process prohibits detention "based on an individual's affiliations and associations alone." Br. 56. While that may be true of affiliations with the Communist Party within the United States, as in the cases petitioners cite, it can hardly be true for affiliations with the forces of foreign governments or terrorist organizations engaged in armed conflict against this country. After all, even United States citizens do not have a constitutional right to travel overseas in order to affiliate with a hostile government or organization. See, e.g., Regan v. Wald, 468 U.S. 222 (1984); Zemel v. Rusk, 381 U.S. 1 (1965). And under the laws of war, membership in an enemy army has always been a sufficient basis for detention, even though it is nothing more than an "affiliation" or "association." Indeed, citizenship in an enemy nation traditionally suffices to justify preventive detention. See, e.g., Eisentrager, 339 U.S. at 772-73. Under petitioners' theory, each of the hundreds of thousands of POWs held by the United States during the World War II in the United States, as well as the two million enemy combatants held in locations controlled by United States during that war outside its sovereign territory, should have been entitled to a hearing not simply on the question whether he belonged to an Axis military force, but on the question whether he personally had committed a specific belligerent act. That is not the law.

6. Timeliness Of CSRT Proceedings

Petitioners finally contend that the CSRTs failed to provide notice "at a meaningful time" (Br. 57). This objection fails because petitioners do not explain how any delay prejudiced them in the CSRT process (as, for example, by impairing their ability to present a defense). To be sure, petitioners suggest that their pre-CSRT detention was unlawful, but they do not explain the relevance of that observation to their present, post-CSRT detention, which is all that the CSRTs addressed, and all that could be addressed through habeas. Under traditional laws of war, under Article 5 tribunals, and under the CSRTs, once someone is determined to be an enemy combatant, he may be detained from that time until the end of armed hostilities, not as punishment for past acts, but to prevent belligerent acts in the future. Absent any allegation that past delay impaired the CSRT proceedings, it is now entirely beside the point.

More fundamentally, petitioners have not shown that the passage of time between their capture and their CSRT proceedings was unconstitutional. To begin with, petitioners do not explain how any delay prior to June 28, 2004, when the Supreme Court simultaneously handed down its decisions in Rasul and Hamdi, could have been unlawful or otherwise inappropriate, given the then-binding precedent that they had neither rights under the Fifth Amendment nor a federal

cause of action through habeas. See Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003); Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002). Moreover, petitioners do not and could not contend that the government engaged in unconstitutional delay after June 28, 2004, when the Executive Branch proactively created the CSRT process less than two weeks after Rasul and Hamdi were announced, even though Rasul by its terms addresses only habeas corpus jurisdiction and Hamdi by its terms addresses only the constitutional rights of citizens detained domestically. Furthermore, in the eleven months since creating the CSRTs, and despite the urgent need to prosecute ongoing hostilities in Iraq and Afghanistan, the Department of Defense has completed literally hundreds of CSRT proceedings. Under these circumstances, petitioners' proceedings more than satisfied any constitutionally compelled standard of promptness.

B. Petitioners Misstate The Applicable Standards Of Habeas Review

1. Petitioners repeatedly assert that their habeas cases present "disputed factual issues." Br. 30; see also Br. 48 & n.32. However, petitioners stop short of explicitly contending, as an independent basis for relief, that there was legally insufficient evidence to support the CSRT determinations. Petitioners' hesitancy to make that argument is understandable, both because there is ample evidence to support the 54 enemy combatant designations at issue and because, in any event,

fact-based sufficiency claims are not cognizable in the enemy combatant context. In Ex parte Quirin, 317 U.S. 1 (1942), and Yamashita v. Styer, 327 U.S. 1 (1946), the Supreme Court held that habeas review even of death sentences imposed by military commissions for war crimes do not encompass the kind of fact-based sufficiency review that would apply outside the context of armed hostilities. See Yamashita, 327 U.S. at 8 (1946) ("If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts."); Quirin, 317 U.S. at 25 ("We are not here concerned with any question of the guilt or innocence of petitioners."). A fortiori, such sufficiency review is not available for the nonpunitive enemy combatant detentions at issue here.

2. Despite declining to seek fact-based review of the CSRT determinations, petitioners even more boldly contend that their allegations require the habeas courts to conduct their own de novo factfinding. That suggestion reflects a basic misunderstanding of the proper scope of review in habeas generally, let alone what could possibly be appropriate in the enemy combatant setting.

Despite petitioners' inapt citation of Conley v. Gibson, 355 U.S. 41 (1957), and Browning v. Clinton, 292 F.3d 235 (D.C. Cir. 2000), which are non-habeas cases involving motions to dismiss under Fed. R. Civ. P. 12(b)(6), as opposed to

factual returns under 28 U.S.C. § 2243, a habeas court may not simply accept the petitioner's well-pleaded allegations and proceed with de novo factfinding on that basis. On the contrary, even in a garden-variety habeas action governed by 28 U.S.C. § 2254, a habeas petitioner seeking an evidentiary hearing must identify a genuine factual dispute bearing on the existence of an independent constitutional violation, rather than on the merits of his case. See, e.g., Herrera v. Collins, 506 U.S. 390, 400 (1993) ("habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution – not to correct errors of fact"); Townsend v. Sain, 372 U.S. 293, 317 (1963) ("the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus"). Moreover, any prior factfinding "shall be presumed to be correct," id. § 2254(e)(1), and the habeas court "shall not hold an evidentiary hearing" absent either an intervening and retroactive change in law or a "factual predicate that could not have been previously discovered through the exercise of due diligence," id. § 2254(e)(2)(A) (emphasis added). And even where one of those narrow exceptions is present, a habeas petitioner still must demonstrate, as a condition of obtaining an evidentiary hearing, that the proffered "facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder

would have found the applicant guilty of the underlying offense." Id. § 2254(e)(2)(B). Of course, this case is not directly governed by the statutory standards set out in § 2254. Nonetheless, the exigencies of armed conflict, and the need to harmonize the Due Process Clause and the habeas statute with Article II, counsel in favor of heightened, not lowered, evidentiary requirements in this context. See, e.g., Hamdi, 124 S. Ct. at 2652 (plurality) ("a District court [should] proceed with the caution that we have indicated is necessary in this context").

Petitioners make no attempt to satisfy even the § 2254 requirements for an evidentiary hearing. To the extent petitioners simply allege that they are not enemy combatants, their claims are not cognizable under Herrera and Townsend v. Sain. And to the extent petitioners generally assert that they "did not receive a fair trial" (Br. 30), or that the CSRTs "apparently" assessed the evidence inappropriately (Br. 46), their allegations are unconnected to any intervening change in law or newly discovered evidence, and do not even begin to show that no reasonable CSRT could have found them to be enemy combatants, much less that new evidence of a constitutional error would demonstrate that proposition by clear and convincing evidence.

Petitioners's reliance on Walker v. True, 399 F.3d 315 (4th Cir. 2005), is misplaced. That case involved a habeas petitioner who had been convicted of

capital murder and who sought an evidentiary hearing to determine whether he was mentally retarded. The petitioner did not present evidence of retardation in state court because his conviction had become final before Atkins v. Virginia, 536 U.S. 304 (2002), held that the Eighth Amendment prohibits execution of the mentally retarded. See 399 F.3d at 318. By then, no state-court avenues of relief remained open to him, see id. at 319, and under those circumstances, the Fourth Circuit held that he was entitled to an evidentiary hearing. In other words, Walker involved a petitioner who alleged an independent constitutional violation and who had not had an opportunity to develop the facts supporting his claim in prior proceedings. Much the same is true of Blackledge v. Allison, 431 U.S. 63 (1977), and the other Supreme Court cases cited by petitioners (Br. 31), which involved challenges to allegedly involuntary guilty pleas. In each case, the petitioner alleged the denial of a constitutional right (an involuntary guilty plea, which is a violation of due process), based on facts that could not have been developed in prior proceedings (for example, alleged promises made by a prosecutor to induce the plea).

This case is radically different, because the facts petitioners seek to develop in an evidentiary hearing do not relate to the constitutional violations they have alleged. Although petitioners generally allege that the CSRTs were not

"fair" (Br. 30), the merits of that allegation does not depend on the resolution of any factual dispute. There is no serious dispute about what procedures the CSRTs actually followed (for example, they excluded petitioners, but not their personal representatives, from access to relevant classified information), and the question whether those procedures are constitutional is purely legal in nature. Instead, petitioners seek to develop facts assertedly showing that they are not enemy combatants and that the CSRTs "apparently" assessed the evidence inappropriately (Br. 46). This is certainly how the district court understood petitioners' claims, for it sought to grant each petitioner an opportunity "to fully litigate the factual basis for his detention in these habeas proceedings and * * * to prove that he is being detained on improper grounds." JA 1291. And as we have explained, that type of evidentiary hearing – which amounts to de novo re-litigation of the merits – is not available in a habeas proceeding at all, let alone a habeas prceeding in this sensitive context.

Once the basic validity of the CSRT process is upheld, courts are simply not in a position to second-guess the factual basis for quintessential military judgments about which aliens seized on the battlefield should be held. As with decisions about what targets to select, at the level of fact-based review, the

decisions at issue are committed to the discretion of military officials and not susceptible to judicially manageable standards for effective review.

3. Petitioners' demand for district court factfinding is also inconsistent with settled remedial principles of administrative law and habeas corpus. As explained in our opening brief, when a reviewing court concludes that an agency acted under unlawful procedures, the appropriate remedy is a remand to enable the agency to carry out its responsibilities under lawful procedures of its choice. See, e.g., INS v. Ventura, 537 U.S. 12 (2002). A similar principle governs habeas corpus: when a habeas court concludes that custody was imposed under unlawful procedures, the appropriate remedy is not for the habeas court itself conducts another proceeding under proper procedures, but for that court to order release conditionally, unless the first-instance tribunal (here, the CSRTs) itself re-tries the petitioner under proper procedures. See, e.g., Hilton v. Braunskill, 481 U.S. 770, 775 (1987). Either of these principles would preclude district court factfinding even if the CSRTs violated due process (which they did not).

Petitioners seek to avoid these settled principles by arguing that it is "too late to give the military another chance to try to provide a sufficient process." Br. 59. But even assuming that petitioners have suffered from unreasonable delay (which they have not), petitioners cite no authority for the proposition that agency

delay is sufficient reason for a reviewing court that finds a legal defect in an agency procedure to assume the agency's powers itself rather than remanding, or for a habeas court itself to re-determine factual innocence (or, in this context, enemy combatant status). Moreover, such judicial usurpation would be particularly inappropriate in this context. After all, the Supreme Court has specifically held that enemy combatant determinations may be entrusted to a "properly constituted military tribunal" (Hamdi, 124 S. Ct. at 2651), and, even in the absence of such a tribunal, any judicial factfinding must be "both prudent and incremental" (id. at 2652). Petitioners' proposed de novo habeas proceedings are not even remotely consistent with those principles.

III. PETITIONERS' INTERNATIONAL CLAIMS ARE MERITLESS

Petitioners primarily seek to enforce the Geneva Conventions through habeas corpus. That undertaking fails for three independent reasons: because as relevant here, the Conventions address only conditions-of-confinement issues not cognizable in habeas; because the Conventions are not judicially enforceable at the behest of individual detainees; and because the underlying Convention claims are meritless. Alternatively, petitioners assert breaches of three additional treaties, violation of an Army regulation, and claims under the Alien Tort Statute ("ATS"). None of those theories fares any better.

A. The Geneva Conventions Create No Right To Release

In our opening brief (at 55), we explained that the Third Geneva Convention provides for release from custody only after "the cessation of active hostilities" (Art. 118), which has not yet occurred in the ongoing conflicts with the Taliban and al Qaeda. The Fourth Geneva Convention similarly provides for release "as soon as possible after the close of hostilities" (Art. 133), and petitioners identify no provision in either Convention assertedly entitling them to release. To the contrary, petitioners acknowledge that even civilians, to the extent protected by the Fourth Geneva Protection, "are not immunized from detention for the duration of hostilities." Br. 70. The Conventions thus afford no basis for petitioners to challenge the lawfulness of their present custody at Guantanamo Bay and, therefore, no basis for relief under the federal habeas statute.

Petitioners' Geneva Convention claims are entirely unrelated to the fact or duration of their confinement. Petitioners invoke (Br. 70-71) various provisions of the Third Geneva Convention governing the conditions of confinement for POWs. But because the habeas statute provides a cause of action only for unlawful "custody," see 28 U.S.C. § 2241(c)(1) & (3), it cannot be used to attack conditions of confinement. See, e.g., Wilkinson v. Dotson, 125 S. Ct. 1242, 1249 (2005) (Scalia, J., concurring) (condition-of-confinement claims in habeas would

"utterly sever the writ from its common-law roots"); Pischke v. Litscher, 178 F.3d 497, 499 (7th Cir. 1999) (habeas is proper "only if the prisoner is seeking to 'get out' of custody in a meaningful sense"); Rael v. Williams, 223 F.3d 1153, 1154 (10th Cir. 2000) ("federal claims challenging the conditions of * * * confinement generally do not arise under § 2241"); Badea v. Cox, 931 F.2d 573, 574 (9th Cir. 1991) ("Habeas corpus proceedings are the proper mechanism for a prisoner to challenge the 'legality or duration' of confinement. A civil rights action, in contrast, is the proper method of challenging 'conditions of * * * confinement.'" (citation omitted)). On this ground alone, petitioners' Geneva Convention claims should be dismissed in their entirety.

B. The Conventions Do Not Create Judicially Enforceable Rights

In our opening brief (at 55-60), we demonstrated that the district court erred in concluding that, because the Geneva Conventions address the treatment of individuals, they therefore must create judicially enforceable individual rights. Because treaties are "primarily * * * compact[s] between independent nations," Head Money Cases, 112 U.S. 580, 598 (1884), they are "not presumed to create rights that are privately enforceable" in court. Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992); see, e.g., United States v. Li, 206 F.3d 56, 60-61 (1st Cir. 2000) (en banc). Moreover, the Supreme Court in Eisentrager

held that the 1929 version of the Geneva Convention, in creating express mechanisms for governmental enforcement through diplomacy, and in remaining silent on private enforcement through litigation, did not create judicially enforceable rights. See 339 U.S. at 789 n.14 ("the obvious scheme of the [1929 Convention is] that responsibility for observance and enforcement of these rights is upon political and military authorities"; "[r]ights * * * are vindicated under it only through protests and intervention of protecting powers"). In ratifying the Third Geneva Convention in 1955, neither the President nor the Senate manifested any intent to override the general presumption against judicial enforcement of treaties, abrogate the specific treaty holding of Eisentrager, and revolutionize the Convention by affording each individual enemy POW the right to litigate in our courts. To the contrary, the Third Geneva Convention, like its predecessor, sets up an "obvious scheme" for governmental enforcement through diplomacy: it commits the "High Contracting Parties" themselves to "ensure respect for the present Convention in all circumstances" (Art. 1); it provides for enforcement "with the cooperation and under the scrutiny of the Protecting Powers" (Art. 8); it further provides for disputes to be resolved by an "umpire" appointed by the Parties (Art. 132); and it obliges the Parties to "enact any legislation necessary to provide effective penal sanctions" for grave breaches, as established in criminal

prosecutions brought by governments (Art. 129). The Fourth Geneva Convention contains parallel provisions. See, e.g., Art. 12 (scrutiny by Protecting Powers); Art. 149 (dispute resolution by appointed umpire); Art. 146 (criminal prosecution for grave breaches).

In response, petitioners advocate a theory far broader even than that erroneously accepted by the district court. The district court permitted judicial enforcement only after concluding that the Geneva Conventions create individual private rights. JA 1296-97. In contrast, petitioners primarily contend that the Conventions are judicially enforceable through habeas corpus, regardless of their terms, simply because they are treaties, even if they were not intended to create judicially enforceable rights. Br. 61-64. Alternatively, petitioners defend the district court's reasoning that Conventions create judicially enforceable individual rights. Br. 64-66. Neither approach succeeds.

1. Petitioners err in contending that the habeas statute by itself makes the Geneva Conventions judicially enforceable. In pertinent part, the statute provides that the writ of habeas corpus "shall not extend to a prisoner unless * * * (3) [h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3) (emphases added). It does not provide that the writ "shall" extend to a prisoner "if" he is in custody in violation of the

"Constitution or laws or treaties" of the United States. Moreover, the Supreme Court has held that, even where custody is at issue, many constitutional claims are simply not cognizable on habeas, see, e.g., Teague v. Lane, 489 U.S. 288 (1989) (claims under retroactive application of new law); Stone v. Powell, 428 U.S. 465 (1976) (claims under Fourth Amendment exclusionary rule), nor are claims under many other federal "laws," see, e.g., United States v. Timmreck, 441 U.S. 780 (1979) (claims under Fed. R. Crim. P. 11); Hill v. United States, 368 U.S. 424 (1962) (claims under Fed. R. Crim. P. 32(a)). Furthermore, whereas treaties are generally presumed not to be judicially enforceable, the Constitution is generally presumed to be judicially enforceable. See, e.g., Franklin v. Massachusetts, 505 U.S. 788, 801 (1992). Accordingly, there is no textual or structural justification for making treaty claims automatically cognizable in habeas, even though constitutional and other federal-law claims are not.

On the specific question of treaty enforcement, every court of appeals to consider the question has held that, if a treaty does not itself create judicially enforceable individual rights, then the habeas statute does not make it enforceable. As the Sixth Circuit has explained, "the reference to 'treaties of the United States' in § 2241 cannot be construed as an implementation of non-self-executing provisions of treaties so as to render them judicially enforceable." Bannerman v.

Snyder, 325 F.3d 722, 724 (6th Cir. 2003); accord Poindexter v. Nash, 333 F.3d 372, 379 (2d Cir. 2003); Wesson v. United States Penitentiary Beaumont, 305 F.3d 343, 348 (5th Cir. 2002); Hain v. Gibson, 287 F.3d 1224, 1243 (10th Cir. 2002); United States ex rel. Perez v. Warden, 286 F.3d 1059, 1063 (8th Cir. 2002). This reasoning is particularly compelling with respect to the Geneva Conventions, because it is highly implausible to suppose that Congress, under no obligation from either treaty, would have acted to confer litigation rights on enemy combatants that our adversaries could permissibly deny to American POWs. As the Fourth Circuit explained in Hamdi, in rejecting a contention that the Third Geneva Convention is judicially enforceable through habeas: "Hamdi provides no reason to conclude that 28 U.S.C. § 2241 makes these diplomatically-focused rights enforceable by a private right of petition. Indeed, it would make little practical sense for § 2241 to have done so, since we would have thereby imposed on the United States a mechanism of enforceability that might not find an analogue in any other nation." Hamdi v. Rumsfeld, 316 F.3d 450, 469 (4th Cir. 2003), vacated on other grounds, 124 S. Ct. 2633 (2004).

Petitioners' reliance on Wildenhus's Case, 120 U.S. 1 (1887), is misplaced. That case involved an 1880 treaty between the United States and Belgium, which gave consular officers of each country various "rights, privileges, and immunities"

to regulate, without local control, "the internal order of the merchant vessels of their nation." See id. at 4-5. The Supreme Court held that this treaty was judicially enforceable in habeas, not though private suits by individual imprisoned sailors, but through suits by the Belgian consul acting on behalf of his government. See id. at 17 (treaty "gives the consul of Belgium exclusive jurisdiction over the offense which it is alleged has been committed"). Given the different language between this treaty and the Geneva Convention, and the different considerations that apply respectively to government and private enforcement in court, see, e.g., Cannon v. University of Chicago, 441 U.S. 677, 690 n.13 (1979) (statutes); Sanitary Dist. v. United States, 266 U.S. 405, 425-26 (1925) (treaties), Wildenhus's Case sheds no light on the question presented here.

Petitioners also invoke the "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction," INS v. St. Cyr, 533 U.S. 289, 298 (2001). However, this case involves no such repeal. As we have explained, § 2241 is simply a grant of jurisdiction, not a source of rights, and the reference to "treaties" in § 2241(c)(3) in no way forecloses analysis of whether the treaty for which enforcement is sought creates rights that private individuals may enforce through the courts.

2. Petitioners fare no better in their alternative contentions that the Geneva Conventions themselves create judicially enforceable individual rights.

Petitioners assert (Br. 64) that the Senate Foreign Relations Committee and the Executive Branch both concluded that the relevant portions of the Geneva Conventions "are self executing." But regardless of whether or not that is true, the question whether a treaty is "self-executing" is entirely distinct from the question whether it confers judicially enforceable rights on private citizens. See, e.g., Li, 206 F.3d at 67 (Selya and Boudin, JJ., concurring) ("The label 'self-executing' usually is applied to any treaty that according to its terms takes effect upon ratification and requires no separate implementing statute. Whether the terms of such a treaty provide for private rights, enforceable in domestic courts, is a wholly separate question.") (citation omitted); Restatement (Third) of Foreign Relations Law § 111 cmt. h ("[W]hether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies."). The materials cited by petitioners simply do not address the latter question. The Senate Committee Report stated that "very little in the way of new legislative enactments will be required to give effect to the provisions contained in the four conventions." Geneva Conventions for the Protection of War Victims: Report of the Senate Comm. on Foreign Relations, S. Exec. Rep. 84-9, at 30 (1955). On its face, that

statement simply does not address the permissibility of private enforcement by individuals. For example, one contemplated "effect" was criminal enforcement by the government (see Arts. 129-130); and, on that point, the Senate simply concluded that most of the Conventions' requirements were already incorporated in domestic law, so that "most of the acts designated as grave breaches would violate our Federal and State penal laws." Geneva Conventions for the Protection of War Victims: Hearings on Executives D, E, F, and G Before the Senate Comm. on Foreign Relations, 84th Cong., 1st Sess. 58 (1955) (emphasis added).

In addition, petitioners assert (Br. 65 n.49) that, because the Third Geneva Convention occasionally speaks in terms of "rights" for POWs, it must therefore be judicially enforceable. This Court rejected just such an argument in Holmes v. Laird, 459 F.2d 1211 (D.C. Cir. 1972). The plaintiffs in Holmes argued that the NATO Status of Forces Agreement, which granted specific rights to individual members of the armed forces, must therefore be judicially enforceable. See id. at 1213. This Court disagreed. Citing Eisentrager, it found "no room" for private enforcement of a treaty "when the corrective machinery specified in the treaty itself is nonjudicial." Id. at 1222. That principle controls this case.

The drafting history of the 1949 Conventions offers no support to petitioners. Although the drafters were "aware that the diplomatic measures

contained in the 1929 Conventions had failed badly" during World War II (Br. 65), they responded by establishing more robust mechanisms for diplomatic enforcement, not by authorizing private enforcement through the courts. In this regard, petitioners' reliance on commentary by the International Committee of the Red Cross ("ICRC") is particularly misplaced. That commentary states that the principle of prisoner rights was "clearly defined" in the 1929 conventions, and that the existence of rights was then "affirmed" by the 1949 revisions. Jean S. Pictet, ed., Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War 91 (ICRC 1952). On its face, that statement forecloses any possible distinction of Eisentrager on the ground that the later Conventions were "written to protect individuals" (JA 1296-97). Moreover, the commentary goes on to explain that the Third Geneva Convention "secured" rights by enabling POWs to complain to military authorities and to enlist the aid of a "protecting power," id. at 91-92, through the oversight and dispute resolution mechanism contained in Article 11 and through a voluntary enquiry procedure among Parties under Article 132. The commentary did not contemplate enforcement in court by captured enemy forces. Petitioners misread further ICRC commentary on the First Geneva Convention. According to petitioners (Br. 65-66 & n. 51), that commentary states that Convention would be enforceable "before an appropriate national court" (Br.

65-66 & n.51). On its face, however, the commentary states only that the First Geneva Convention "may" be enforceable by individuals against "their own Governments," and it expressly distinguishes that question from the question of enforcement for asserted "violations committed by the enemy." See Jean S. Pictet, ed., Commentary: I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 84 (ICRC 1952).

Petitioners cite several specific provisions of the Conventions that they say give them judicially enforceable "protections" (Br. 70 & n.59). Among the cited provisions are articles of the First and Second Geneva Conventions. Petitioners do not explain how these Conventions could possibly be relevant to this case. Petitioners also cite articles of the Third and Fourth Geneva Conventions that define certain particularly serious violations as "grave breaches" and that require High Contracting Parties to impose penal sanctions for such breaches. Third Geneva Convention Arts. 129-130; Fourth Geneva Convention Arts. 146-47. Far from providing for judicial enforcement in actions by individual detainees, these provisions establish an entirely different mechanism of enforcement: public criminal prosecution of those who commit grave breaches.

C. Taliban and al Qaeda Detainees Are Not Entitled To POW Status Under The Third Geneva Convention

On the merits, petitioners appear to seek the protections that the Third Geneva Convention affords to POWs. Those protections are unavailable, however, to members of the Taliban or al Qaeda.

1. At the outset, petitioners allege that are "innocent civilians" (Br. 68 n.56) who are neither members nor supporters of the Taliban or al Qaeda. By itself, this assertion defeats their claim to POW status, because Article 4 of the Third Geneva Convention plainly does not extend POW status to individuals who are in no way associated with any hostilities.[1] Petitioners suggest (Br. 70 & nn. 58, 59) that, as

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[1] In pertinent part, Article 4 provides:

> A. Prisoners of war * * * are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> 1. Members of the armed forces of a Party to the conflict * * * .
>
> 2. Members of other militias * * * belonging to a Party to the conflict * * * [that] fulfil the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.

putative civilians, they might have rights under the Fourth Geneva Convention. They do not explain what those rights may be, and this bare assertion, accompanied only by an unexplained citation in a footnote, is insufficient to preserve the argument. See Hutchins v. District of Columbia, 188 F.3d 531, 539 n. 3 (D.C. Cir. 1999) (en banc) ("We need not consider cursory arguments made only in a footnote."). In any event, petitioners' statement that anyone captured during "military hostilities" must be either a "prisoner of war" covered by the Third Geneva Convention or a "civilian covered by the Fourth Convention" (Br. 67) is incorrect. For one thing, that taxonomy ignores unlawful combatants – belligerents who do not qualify for POW status under Article 4 of the Third

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> 3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
>
> 4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces * * * .
>
> 5. Members of crews * * * of the merchant marine and the crews of civil aircraft of the Parties to the conflict * * * .
>
> 6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Geneva Convention. For another, the Third and Fourth Geneva Conventions apply only to conflicts "between two or more of the High Contracting Parties," Third Geneva Convention Art. 2; Fourth Geneva Convention Art. 2, and the conflict between the United States and al Qaeda is not one of those.

2. Neither the al Qaeda nor the Taliban detainees qualify for POW status under the Third Geneva Convention. As the district court recognized, the Third Geneva Convention is inapplicable to the conflict between the United States and al Qaeda, and therefore to the al Qaeda detainees, because al Qaeda is not a High Contracting Party to the Convention. JA 1297.

The Taliban detainees also fail to qualify for POW status. The President has determined that the Taliban does not satisfy the requirements for POW status under Article 4: they have no organized chain of command and responsibility; they do not wear fixed signs recognizable at a distance; and they do not conduct operations in accordance with the laws and customs of war. Moreover, each Taliban detainee has been determined, during an individualized proceeding before a duly constituted CSRT, to be either a member or supporter of the Taliban. Together these determinations foreclose any asserted entitlement to POW status.

Petitioners nowhere contend that the President made factually erroneous determinations about the Taliban. Instead, they contend (Br. 69) that any

groupwide determination is foreclosed by Article 5 of the Third Geneva Convention, which provides that if "any doubt" arises about the POW status of a belligerent, that belligerent is entitled to POW protections "until such time as their status has been determined by a competent tribunal." As explained in our opening brief (at 62-64), nothing in Article 5 requires the pointless exercise of multiple hearings to determine the status of members of the same fighting force; under that system, the very same questions (for example, whether the Taliban observe the laws or customs of war) would be subject to reconsideration literally hundreds or thousands of times. Nor does Article 5 require a hearing unless a detainee's status is in "doubt." While the Taliban detainees contend that they are not affiliated with the Taliban (the question resolved against them by the CSRTs), they raise nothing to cast doubt on the President's manifestly correct factual determinations about the Taliban.

Instead, as to the questions resolved by the President, petitioners raise only one erroneous legal argument. Specifically, petitioners contend (Br. 69) that members of the Taliban constitute an "armed force" within the meaning of Article 4(A)(1) of the Convention, even though the Taliban does not satisfy the requirements for "militia" status under Article 4(A)(2). Put another way, petitioners contend that the "[m]embers of the armed forces of a Party" are entitled

to POW protection even if those armed forces have no command structure, wear no recognizable insignia, do not carry arms openly, and flout the laws of war. That surprising argument fundamentally misconstrues the Convention.

The phrase "armed forces" in Article 4(A)(1) is a term of art. At least since the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, it has incorporated the four requirements that Article 4(A)(2) imposes explicitly on "militias." Moreover, in drafting the 1949 Convention, "there was unanimous agreement that the categories of persons to whom the Convention is applicable must be defined, in harmony with the Hague Regulations." Pictet, Commentary III, at 49. Because the term "armed forces" had a well-understood meaning under preexisting international law, there was no need to define it explicitly. See, e.g., Molzof v. United States, 502 U.S. 301, 307 (1992).

Commentators have agreed that "armed forces" must satisfy the Hague requirements in order to qualify for POW protection under Article 4(A)(1). For example, the ICRC has construed Article 4(A)(1) to require all regular armed forces to satisfy the four Hague (and Article 4(A)(2)) conditions: "These 'regular armed forces' have all the material characteristics and all the attributes of armed forces in the sense of sub-paragraph (1) * * *. The delegates * * * were therefore

fully justified in considering that there was no need to specify for such armed forces the requirements stated in sub-paragraph (2) (a), (b), (c), and (d)." Pictet, Commentary III, at 62-63. See also United States v. Lindh, 212 F. Supp. 2d 541, 557 & n.35 (E.D. Va. 2002); H. Levie, 59 International Law Studies: Prisoners of War in International Armed Conflict 36-37 (1977); I. Detter, The Law of War 136-37 (2d ed. 2000); G. Travalio, Terrorism, International Law, and the Use of Military Force, 18 Wis. Int'l L.J. 145, 184 n.140 (2000).

Moreover, a contrary view would render the Convention nonsensical. Petitioners offer no conceivable justification why the drafters of the Convention would have wanted to impose on "militias" a set of standards for civilized warfare, and yet simultaneously impose none of those standards on any of the "armed forces" of any High Contracting Party. And as explained above, the text of Article 4 does not compel that absurd consequence.

Finally, although petitioners complain about the lack of "individualized" hearings before Article 5 tribunals (Br. 69), each petitioner has received an individualized hearing before a CSRT. The CSRTs plainly qualify as "competent tribunals" under Article 5, for they provide more process to detainees than the tribunals traditionally used to determine POW status. The CSRTs determined that each detainee was affiliated with the Taliban or al Qaeda. Petitioners' real

objection, then, is not that they did not receive individual tribunals, but that the tribunals adopted concededly correct determinations made by the President about the Taliban. It is entirely proper, however, for the President to make such a determination, and to direct subordinate officials to carry it out. See, e.g., Building & Const. Trades Dep't v. Allbaugh, 295 F.3d 28, 32 (D.C. Cir. 2002).

3. Petitioners also contend (Br. 75) that Army Regulation 190-8 entitles them to be treated as POWs. In our opening brief (at 64), we explained that, even if petitioners' interpretation of the regulation were correct, the regulation could not overcome the President's contrary determination. Petitioners do not respond to this argument. Instead, they contend only that the regulation is judicially enforceable, but that too is incorrect. By its terms, the regulation merely sets out "policies and planning guidance" for the treatment of detainees. Army Regulation 190-8, preliminary statement. It thus does not create judicially enforceable rights.

In any case, the regulation parallels Article 5 of the Convention. It states that "[a]ll persons taken into custody by U.S. forces will be provided with the protections of the [Geneva Convention] until some other legal status is determined by competent authority." § 1-5(a)(2). And it provides for a tribunal to adjudicate detainees' status only "if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces,

belongs to any of the categories enumerated in Article 4 of the Convention." § 1-6(a). Thus, petitioners' arguments based on the regulation fail for the same reasons as their arguments based on Article 5.

D. Petitioners' Other International Law Claims Lack Merit

1. Petitioners briefly contend (Br. 71-72) that two further treaties make it unlawful to detain enemy combatants who are under the age of 18. The first of these restricts the enlistment of minors in a State Party's own armed forces, but says nothing about the detention of minors captured while fighting for an enemy force. See, e.g., Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Art. 1 ("States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities."); id. Art. 2 ("States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces."). The second treaty regulates child labor; it too says nothing about detention. See Convention for Elimination of the Worst Forms of Child Labor, Art. 1 ("Each Member which ratifies this Convention shall take immediate and effective measures to secure the elimination of the worst forms of child labour as a matter of urgency."). Because the treaties do not address custody, they are not cognizable in habeas. Because the

treaties use no rights-creating language, they are not judicially enforceable. And because the United States neither enlists minors nor permits child labor, the treaties were not violated. The district court correctly dismissed these insubstantial treaty claims.

2. In a footnote (Br. 72 n.65), petitioners also briefly invoke the International Covenant on Civil and Political Rights ("ICCPR"). Because petitioners cite no specific provision of the ICCPR, much less explain its relevance, they have not adequately placed it at issue. See Hutchins, 188 F.3d at 539 n.3. In any event, the courts of appeals unanimously have held that the ICCPR is not judicially enforceable, through habeas or otherwise. See, e.g., Poindexter, 333 F.3d at 379; Bannerman, 325 F.3d at 724; Wesson, 305 F.3d at 348; Hain, 287 F.3d at 1243; Warden, 286 F.3d at 1063.

3. Finally (Br. 73-75), petitioners invoke the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, which provides that "[t]he district courts shall have original jurisdiction in any civil action by an alien for a tort only, committed in violation of the law of nations or of a treaty of the United States." However, the ATS does not waive the federal government's sovereign immunity. See Industria Panificadora, S.A. v. United States, 957 F.2d 886, 887 (D.C. Cir. 1992). Moreover, for two different reasons, the separate waiver of waiver of sovereign immunity in the

Administrative Procedure Act ("APA"), 5 U.S.C. § 702, is inapplicable here. First, that waiver does not extend to suits challenging "military authority exercised in the field in time of war or in occupied territory," id. § 701(b)(1)(G), or to suits seeking review of "courts martial and military commissions," id. 701(b)(1)(F). These exclusions apply not only to "combat zones," but also to the exercise of military authority "in the aftermath of * * * battle." Doe v. Sullivan, 938 F.2d 1370, 1380 (D.C. Cir. 1980). Second, because petitioners seek release from custody, their remedy is habeas corpus, and the APA does not apply. See 5 U.S.C. § 704 (APA provides for review of agency action "for which there is no other adequate remedy in a court"); Muhammad v. Close, 540 U.S. 749, 750 (2004) ("Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus.").

Petitioners state that Rasul established district court "jurisdiction over the Detainees' ATS claims" (Br. 74). That statement is true only up to a point. The Court held that Eisentrager does not preclude aliens outside the United States from establishing subject-matter jurisdiction under 28 U.S.C. § 1350. See 124 S. Ct. at 2698-99. However, the existence of subject-matter jurisdiction under § 1350 in no way implies a waiver of sovereign immunity, any more than would the existence

of subject-matter jurisdiction under 28 U.S.C. § 1331 or § 1332. Rasul simply did not address the distinct question of sovereign immunity.

IV. THE PRESIDENT IS NOT A PROPER RESPONDENT

In our opening brief, we explained that, regardless of any other points, the district court should have dismissed the President as a respondent. Petitioners offer no response on the merits. Instead, in a footnote (Br. 79 n.71), they assert that this argument has been waived. Petitioners' footnoted response does not preserve their contention of waiver. See, e.g., Hutchins, 188 F.3d at 539 n. 3. And in fact, the argument was raised below in the government's motion to dismiss. Motion to Dismiss, 5 n.4.

More fundamentally, the argument is not subject to waiver, because it is jurisdictional: the federal courts have "'no jurisdiction * * * to enjoin the President in the performance of his official duties'" or otherwise to compel the President to perform any official act. Franklin v. Massachusetts, 505 U.S. 788, 803 (1992) (plurality opinion) (quoting Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1866)) (emphasis added). And following that bedrock separation-of-powers principle is even more appropriate here, where the President is an improper party on a wholly independent ground as well: that he is not the immediate custodian of any petitioner. See Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004).

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A STAY PENDING APPEAL

1. Petitioners' purported "appeal" from the district court's entry of a stay pending appeal (Br. 77) is procedurally odd and jurisdictionally improper. We know of no authority for the proposition that a stay pending appeal is itself appealable, either as a final judgment, collateral order, or injunction. Instead, the proper vehicle for seeking review of the stay pending appeal would have been a motion in this Court to vacate the stay. See Fed. R. App. P. 27. Petitioners could have, but did not, file such a motion. Moreover, now that the Court is prepared to decide the appeal on the merits (expedited at the Government's request), petitioners' claims of harms during the pendency of the appeal are all but moot. And to the extent petitioners speculate about stays pending certiorari in light of this Court's decision on the merits (Br. 79), their claims are manifestly unripe.

2. In any event, the district court acted properly in granting a stay of proceedings pending appeal. Such a stay is reviewed only for abuse of discretion. See Willoughby v. Potomac Elec. Power Co., 100 F.3d 999, 1003 (D.C. Cir. 1996). There plainly was no such abuse in this case.

The district court's stay order was not a stay of an injunction or order, but merely a stay of proceedings pursuant to the court's inherent power to manage its docket to promote efficient adjudication. Thus, the district court's stay order need

not satisfy the traditional four-part test governing stays pending appeal. But even if that test applied, it would be satisfied here. The decision whether to grant a stay pending appeal is governed by: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985). These factors are not prerequisites to be met, but rather considerations to be balanced: a stay "may be granted with either a high probability of success and some injury, or vice versa." Ibid.

In this case, a balancing of the factors supports the district court's decision to grant a stay. As explained in our opening brief and above, the government has a substantial likelihood of success on the merits on appeal. Indeed, another judge of the district court has resolved in the government's favor all of the principal contentions at issue here. See Boumediene v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005), appeal pending, Nos. 05-5062, 05-5063 (D.C. Cir.).

The government has also demonstrated a likelihood of harm to it and to the public interest in the absence of a stay. Under the terms of the district court's orders, further proceedings in the district court would involve a detailed and

protracted evidentiary inquiry regarding each petitioner. These inquiries would entail disclosure to petitioners' counsel of especially sensitive classified information involving intelligence sources and methods – an aspect of the district court's rulings that is before this Court in a separate appeal, see Nos. 05-5117 through 05-5127 (D.C. Cir.). Moreover, discovery would involve an examination of the circumstances surrounding statements made by petitioners, giving al Qaeda unprecedented insights into our interrogation methods and enabling it to enhance its own counter-interrogation techniques. Judicial inquiry into such sensitive information could induce foreign sources to decline further cooperation with the United States. See CIA v. Sims, 471 U.S. 159, 175-77 (1985). Moreover, the intensive further proceedings contemplated by the district court would involve significant judicial intrusion into core military matters, and thus raise serious separation-of-powers concerns. See Hamdi, 124 S. Ct. at 2647 (plurality) (the "Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them").

Most importantly, the need for any of this troubling discovery would be obviated if the Government were to prevail in these expedited appeals. The district court acted within its discretion in deciding to await guidance from this

Court before proceeding with such burdensome, disruptive, and constitutionally problematic discovery.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the district court's order should be reversed insofar as it denies the Government's motions to dismiss and affirmed in all other respects.

Respectfully submitted,

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June 17, 2005

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

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 16,007 words (which does not exceed the 20,000 word limit established by order of this Court on May 18, 2005).

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CERTIFICATE OF SERVICE

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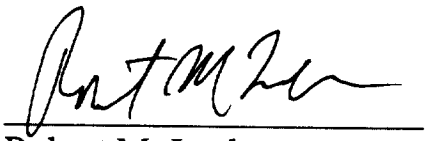

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