[ORAL ARGUMENT TO BE SCHEDULED]

Nos. 05-5062 and 05-5063

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PUBLIC

LAKHDAR BOUMEDIENE, *et al.*,
Appellants,
vs.
GEORGE W. BUSH, *et al.*,
Appellees.

RIDOUANE KHALID,
Appellant,
vs.
GEORGE W. BUSH, JR., *et al.*,
Appellees.

APPEAL FROM DECISION OF THE
U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CORRECTED JOINT BRIEF OF APPELLANTS

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IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAKHDAR BOUMEDIENE, et al.	)	
	)	
Appellants,	)	
	)	
v.	)	Case No. 05-5062
	)	
GEORGE WALKER BUSH, et al.	)	
	)	
Appellees.	)	
RIDOUANE KHALID	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 05-5063
	)	
GEORGE WALKER BUSH, et al.	)	
	)	
Appellees.	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Appellants Lakhdar Boumediene, Abassia Bouadjmi (as next friend of Lakhdar Boumediene), Mohammed Nechla, Badra Baouche (as next friend of Mahammed Nechla), Saber Lahmar, Emina Lahmar (as next friend of Saber Lahmar), Mustafa Ait Idir, Sabiha Delic-Ait Idir (as next friend of Mustafa Ait Idir), Belkacem Bensayah, Anela Kobilica (as next friend of Belkacem Bensayah), Hadj Boudella and Emina Planja (as next friend of

Hadj Boudella) (collectively "Lakhdar Boumediene, et al.") and Ridouane Khalid and Mohammed Khalid (as next friend of Ridouane Khalid) certify as follows:

I. Parties and Amici

The following parties either participated in the District Court proceedings below or are participants in this appeal.

A. Parties Before the District Court

The following parties appeared before the District Court in *Lakhdar Boumediene, et al. v. George Walker Bush, et al.* (Case No. 04-1166) ("*Boumediene* Case"):

Petitioners	Respondents
Lakhdar Boumediene Abassia Bouadjmi (As next friend of Lakhdar Boumediene) Mohammed Nechla Badra Baouche (As next friend of Mahammed Nechla) Saber Lahmar Emina Lahmar (As next friend of Saber Lahmar) Mustafa Ait Idir Sabiha Delic-Ait Idir (As next friend of Mustafa Ait Idir) Belkacem Bensayah Anela Kobilica (As next friend of Belkacem Bensayah) Hadj Boudella	George Walker Bush Donald Rumsfeld Jay Hood Nelson J. Cannon

Emina Planja (As next friend of Hadj Boudella)	

The case was argued and briefed, in part, before the District Court with *Khalid v. Bush, et al.* (Case No. 04-1142) ("*Khalid* Case"), in which the following additional parties appeared:

Petitioners	**Respondents**
Mourad Benchallali Amel Benchallali (As next friend of Mourad Benchallali) Nizar Sassi Sassi Sassi (As next friend of Nizar Sassi) Ridouane Khalid Mohammed Khalid (As next friend of Ridouane Khalid)	Identical to above.

B. Parties Before the Court

The following parties now appear before the court:

Appellants	**Appellees**
Lakhdar Boumediene Abassia Bouadjmi (As next friend of Lakhdar Boumediene) Mohammed Nechla Badra Baouche (As next friend of Mahammed Nechla) Saber Lahmar Emina Lahmar (As next friend of	George Walker Bush Donald Rumsfeld Jay Hood Nelson J. Cannon

Saber Lahmar) Mustafa Ait Idir Sabiha Delic-Ait Idir (As next friend of Mustafa Ait Idir) Belkacem Bensayah Anela Kobilica (As next friend of Belkacem Bensayah) Hadj Boudella Emina Planja (As next friend of Hadj Boudella) Ridouane Khalid Mohammed Khalid (As next friend of Ridouane Khalid)	

C. Amici Before the Court

Global Rights, of 1200 18th St., N.W. Washington, D.C. 20036, appears as amicus before the court on issues regarding international law.

D. Rulings Under Review

In the proceedings below, the District Court issued the following order under review in this appeal: "Memorandum Opinion and Order" (issued by Judge Richard J. Leon on Jan. 19, 2004, and amended on January 21, 2004) Case Nos. 04-1166 and 04-1142.

E. Related Cases

The cases on review have not previously been before this Court. Below is a list of cases pending before this Court or other courts that may be related cases.

The following cases, individually assigned to various judges in the District Court of the District of Columbia, were coordinated pursuant to an August 17, 2004 Order of the Calendar and Case Management Committee and a subsequent Executive Session Resolution of the District Court of September 15, 2004 (the *Khalid* and *Boumediene* Cases were subject to those orders as well). Those orders provided that Judge Joyce Hens Green would manage the coordinated cases, and rule on common substantive and procedural issues. On November 15, 2004, Judge Green issued an order retransferring the *Khalid* and *Boumediene* cases back to Judge Leon.[1]

Related Case Names	***Case No.***
Shafiq Rasul, et al. v. George Walker Bush, et al.	*02-CV-0299 (CKK)*
Fawzi Khalid Abdullah Fahad Al Odah, et al. v. United States of America, et al.	*02-CV-0828 (CKK)*
Mamdouh Habib, et al v. George Walker Bush, et al.	*02-CV-1130 (CKK)*
Related Case Names	***Case No.***
Murat Kurnaz, et al. v. George W. Bush, et al.	*04-CV-1135 (ESH)*
O.K., et al. v. George W. Bush, et al.	*04-CV-1136 (JDB)*
Moazzam Begg, et al. v. George W. Bush, et al.	*04-CV-1137 (RMC)*
Jamil El-Banna, et al. v. George W. Bush, et al.	*04-CV-1144 (RWR)*
Falen Gherebi, et al. v. George W. Bush, et al.	*04-CV-1164 (RBW)*
Suhail Abdul Anam, et al. v. George W. Bush, et al.	*04-CV-1194 (HHK)*
Isa Ali Abdulla Almurbati, et al. v. George W. Bush, et al.	*04-CV-1227 (RBW)*
Mahmoad Abdah, et al. v. George W. Bush, et al.	*04-CV-1254 (HHK)*
Salim Ahmed Hamdan v. Donald Rumsfeld, et al.	*04-CV-1519 (JR)*

[1] There also are 48 other *habeas* cases, as of this date, that have been filed with the District Court on behalf of men held in detention at Guantanamo Bay.

The cases cited above also were consolidated for appeal before this Court:

Related Case Name	*Case No.*
In re: Guantanamo Detainee Cases	*05-5064*

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GLOSSARY

AUMF	Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001)
B-H or Bosnia	Bosnia-Herzegovina
B-H Supreme Court	Supreme Court of the Federation of Bosnia-Herzegovina
Chamber Court	Bosnia-Herzegovina Human Rights Chamber Court
CSRT	Combatant Status Review Tribunal (established pursuant to Wolfowitz Order, below)
DOD	Department of Defense
FAP	Boumediene Petitioners' First Amended Petition
Fourth Geneva Convention or Geneva IV	Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949
H.R. Chamber Decision	Boudella v. Bosnia and Herzegovina
ICCPR	International Covenant for Civil and Political Rights
J.A.	Joint Appendix
Khalid Pet.	Khalid Petition for Writ of Habeas Corpus
Wolfowitz Order	Deputy Secretary of Defense, Paul Wolfowitz's Order Establishing Combatant Status Review Tribunal (July 7, 2004)

[Oral Argument to be Scheduled]

I. JURISDICTIONAL STATEMENT.

Lakhdar Boumediene, Mohammed Nechla, Hadj Boudella, Belkacem Bensayah, Mustafa Ait Idir, Saber Lahmar ("Boumediene Petitioners") and Ridouane Khalid (collectively "Petitioners") petitioned for writs of *habeas corpus* in the United States District Court for the District of Columbia, challenging their indefinite detention at the United States Naval Base at Guantanamo Bay, Cuba ("Guantanamo").[1] The District Court had jurisdiction over the petitions pursuant to 28 U.S.C. § 2241. *See generally Rasul v. Bush,* 124 S. Ct. 2686 (2004). Respondents moved to dismiss the Petitions on October 4, 2004 ("Respondents' Motion to Dismiss"). On February 18, 2005, the District Court entered final judgment, granting Respondents' Motion to Dismiss, and ordered that Petitioners' cases be dismissed. J.A. 1108. This Court has jurisdiction to consider this appeal pursuant to 28 U.S.C. §§ 1291, 1294, and 2253(a). Petitioners filed a Notice of Appeal on February 22, 2005.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW.

(i) Whether, in considering Respondents' Motion to Dismiss, the Court erred by failing to accept Petitioners' well-pled allegations that they are not enemy combatants.

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[1] Each of the individual Boumediene Petitioners was joined by his wife, as next friend. Petitioner Khalid was joined by his brother, as next friend.

(ii) Whether the Court erred in holding that Petitioners failed to state a claim to enforceable due process rights under the Fifth Amendment of the U.S. Constitution.

(iii) Whether the Court below erred in holding that the Boumediene Petitioners failed to state a claim that the Authorization for the Use of Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001) does not grant the Executive authority to seize in Bosnia-Herzegovina and intern indefinitely in Guantanamo Bay, Cuba, five citizens and one lawful permanent resident of Bosnia-Herzegovina, none of whom (i) was present on any battlefield; (ii) took up arms against the United States in any war; (iii) planned, authorized, committed, or aided the terrorist attacks of September 11, 2001, or harbored any such person(s).

(iv) Whether the Court erred in holding that Petitioners failed to state a claim under international law.

(iv) Whether the District Court erred by failing to determine that the Respondents' Combatant Status Review Tribunals ("CSRT") did not provide Petitioners adequate process under the Fifth Amendment of the U.S. Constitution.

III. STATEMENT OF THE CASE.

Petitioners appeal the District Court's grant of Respondents' Motion to Dismiss their *habeas* petitions pursuant to Fed. R. Civ. P. 12(b)(6). Petitioners sued immediately after the U.S. Supreme Court decisions in *Rasul v. Bush,* 124 S. Ct. 2686 (2004) and *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). On July 7, 2004, Respondents created the CSRT process, declaring that the Department of Defense ("DOD") would review its prior determinations that each Guantanamo detainee was an "enemy combatant." In August 2004, the Boumediene Petitioners applied

for a Temporary Restraining Order to enjoin Respondents from processing their cases before the CSRTs. J.A. 0015. That application was denied.

Judge Joyce Hens Green was designated to coordinate and manage all pending Guantanamo *habeas* cases, and, with the consent of each transferring judge, to rule on common procedural and substantive issues. *See* Order of the Calendar and Case Management Committee, J.A. 0258-62; September 15, 2004 Executive Session Resolution of the District Court for the District of Columbia, J.A. 0327-28. On September 20, 2004, Judge Green issued an Order to Show Cause why *habeas* relief should not be granted on the pending coordinated *habeas* applications and ordered Respondents to file factual returns for each Petitioner. Respondents instead filed the record of each CSRT proceeding. *See* J.A. at 0330-0562; 0569-0638; 1165-1206.

On September 29, 2004, Judge Leon transferred Petitioners' cases to Judge Green. J.A. 0329. On October 4, 2004, Respondents moved to dismiss. J.A. 0329.1-29.93. On November 6, 2004, Petitioners filed a Joint Opposition to Respondents' Motion to Dismiss. The Boumediene Petitioners filed an Amended Supplemental Opposition on November 9, 2004 ("Pets.' Am. Supp. Opp.").

On November 15, 2004, Judge Green scheduled oral argument on Respondents' Motion to Dismiss for December 1 (before Judge Green), and,

ordered the *Boumediene* and *Khalid* cases returned to Judge Leon.[2] J.A. 0710-11. Arguments on Respondents' Motion to Dismiss in these cases occurred on December 2, 2004.

On January 19, 2005, the Court granted the Respondents' Motion to Dismiss.[3]

IV. STATUTES AND REGULATIONS.

Pertinent statutes and regulations are set forth in the Addendum attached to this brief.

V. STATEMENT OF FACTS.

A. **Boumediene Petitioners.**

The Boumediene Petitioners are five Algerian-Bosnian citizens and one Algerian citizen with permanent Bosnian residency (Mr. Lahmar). At the request of the U.S., all were arrested in Bosnia-Herzegovina ("B-H" or "Bosnia") by Bosnian police in October 2001; they were seized and brought to Guantanamo by U.S. forces in January 2002. Mr. Nechla worked for the Red Crescent of the United Arab Emirates ("U.A.E.") in Bihartch, where he lived with his wife and two

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[2] No other cases were transferred. Judge Green heard argument on the Respondents' Motion to Dismiss all other cases on December 1.

[3] On January 21, 2005, the Court issued a Memorandum correcting some of the errors in the Order. J.A. 0997-98. The Court entered an Order of Final Judgment on February 18, 2005. J.A. 1108.

children. J.A. 0090.[4] Mr. Lahmar, an Arabic studies scholar with two children, lived in Sarajevo with his wife, where he worked for the Islamic Centre of the High Saudi Arabian Committee. J.A. 0012-13. Mr. Ait Idir maintained computers for Taibah in Sarajevo, where he lived with his wife and their children. J.A. 0105. Mr. Boumediene lived in Sarajevo with his wife and their two children, and worked in the Sarajevo offices of the Red Crescent of the U.A.E. J.A. 0087. Mr. Boudella administered programs aiding orphans for Human Appeal and is a father of seven, who lived in Sarajevo with his wife. J.A. 0093-94. Mr. Bensayah worked and lived in Zenica with his wife and their two children. J.A. 0100.

B-H authorities arrested the Boumediene Petitioners, reportedly based on U.S. assertions that they were planning to attack the United Kingdom and U.S. Embassies in B-H. *See generally Boudella v. Bosnia and Herzegovina*, Nos. CH/02/8679; CH/02/8689; CH/02/8690; CH/02/8691, H.R. Chamber for B-H (Oct. 11, 2002) ("H.R. Chamber Decision"), J.A. 0123-0253. The six men were then over 2,000 miles from Afghanistan; none was involved in any military campaign there, or in activities related to planning or carrying out the attacks of September 11, 2001. Boumediene First Amended Petition ("FAP") at ¶¶ 38-39, J.A. 0073-74.

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[4] The affidavits included in the Joint Appendix were submitted in support of the Boumediene Petitioners' Petition and Amended Petition for a Writ of *Habeas Corpus*.

Bosnia held the six for three months and investigated the U.S. assertions. On January 17, 2002, at the conclusion of that investigation, the Supreme Court of the Federation of B-H ("B-H Supreme Court"), ordered the six released.[5]

Notwithstanding that court order for release, in the pre-dawn hours of January 18, 2002—immediately after local authorities released them from the Sarajevo jail, and while a large number of protesting Bosnian citizens (including family members) watched—U.S. forces seized Petitioners and transported them to Guantanamo. *See* H.R. Chamber Decision at ¶¶ 53-55, J.A. 0138-39; ***see also*** Boudella Statement to Combatant Status Review Tribunal ("Boudella CSRT"), J.A. 0597-98.

In September 2002, the B-H Human Rights Chamber Court ("Chamber Court"), established by the Dayton Peace Accords, heard the applications of Petitioners Boudella, Boumediene, Nechla, and Lahmar asserting that, by allowing U.S. forces to seize them, B-H had violated the European Convention on Human Rights.[6] The Chamber Court agreed. J.A. 0202, ¶ 230.

On April 9, 2002, the B-H Supreme Court suspended the criminal proceedings against Messrs. Boudella, Boumediene, Nechla, and Lahmar. J.A. 0135, ¶ 42. On June 24, 2004, the Federal Prosecutor of the Federation of B-H

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[5] *See* Decision and Order of the Supreme Court of the Federation of B-H, No-Ki-1001/01 (Sarajevo, Jan. 17, 2003) (J. Eterovic), J.A. 0058-59.

dismissed the criminal investigations against the Boumediene Petitioners. J.A. 0704-05.

The Bosnian Government has requested the return of the Boumediene Petitioners. The Boumediene Petitioners continue to be wrongfully detained at Guantanamo, without charges.

B. **Petitioner Khalid.**

Petitioner Ridouane Khalid is a French citizen seized in Pakistan in December 2001 and transported to Guantanamo in January 2002. Mr. Khalid, whose wife also is French, is an accountant and electrician. *See* J.A. 1134, ¶¶ 5-6.[7]

In or around July 2001, Mr. Khalid traveled from France to Afghanistan, through Pakistan, to enhance his understanding of the Muslim faith, take an intensive Arabic language course, and investigate whether to relocate his family. J.A. 1135, ¶ 8; Khalid Statement to Combatant Status Review Tribunal ("Khalid CSRT"), J.A. 1179. Mr. Khalid was in Afghanistan on September 11, 2001. Thereafter, he traveled to Pakistan, in an effort to return home to France. *See id.* at 7, 9, J.A. 1185, 1187. Pakistani authorities seized Mr. Khalid and other French

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[6] *See* J. David Yeager, *The Human Rights Chamber for Bosnia and Herzegovina: A Case Study in Transnational Justice*, 14 Int'l Legal Persp. 44, 51 (2004).

[7] The Khalid Petition ("Khalid Petition") was filed on behalf of three French citizens held at Guantanamo. Petitioners Mourad Benchellali and Nizar Sassi were repatriated to France before Respondents filed their Motion to Dismiss. They were not subject to the District Court's February 18, 2005 order and are not parties to this appeal.

nationals in a mosque in December 2001. J.A. 1187-88. Mr. Khalid was transferred to U.S. custody, and transported to Guantanamo in early 2002. J.A. 1135-36. Mr. Khalid had no contact with any representative of al Qaeda or the Taliban during his time in Afghanistan and Pakistan, or otherwise. J.A. 1183-85.

Petitioners noticed this appeal on February 22, 2005. Respondents repatriated Mr. Khalid to France on or about March 8, 2005.[8]

VI. SUMMARY OF ARGUMENT.

The recent Supreme Court decision in *Rasul v. Bush*, read in conjunction with the companion decision in *Hamdi v. Rumsfeld*, establishes that these Petitioners (who pleaded their Petitions based on those decisions) have rights to challenge the basis for the Respondents' decisions to intern them. The District Court ignored those decisions, interpreting *Rasul* to authorize Petitioners merely to file, but not pursue, *habeas* petitions.

Compounding the error that flowed from its decision to ignore that recent, binding Supreme Court precedent, the District Court also erred: (a) by rejecting

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[8] *See* News Release, U.S. Department of Defense, Detainee Transfers Announced (Mar. 7, 2005) (*available at* http://www.defenselink.mil/releases/2005/nr20050307-2165.html) (announcing release of three detainees from Guantanamo Bay "to France for prosecution."). Mr. Khalid's release to French authorities does not render his appeal moot. Mr. Khalid's petition for writ of *habeas corpus* was filed while he was still in the United States' custody, and he continues to suffer collateral injuries—*e.g.*, continued detention in France—as a result of his detention at Guantanamo. *See Carafas v. Lavallee*, 391 U.S. 234 (1968).

Petitioners' well-pled facts and adopting facts and conclusions proffered by Respondents; (b) by adopting Respondents' definitions of the term "enemy combatant," which exceeds the narrow authority granted by Congress; (c) by ignoring well established precedent affording due process protections to those situated similarly to Petitioners; (d) by failing to evaluate properly Petitioners' claims based on treaties (which forbid arbitrary detention without process) and customary international law (which forbids prolonged, arbitrary detention and detention without process); and (e) by failing even to consider the adequacy of the administrative process Respondents established expressly to meet their obligations after *Rasul* and *Hamdi*.

VII. ARGUMENT.

The standard of review for this appeal of the District Court's grant of Respondents' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is *de novo*. *See Gilven v. Fire*, 259 F.3d 749, 756 (D.C. Cir. 2001) (citing *Wilson v. Pena*, 79 F.3d 154, 160, n.1 (D.C. Cir. 1996). "In considering the claims dismissed pursuant to Rule 12(b)(6), [the Court] must treat the [petition's] factual allegations as true, must grant plaintiff the benefit of all reasonable inferences from the facts alleged, and may uphold the dismissal only if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quoting *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1114 (D.C. Cir. 2000)).

A. **The District Court Ignored the Supreme Court's Decision in *Rasul* and Failed to Accept Petitioners' Allegations As True For Purposes of the Motion to Dismiss.**

1. *The District Court Ignored Rasul.*

In *Rasul*, the Supreme Court held U.S. courts have jurisdiction to hear the *habeas* claims of Guantanamo detainees, because the United States exercises "'complete jurisdiction and control'[9] over the Guantanamo Bay Naval Base. . . ." *Rasul,* 124 S. Ct. at 2696.

In footnote 15, the Court addressed the adequacy of the *habeas* claims advanced by the subject alien detainees under 28 U.S.C. 2241(c)(3):

> Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe "custody in violation of the Constitution, or laws or treaties of the United States." 28 U.S.C. §2241(c)(3). *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-278 (1990) (Kennedy, J., concurring) and cases cited therein.

Rasul, 124 S. Ct. at 2698, n.15. The Supreme Court made clear that, if Petitioners there could establish the very claims pleaded here, they "unquestionably describe" violations of § 2241(c)(3). *Id.*

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[9] *See* Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. 3, T.S. No. 418.

Rasul expressly rejected the reasoning relied upon by this Court in *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd*, *Rasul v. Bush*, 124 S. Ct. 2686 (2004), and, inexplicably, by the District Court here. J.A. 1013-14.[10] This Court's *Al Odah* holding focused on the detainees' status as aliens at Guantanamo, and concluded that, because alien detainees held at Guantanamo had no rights, the Court lacked *habeas* jurisdiction. This Court reasoned:

> We cannot see why, or how, the writ may be made available to aliens abroad when basic constitutional protections are not .... If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty.

See Al Odah, 321 F.3d at 1141. While this Court properly recognized the inextricable link between the availability of *habeas* rights and *habeas* jurisdiction, it dismissed the *Al Odah* petitions because its rights analysis mistakenly focused on the Petitioners' status as aliens abroad, rather than the Respondents' authority over Guantanamo. *Rasul* adopted this Court's view of the close nexus between *habeas* rights and *habeas* jurisdiction, but rejected this Court's focus on the alien status of the individual. The Supreme Court held that "aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under

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[10] The District Court held "due to their status as aliens outside the sovereign United States territory with no connection to the United States, it was well

§ 2241."[11] *Rasul*, 124 S. Ct. at 2696. *Rasul* establishes that Guantanamo is, for *habeas* purposes, like any place in the United States.

The only question before the Court below was whether the Petitioners had pleaded any facts from which it could be found that their detention at Guantanamo was unlawful.

2. *The Court Erred When It Failed to Accept Petitioners' Allegations As True.*

The District Court should have denied Respondents' motion unless "it appears beyond doubt that [petitioners] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Kowal v. MCI Communications Corp.*, 16 F. 3d 1271, 1276 (D.C. Cir. 1994). The District Court must accept the well-pleaded facts as they appear in the petition and extend to the Petitioners every reasonable inference in their favor. *See Doe v. U.S. Dept. of Justice*, 753 F.2d 1092, 1102 (D.C. Cir. 1985); *Kiely v. Raytheon Co.*, 105 F.3d 734, 735 (1st Cir. 1997).

Petitioners specifically alleged facts establishing that they were not combatants, enemy aliens, or unlawful belligerents, FAP at ¶ 21, J.A. 0069; Khalid

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established prior to *Rasul* that the petitioners possess no cognizable constitutional rights." *Id.*

[11] The *Rasul* Court used the word "authority" not "jurisdiction." The District Court mistakenly construed the words to have the same meaning. The *habeas* "authority" of federal courts is well settled. *See Ex Parte Bollman and Ex Parte Swartwout*, 8 U.S. (45 Cranch) 75, 94-95 (1807).

Pet. at ¶ 25, J.A. 1116; not enemy combatants "supporting forces hostile to the United States or coalition partners in Afghanistan [ ] who engaged in an armed conflict against the United States there," FAP at ¶ 22, J.A. 0069; Khalid Pet. at ¶ 26, J.A. 1116; not in or near Afghanistan, or any theater of war, at the time they were detained, FAP at ¶ 39, J.A. 0074; not members of al Qaeda, caused no harm to American property, were not involved in the attacks of September 11, and not involved in any other acts of international terrorism. FAP at ¶ 38, J.A. 0073-74; Khalid Pet. at ¶ 33, J.A. 1118.

Despite acknowledging its obligation to "accept the well pleaded facts as they appear in the writ," J.A. 1005, the District Court then presumed, as a matter of both fact and law, that Petitioners were "enemies," J.A. 1009, "enemy combatants," J.A. 1010, and "terrorists," J.A. 1011, allegations each Petitioner had expressly disputed. Relying on those erroneous presumptions, the Court concluded that Petitioners' detentions are lawful, in order to prevent them from returning to battle.[12] J.A. 1010. That rationale, though cited favorably in *Hamdi*, 124 S. Ct. at 2641, makes no sense here. The Boumediene Petitioners never set foot on any

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[12] The Court also concluded, contrary to the facts pled, that the Boumediene Petitioners had been "captured," *id.* at 5, 6, J.A. 1003-05, when, in fact, none was captured. They accompanied Bosnian police, voluntarily. For example, Mr. Boudella went to the Sarajevo police station in response to a telephone call. FAP at ¶ 30, J.A. 0071.

battlefield—a fact they pled, FAP at ¶ 39, J.A. 0074, and one well substantiated even in the CSRT records filed by Respondents. J.A. 0330-0562, 0569-0638.

B. **The Petitioners Have Fifth Amendment Due Process Rights.**[13]

1. *Rasul Decided That Petitioners Have Rights Under the Constitution.*

Rasul confirmed that Petitioners' claims, if proved, "unquestionably describe" violations of § 2241(c)(3). 124 S. Ct. at 2698, n.15. In so holding, the Supreme Court relied on a line of decisions, beginning with the early 20th century *Insular Cases*, that afforded fundamental constitutional protections to aliens in territory subject to U.S. governing authority.

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[13] The Petitioners also have common law *habeas* rights which the District Court failed to recognize. Because Petitioners are "in custody under or by color of the authority of the United States," 28 U.S.C. § 2241(c)(1), Respondents have an independent common law obligation to demonstrate a lawful basis for the detentions. *See, e.g., Ex parte Bollman and Ex Parte Swartwout*, 8 U.S. (4 Cranch) 75 (1807) (Marshall, C.J.). The original *habeas* provision, found in section 2241(c)(1), extends to any prisoner held "in custody, under or by color of the authority of the United States." As the Supreme Court emphasized in *Rasul*, the protection embodied in this provision, enacted in 1789 as Section 14 of the First Judiciary Act, is not only antecedent to the Bill of Rights, it is "antecedent to statute, . . . throwing its root deep into the genius of our common law." 124 S. Ct. at 2692. *Habeas corpus* historically has supplied a remedy to detention when there otherwise would have been none. *See, e.g. Goldswain's Case*, 96 Eng. Rep. 711 (C.P. 1778) (*habeas corpus* challenging sailor's impressments into the navy); *R. v. White,* 20 Howell's State Trials 1376, 1377 (K.B. 1746) (granting *habeas corpus* relief to impressed seaman who had "no other remedy"); *see also A.V. Dicey, Introduction to the Study of Law of the Constitution* 219 (8th ed. 1927) (*habeas* review of impressments of sailors by the Admiralty reflected a "very notorious instance of judicial authority in matters most nearly concerning the executive"). The District Court ignored the independent sufficiency of assertions challenging the detentions under 2241(c)(1).

Those cases do not turn on notions of technical sovereignty. Rather, as did the Court in *Rasul*, they focus on the presence of precisely the degree of "long-term, exclusive control" Respondents exercise at Guantanamo. *Rasul*, 124 S. Ct. at 2698, n.15.

The District Court ignored those cases and, instead, relied on *Johnson v. Eisentrager*, 399 U.S. 763 (1950), to support its conclusion that Petitioners have no rights. The District Court misunderstood the relevance of *Eisentrager*. *Rasul* held that *Eisentrager* does not control because Guantanamo is, for *habeas* purposes, the United States.[14] *See Rasul*, 124 S. Ct. at 2698. Which rights are afforded rests on a case-by-case analysis of the relationship of the United States to the particular territory. *See, e.g., Reid v. Covert*, 354 U.S. 1, 75 (1957); *Verdugo-Urquidez*, 494 U.S. at 277-78 (Kennedy, J., concurring). *Eisentrager* held that "the Constitution does not confer a right of personal security or immunity from military trial and punishment upon an enemy alien engaged in the hostile service of a government at

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[14] Justice Kennedy's concurrence also rejected this Court's reasoning that Guantanamo is like the Landsberg prison in *Eisentrager*. He too focused on specific elements of U.S. control over Guantanamo. *Cf. Al Odah*, 321 F.3d at 1140. Justice Kennedy concluded:

> The facts here are distinguishable from those in *Eisentrager* in two critical ways[.] . . . *Guantanamo Bay is in every practical respect a United States territory*[.] . . . What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the "implied protection" of the United States to it.

war with the United States." 339 U.S. at 785. Petitioners present no such question; *Eisentrager* is inapposite.[15]

The Court below ignored *Rasul*. *Rasul* held that federal courts have *habeas* jurisdiction in these precise circumstances, and left no doubt that, if Petitioners could establish their allegations, they would "unquestionably describe" violations of 28 U.S.C. § 2241 (c)(3). *Rasul*, 124 S. Ct. at 2698, n.15. The *Rasul* footnote 15 makes no sense if, as Respondents contend, the Supreme Court remanded in order to allow those Petitioners the purely mechanical right to file *habeas* petitions, understanding they would immediately be dismissed for failure to state any claim.

Nine District Court judges agreed that, "*Rasul* in conjunction with other precedent [ ] require[s] the recognition that the detainees at Guantanamo Bay possess enforceable constitutional rights." J.A. 1050. Fundamental constitutional rights apply in Guantanamo and the due process protections of the Fifth Amendment are such fundamental rights. That conclusion necessarily follows

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Rasul, 124 S. Ct. at 2700 (Kennedy, J., concurring) (emphasis supplied).

[15] Petitioners have been interned for more than three years without charges. The *Eisentrager* petitioners *already had received due process*. There, 27 Germans were taken into custody after WWII for aiding the Japanese in occupied China. They were formally accused of violating the laws of war, informed of the charges against them, represented by counsel, and tried in China by a US military commission. Six were acquitted; 21 were convicted. The sentences of those convicted were reviewed and upheld by a reviewing authority. *Habeas* petitions there challenged the jurisdiction of the military commission.

from the core reasoning of a long line of Supreme Court and federal court decisions, beginning with the *Insular Cases*.[16]

The *Insular Cases* doctrine evolved to protect fundamental rights of aliens who—like Petitioners—had become subject to U.S. governance involuntarily, and extended fundamental constitutional rights to locations where the U.S. exercises governing authority. *See* Neuman at 6, 9-10. The nature and extent of that authority is the touchstone for determining whether fundamental rights apply.

Downes v. Bidwell was the first decision to distinguish among the types of rights afforded to persons living in unincorporated territories and those living in incorporated territories. 182 U.S. 244 (1901). The *Downes* court concluded that "certain natural rights enforced in the Constitution" would apply to aliens in unincorporated territories who "are entitled under the principles of the Constitution to be protected in life, liberty, and property." 182 U.S. at 282-83.

In determining what rights apply, Justice White's seminal concurrence noted that it is the nature of the Government's relationship to the territory that controls,

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[16] Following the Spanish-American War, the United States acquired the Insular territories of Puerto Rico, Guam and the Philippines, and established a protectorate over Cuba. The *Insular Cases* addressed the application of U.S. Tariff laws and constitutional criminal provisions there. *See* Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 Loy. L. Rev. 1, at 6, (2004) ("Neuman").

not the status of the territory's inhabitants.[17] *Id.* at 293 (White, J., concurring) ("And the determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States."). *See also Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922) ("It is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it.").

In 1957, the Supreme Court addressed the *habeas* petitions of two U.S. citizens, each the wife of a serviceman—one in England and one in Japan—who had been tried by courts martial for murdering their husbands. A plurality held that the Constitution in its entirety applied to the wives, and that their trials by military authorities had violated their constitutional rights. *Reid v. Covert*, 354 U.S. 1 (1957). *Reid* swept aside earlier cases, which had held that the Constitution did not apply abroad. *See Ross v. McIntyre*, 140 U.S. 453 (1891).

Justice Harlan's *Reid* concurrence, cited by Justice Kennedy in *Verdugo-Urquidez*, drew on the common thread among the *Insular Cases* and explains the foundation for footnote 15 of *Rasul*:

> [T]he *Insular Cases* do stand for an important proposition, one which seems to me a wise and necessary

[17] Justice White's concurrence in *Downes* presages the precise circumstances presented here—the application of fundamental rights to "a naval station or coaling station on an island." *Id.* at 311.

> gloss on our Constitution. The proposition is, of course, not that the Constitution "does not apply" overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place . . . . Decision is easy if one adopts the constricting view that these constitutional guarantees as a totality do or do not "apply" overseas. But, for me, the question is which guarantees of the Constitution should apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it. The question is one of judgment, not compulsion. . . . we have before us a question analogous, ultimately, to issues of due process; one can say, in fact, that the question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is "due" a defendant in the particular circumstances of a particular case.

Reid, 354 U.S. at 75 (Harlan, J., concurring).

Lower courts more recently have applied the reasoning of the *Insular Cases* to the Panama Canal Zone territory where the U.S. acquired rights similar to those it has in Guantanamo early in the 20th century. *See Canal Zone v. Scott*, 502 F.2d 566, 567-68 (5th Cir. 1974) ("it is the territorial nature of the Canal Zone and not the citizenship of the defendant that is dispositive"); *United States v. Husband R. (Roach)*, 453 F.2d 1054, 1057 (5th Cir. 1971).

This Court relied on the *Insular Cases* in *Ralpho v. Bell*, extending Fifth Amendment due process rights to non-citizens in the Trust Territory of the Pacific Islands. 592 F.2d 607, 612 (D.C. Cir. 1977), *reh'g denied*, 569 F.2d 636 (D.C. Cir.

1977) (non-citizens entitled to 5th Amendment protections in administrative proceedings assessing World War II related property losses).[18]

C. **The AUMF Does Not Provide Authority to Detain the Boumediene Petitioners.**[19]

The AUMF was enacted by a Joint Resolution of Congress one week after the September 11th attacks. It authorized the President to:

> use all necessary and appropriate force against those nations, organizations, or persons he determines *planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons*, in order to prevent any future acts of international terrorism against the United States by *such* nations, organizations or persons.

AUMF, (emphasis supplied). The AUMF authorized the President to act against a limited class of persons: those involved in the planning and execution of the September 11 attacks and those who harbored such persons or organizations.

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[18] *See also Juda v. United States*, 6 Cl. Ct. 441 (1984) (extending Fifth Amendment protections to Marshall Islanders in Trust Territory for nuclear test related losses). There, the *United States* argued that whether and to what extent the Constitution applies outside the United States "depends upon the relationship of the locality in which the claim arises and the United States." *Id.* at 456.

[19] Respondents conceded that Petitioners are not being detained pursuant to the President's Military Order of November 13, 2001, *see* Respondents' Motion to Dismiss at 7, n.6, J.A. 0329.23—as Petitioners noted below. Respondents contend Petitioners are being detained under the President's "general" authority as Commander in Chief, the AUMF, and international law of war. *See id.* Despite Respondents' clear concession and corresponding assertion of the sources of the Executive's authority to detain Petitioners, the District Court inexplicably devoted six of the 25 pages of its analysis to the applicability of the Military Order.

Hamdi recognized the AUMF granted the President authority to use force against only the class of persons referenced in the plain language of that statute: those "associated with the September 11, 2001 terrorist attacks." 124 S. Ct. 1240.

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

124 S. Ct. at 2640 (internal quotations omitted) (emphasis supplied). Applying principles consistent with the law of war, *Hamdi* held that the authority granted in the AUMF necessarily includes the authority to detain persons within the "narrow category" described. *See* 124 S. Ct. at 2639.

The District Court ignored Congress' tightly crafted nexus to September 11, confirmed in *Hamdi*, and adopted Respondents' interpretation of the AUMF, finding that it also authorized the President to use force against and detain: "those who the military determined . . . pose[ ] a threat of future terrorist attacks," a class of individuals referenced nowhere in the statute. J.A. 1009.[20] The Court ruled:

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[20] Although the Memorandum discusses at length the President's War Powers under Article II, the Court did not address whether Article II confers authority on the President to detain the Petitioners, and held only that the AUMF authorizes Petitioners' internment. J.A. 1012, n.11.

> Thus, when Congress, through the AUMF, authorized the President "to use all necessary and appropriate force against those . . . persons he determines planned, authorized, committed, or aided the terrorist attacks [of 9/11]" "to prevent any future acts of international terrorism against the United States by such . . . persons[,]" *see* AUMF § 2, ***it in effect***, gave the President the power to capture and detain those who the military determined were ***either responsible for the 9/11 attacks or posed a threat of future terrorist attacks***.

Id. (alterations and citation in original, emphasis added). Basic canons of statutory interpretation preclude such a result. *See United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2002) (explaining that "[i]n construing a statute, the court begins with the plain language of the statute. Where the language is clear, that is the end of judicial inquiry in all but the most extraordinary circumstances.") (internal citations and quotation omitted).[21]

The District Court's interpretation ignored the Supreme Court's prior reading in *Hamdi*. The AUMF does not contain the disjunctive "either/or" grafted onto it by the District Court. The September 18, 2001, legislation allows the Executive to act against those persons involved in the September 11 attacks and

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[21] The District Court's interpretation also conflicts with that of Judge Green which was adopted by eight other judges of the District Court:

> Of course, one of the government's most important obligations is to safeguard this country and its citizens by ensuring that *those who have brought harm upon U.S. interests are not permitted to do so again*. Congress itself expressly recognized this when it enacted the *AUMF authorizing the President to use all necessary and appropriate force against those responsible for the September 11 attacks*.

those who harbored "such persons." The Boumediene Petitioners have pled facts placing them outside those categories, and Respondents have not asserted they were involved in the events of September 11, 2001.[22] Despite the total lack of that critical nexus, at this motion to dismiss phase, the District Court nonetheless concluded that the AUMF grants the President authority to detain Petitioners.

The District Court characterized the fact that Petitioners were detained in Bosnia as "of no legal significance . . . because the AUMF does not place geographic parameters on the President's authority to wage this war against terrorists."[23] J.A. 1011. This interpretation renders the statute inconsistent with the very law of war principles relied on in *Hamdi* to interpret the AUMF. There is no suggestion in the AUMF that Congress intended such a result. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); Restatement (Third) of Foreign Relations Law of the United States § 114 (2000) ("Third Restatement of Foreign Relations Law" or "Third Restatement"). The laws of war, and any derivative Article II authority the President may have, permit the Executive to

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(emphasis supplied). J.A. 1073.

[22] *See* J.A. 0330-0562; 0569-0638; 1218-2182.

[23] The District Court analogized Petitioners' initial arrest, court-ordered release, and later seizure by U.S. forces, to the circumstances in *Ex Parte Quirin*, 317 U.S. 1 (1942). *See* Corr. Mem. at 13. J.A. 1011. *Quirin* is inapposite; Petitioners were never combatants—either lawful or unlawful—and have pleaded that they never committed, or attempted to commit, acts of violence or sabotage, unlike the *Quirin* defendants. J.A. 1094.

detain combatants engaged in a conflict with the United States, such as the Taliban in Afghanistan. However, "longstanding law-of-war principles" limit the President's authority, *Hamdi*, 124 S. Ct. at 2641; the President may detain only combatants fighting for a nation with which we are at war. The Supreme Court in *Hamdi* used the laws of war to assess the scope of authority granted by the AUMF. Indeed, Respondents themselves cite the laws of war to define the scope of the President's authority under Article II. J.A. 0329.25.

The Boumediene Petitioners were detained by a friendly nation in connection with a Bosnian criminal investigation, launched at the request of the U.S., and unrelated to the September 11 attacks. Neither the AUMF, laws of war, nor Article II authorize the Executive to detain such persons indefinitely without charges. *See generally* Petitioners' Supp. Opp. at 21-23; 25-27; and Exhibit O, von Heinegg Decl. J.A. 0642. *Hamdi* confirmed the statute authorizes the use of military force against those associated with the September 11 attacks, not the indefinite detention of any person, wherever situated, who might appear to threaten U.S. interests.[24]

The District Court also accepted the definition of "enemy combatant" set forth in Deputy Secretary of Defense, Paul Wolfowitz's Order Establishing

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[24] Other statutes permit the arrest and criminal trial of those charged with international acts of terrorism. *See, e.g.*, Antiterrorism Act, 18 U.S.C. §§ 2331-2339C (2004).

Combatant Status Review Tribunal (July 7, 2004) ("Wolfowitz Order"), J.A. 1207, which purports to expand the class of individuals who may be detained well beyond the language of the AUMF, and *Hamdi's* reading of that language. The Executive's authority is defined by the AUMF, not the Wolfowitz Order.

The Wolfowitz Order defines an enemy combatant as:

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

(emphasis supplied). J.A. 1207, ¶ 1.

Nine District Court judges found that the enemy combatant definition in the Wolfowitz Order is "significantly broader" than the definition proffered by Respondents in *Hamdi* and "indicates that the government interprets the AUMF to permit the indefinite detention of individuals who never committed a belligerent act or who never directly supported hostilities against the U.S. or its allies." J.A. 1092-93. Those judges recognized that detainees situated similarly to Petitioners stated a claim for relief because Respondents' definition of enemy combatant in the Wolfowitz Order is over broad.

> Whether the detention of each individual petitioner is authorized by the AUMF and satisfies the mandates of due process must ultimately be determined on a detainee by detainee basis. At this stage of the litigation, however, sufficient allegations have been made by at

> least some of the petitioners and certain evidence exists in some CSRT factual returns to warrant the denial of the respondents' motion to dismiss on the ground that the respondents have employed an overly broad definition of "enemy combatant."

J.A. 1094. That decision singled out *Kurnaz v. Bush* and *El-Banna v. Bush* as examples where the overbroad application of the definition of enemy combatant is "readily apparent."[25] *Id.* It also is "readily apparent" that Respondents have employed an overly broad interpretation of the term "enemy combatant" for the Boumediene Petitioners, who, like the *El-Banna* Petitioners, were detained thousands of miles from Afghanistan and have asserted they had no connection to the attacks of September 11.

The Wolfowitz Order radically departs from Congress' nexus, tying the use of military force to involvement in the events of September 11. It includes no geographic "battlefield" limits, and speaks vaguely, if at all, of the types of activities that might trigger enemy combatant status, such as "supporting Taliban or al Qaeda forces" or "associated forces." Precisely what constitutes a "force," what conduct constitutes "support," or what action is required, if any, to decide that a person or "force" is "associated" with al Qaeda or the Taliban is not explained. By using the word "includes," Respondents sought to extend their

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[25] The *El-Banna* Petitioners were detained in The Gambia and Zambia, and joined the Boumediene Petitioners' Supplemental Opposition, challenging the

authority beyond the AUMF language, to permit the indefinite internment of individuals who neither committed a belligerent act nor directly supported hostilities against the U.S. or its allies.[26] *See* J.A. 1092-93. Such unfettered Executive power is not authorized by the AUMF.[27]

D. **Petitioners Have Enforceable Rights Under International Law.**

The District Court found there were no circumstances under which Petitioners could assert claims arising under international law. J.A. 1026. Petitioners properly pleaded they have such rights based upon two independent and mutually reinforcing sources: the constraints placed upon Respondents by

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Executive's authority to detain them absent any nexus to the events of September 11.

[26] The AUMF does not authorize holding a person as an enemy combatant merely to interrogate him. *See Hamdi*, 124 S. Ct. at 2640, 2641-2 ("Certainly we agree that indefinite detention for the purposes of interrogation is not authorized [by the AUMF]."). Notwithstanding the Supreme Court's prohibition against such detention, Respondents have detained Petitioners for interrogation purposes. During their CSRT hearings, Petitioners Ait Idir (J.A. 0470), Nechla (J.A. 0525), and Boudella (J.A. 0595-96) contended that they had never been interrogated with respect to any terrorism charges or even about the allegations reportedly leading to their initial arrest.

[27] The *Hamdi* Court was concerned with the "substantial prospect of perpetual detention" in view of "the lack of certainty regarding the date on which the [war on terror] will end . . ." It observed that, if the manner in which the war on terror is prosecuted ultimately does not resemble traditional conflicts "that informed the development of the law of war," then the AUMF may not be interpreted properly to authorize detention for the duration of the "relevant conflict." *Hamdi*, 124 S. Ct. at 2641.

international humanitarian law, and Petitioners' independent rights arising under international human rights law.

1. *Petitioners Have Rights Under The Laws Of War If This Court Concludes Those Laws Apply To Them.*

Petitioners are civilian nationals of a friendly state seized far from any battlefield and are thus not subject to the laws of war. Those facts do not empower Respondents to detain Petitioners without constraint. Petitioners possess rights under international human rights law that can be vindicated on *habeas*. Those rights arise from two sources: treaties ratified by the United States, and customary international law.

Even if this Court were to conclude that the laws of war apply to Petitioners, then, at minimum, Petitioners would be entitled to the protections afforded "civilians" in wartime under the Fourth Geneva Convention. *See* Convention Relative to the Prosecution of Civilian Persons in Time of War, Aug. 12, 1949, 6. U.S.T. 3516; T.I.A.S.; 75 U.N.T.S. 135 ("Geneva IV" or "Fourth Geneva Convention"). Under the Geneva Conventions, a person is either a "combatant" or a "civilian."[28] This schema covers the entire universe of potentially affected persons:

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[28] *See* Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 27 (Cambridge University Press 2004); *see also* Hans-Peter Grasser, *Acts of Terror, Terrorism and International Humanitarian Law*, 84 Int'l Rev. Red Cross 547, 568 (2002).

> [e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third [Geneva] Convention, a civilian covered by the Fourth [Geneva] Convention, or [] a member of the medical personnel of the armed forces who is covered by the First [Geneva] Convention. There is no intermediate status; *nobody in enemy hands can be outside the law.*

Oscar M. Uhler et al., III, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War: Commentary* 51 (Ronald Griffin & C.W. Dumbleton trans., 1958) (emphasis supplied). The Fourth Geneva Convention applies to all persons who are not protected by the other three 1949 Geneva Conventions who "find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." Geneva IV, art. 4.[29] Additionally, the Fourth Geneva Convention provides interned "protected persons" with a number of procedural and other protections. While the Fourth Geneva Convention permits a Party to limit an individual's rights in the interest of national security, *see* Geneva IV, art. 5, this provision does not extend to the Convention's prohibitions against inhumane treatment and its guarantee of rights to fair and

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[29] A civilian who engages in hostile acts (*i.e.*, an "unlawful combatant") is subject to criminal prosecution. A civilian may lose a substantial part of the privileges he or she normally enjoys under Geneva IV for engaging in hostilities that constitute a "threat to the state," under Article 5 of Geneva IV. However, even such unprivileged persons must be treated humanely and must be granted a fair trial. *See* Geneva IV, art. 5 ("In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and

regular trial, which are non-derogable. *See* Yasmin Naqvi, *Doubtful Prisoner of War Status*, 84 Int'l Rev. Red Cross 571, 583 (2002).

2. *Petitioners Possess Rights Under International Human Rights Law That Can Be Vindicated on Habeas*.

a. Petitioners' Claims Based On Treaties.

The District Court rejected Petitioners' treaty claims, finding the treaties cited are not self-executing and therefore do not give rise to a private cause of action. J.A. 1023. This conclusion misapprehends the relationship among treaty implementation, federal jurisdiction, causes of action, and the *habeas* statute. This Court has not stated whether *habeas* may enforce rights conferred through a treaty that is neither self-executing nor implemented by legislation.[30] At least one Circuit has implied that the *habeas* statute creates a separate right of action to vindicate rights under non-self-executing treaties. *See Ogbudimka*, 342 F.3d at 218, n.22;

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regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention. . . .").

[30] Although other Circuits ruling on this issue have held that rights enumerated in non-self-executing treaties are unenforceable on *habeas*, s*ee Bannerman v. Snyder*, 325 F.3d 722 (6th Cir. 2003); *Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003); *Wesson v. United States ex rel. Penitentiary*, 305 F.3d 343 (5th Cir. 2002); *Hain v. Gibson*, 287 F.3d 1224 (10th Cir. 2002); *United States ex rel. Perez v. Warden*, 286 F.3d 1059 (8th Cir. 2002); *Garza v. Lappin*, 253 F.3d 918 (7th Cir. 2001), none involved circumstances like those of Petitioners. Each contains only a conclusory analysis of the issue. *See Ogbudimka v. Ashcroft*, 342 F.3d 207, 218, n.22 (3d Cir. 2003) (observing that these cases reject the section 2241 argument "in a rather cursory manner"). Finally, in those cases, the petitioners were invoking *habeas* to challenge proceedings brought under accepted domestic law which incorporated established due process protections.

see also Stephen I. Vladeck, *Comment, Non-Self- Executing Treaties and the Suspension Clauses After* St. Cyr, 113 Yale L.J. 2007, 2012-14 (2004) (arguing that the Suspension Clause concerns that motivated the Supreme Court in *St. Cyr* counsel that courts should find that *habeas corpus* provides a right of action for otherwise unenforceable non-self-executing treaties).

A properly ratified treaty is the law of the United States, with or without implementing legislation. *See* U.S. Const. art. VI, cl. 2; *Maiorano v. Baltimore & Ohio R.R. Co.*, 213 U.S. 268, 273 (1909) (under Supremacy Clause, duly ratified treaty is "binding alike [on] national and state courts, and is capable of enforcement, and must be enforced. . . ."). Federal courts have jurisdiction to decide cases arising out of treaties. *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). The *habeas* statute, 28 U.S.C. § 2241, establishes a separate cause of action for the narrow purpose of guarding against arbitrary detention.[31] *Habeas* relief is available for violations of a treaty. *See* 28

[31] Unless the treaty is aided by implementing legislation, there usually is no cause of action by which a litigant may claim advantage of the court's jurisdiction. *See Dreyfus v. Von Finck*, 534 F2d 24, 28-30 (2d Cir. 1976) (dismissing claim based on non-self-executing treaty violation because, while 28 U.S.C. § 1331 provided jurisdiction for the court to consider a claim under a treaty, it did not provide a cause of action). Courts occasionally collapse the distinction between a non-self-executing treaty and a treaty that provides for a private cause of action, *e.g.*, *Tel-Oren v. Libyan Arab Republic*, 595 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring) (quotation omitted), but this proposition has never commanded the

U.S.C. § 2241(c)(3) (providing that writs of *habeas corpus* may be granted to a prisoner who is "in custody in violation of the Constitution or laws or treaties of the United States"); *see also Mali v. Keeper of the Common Jail*, 120 U.S. 1, 11 (1887) (considering *habeas* petition premised on treaty violation); *id.* at 17 ("[W]e see no reason why [petitioner] may not enforce his rights under the treaty by writ of *habeas corpus* in any proper court of the United States."). 28 U.S.C. § 2241 thus provides a cause of action in addition to that available under 28 U.S.C. § 1331. A treaty that is ratified but not self-executing need not be implemented in order for a party to have a *habeas* cause of action based on that treaty. *See Edye v. Robertson (Head Money Cases)*, 112 U.S. 580, 598-99 (1884) (ratified treaty is "a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. . . . [The]

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majority of a panel of this Court. As the Restatement points out, this blurring of distinctions is incorrect: the question of self-execution and the question of whether a treaty provides a private right of action are intimately related, but analytically distinct. *See* Third Restatement, §111 cmt. h ("Whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies"); *see also* David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. Davis L. Rev. 1 (2002) (identifying no fewer than four separate doctrines of non-self-execution that are frequently conflated). The Court need not reach this issue to resolve this appeal.

court resorts to the treaty for a rule of decision for the case before it as it would to a statute").[32]

That arbitrary detention in violation of a treaty right may be vindicated through *habeas* is not surprising, given the historically central place of the writ's protection against arbitrary imprisonment in the Anglo-American legal tradition. *Cf. INS v. St. Cyr*, 533 U.S. 289 (2001) (*habeas* remained available for the vindication of legal rights unless Congress explicitly indicated an intention to suspend the writ). Although treaties generally give rise to a private cause of action for injunctive or monetary relief on a case-by-case basis, the *habeas* statute permits any person to challenge arbitrary deprivation of liberty that is contrary to a treaty. For example, until the Supreme Court decided *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, no decision established whether an affirmative private action for damages would lie for violations of the Constitution. 403 U.S. 388 (1971). In contrast, there was never any doubt that the *habeas* statute allowed an individual to challenge detention asserted to be in violation of the Constitution. *See, e.g., Mancusi v. DeForte*, 392 U.S. 364 (1968) (Fourth Amendment rights enforceable via *habeas*); *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963) (Sixth Amendment rights enforceable via *habeas*).

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[32] *Cf. Kolovrat v. Oregon*, 366 U.S. 187, 191 (1961) (relying on treaty as rule of decision to determine takings issue); *Jordan v. Tashiro*, 278 U.S. 123, 130 (1928) (relying on treaty to uphold issuance of writ of mandamus against public official).

Petitioners allege they are being detained in violation of the International Covenant for Civil and Political Rights (the "ICCPR"), which the United States ratified in 1992. FAP at ¶¶ 52, 54, J.A. 0077-78; Khalid Pet. at ¶ 57, J.A. 1125. Petitioners assert their detention violates the ICCPR in two ways. First, the ICCPR mandates that "[n]o one shall be subjected to arbitrary arrest or detention." ICCPR, Dec. 19, 1966, art. 9.1, 999 U.N.T.S. 171. 6 I.L.M. 368. Petitioners have alleged that their arrest and detention were arbitrary. FAP at ¶¶ 52, 54, J.A. 0077-78; Khalid Pet. at ¶ 57, J.A. 1125. Second, the ICCPR obligates signatory states to ensure that "[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." ICCPR art. 9.2.[33] Petitioners have alleged that no such information was provided them when they were seized by U.S. forces. FAP at ¶ 40, J.A. 0074-75; Khalid Pet. at ¶¶ 40, 48, J.A. 1120, 1122. The plain terms of the ICCPR make clear that its protections apply to Petitioners. Its guarantees extend "to all individuals within [the] territory [of a signatory state] and subject to its jurisdiction." *Id.* art. 2.1. It unambiguously states these protections should be real and effective, ensuring that "any person whose rights or freedoms as herein recognized are violated shall have

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[33] *Cf.* The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 5, 213 U.N.T.S. 221 (providing similar right against prolonged arbitrary detentions and for a *habeas*-like proceedings); *see also* American Declaration of the Rights and Duties of Man, May 2, 1948, arts. XXV, XXVI.

an effective remedy . . . that any person claiming such a remedy shall have his right thereto determined by competent judicial . . . authorities . . . [and] that the competent authorities shall enforce such remedies when granted." *Id.* art 2.3.

b. Petitioners' Claims Based On Customary International Law.

Petitioners further allege that their detention constitutes prolonged, arbitrary detention in violation of customary international law. Customary international law is independent of treaties, though it is informed both by treaties and other instruments of international law and practice. The District Court failed to reach Petitioners' customary international law claims in the mistaken belief that separation of powers precluded such action. J.A. 1011-12. *See Hamdi*, 124 S. Ct. at 2650–51 (rejecting Government's argument that nature of war precluded judicial review of Executive Branch classifications).

The District Court should have reached the merits of Petitioners' customary international law claims, because customary international law forms part of the "laws . . . of the United States," 28 U.S.C. § 2241(c)(3),[34] the violation of which may be vindicated on *habeas*, and which federal courts are obligated to enforce. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2761 (2004) (international law is part of federal common law). The Supreme Court has long acknowledged that customary

[34] *See also Illinois v. Milwaukee*, 406 U.S. 91, 92 (1972) ("We see no reason not to give 'laws' its natural meaning . . . and therefore conclude that section 1331

international law is incorporated into federal law. "International law is part of our law," the Supreme Court said in *The Paquete Habana*:

> and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[35]

175 U.S. 677, 700 (1900) (citation omitted); *accord Sosa*, 124 S. Ct. at 2764 (2004); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 161 (1795) (describing a violation of "our own law[,] I mean the common law, of which the law of nations is a part, as it subsisted either before the act of Congress on the subject, or since that has provided a particular

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jurisdiction will support claim founded upon federal common law as well as those of a statutory origin.") (internal citation omitted).

[35] *The Paquete Habana's* pronouncement that the law of nations is "part of our law" is fundamental to understanding how U.S. domestic courts implement international humanitarian law. The case involved the prohibition against making war on civilians. The norms protecting an enemy's domestic fishing vessels were enforced against the Executive branch in an international conflict, underscoring the extent to which the Supreme Court has historically credited customary international law.

manner of enforcing it"); *see also* Pet. Amended Joint Supp. Br. In Opp. To Resp. Mtn. To Dismiss, at 43–47 (Dec. 13, 2004) (citing authorities). Courts must avoid an interpretation of a statute that would conflict with international law. *See, e.g.*, *Charming Betsy*, 6 U.S. at 118; Third Restatement § 114 (2000) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").[36]

The right of an individual to be free from prolonged, arbitrary executive detention is one of the most fundamental rights recognized under customary international law. This protection is guaranteed under all international conventions that contain a general enumeration of rights, including the ICCPR. The Universal Declaration of Human Rights, which is recognized as an authoritative statement of customary international law,[37] contains the obligation to provide detainees with a "fair and public hearing by an independent and impartial tribunal." Dec. 10, 1948, arts. 9-10, G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810. The prohibition against arbitrary detention is also recognized in each of the regional human rights

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[36] *Cf. Roper v. Simmons*, 125 S. Ct. 1183, 1198-1200 (2005) (international norms may also be persuasive as to the interpretation of the Constitution); *Lawrence v. Texas*, 539 US 558, 573, 576 (2003) (same); *Atkins v. Virginia*, 536 U.S. 304, 316, n.21 (2002) (same).

[37] *See, e.g.*, Mark Janis, *An Introduction to International Law* 256–57 (3d ed. 1999).

systems.[38] The United States itself has long recognized the prohibition through numerous executive statements,[39] legislative pronouncements,[40] and judicial decisions.[41] Commentators agree that the prohibition against arbitrary detention is customary international law. *See, e.g.*, Nigel Rodley, *The Treatment of Prisoners Under International Law* (2d ed. 1999). Federal courts have found violations of the prohibition against arbitrary detention in much less egregious circumstances than those alleged here. *See, e.g., Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981) (excludable refugee sufficiently alleged violation of customary international law against arbitrary detention; his *habeas* petition alleged he had been held one year); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995) (detention plus abuse for fourteen hours violated arbitrary detention rule);

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[38] *See* American Convention on Human Rights, 1144 U.N.T.S. 123, arts. 7 (3), art. 7 (5), 7 (6), 8 (1), 25 (1); American Declaration on The Rights and Duties of Man, May 2, 1948, OEA/Ser. L/V/I.4 Rev. (1965), arts. I, XVIII, XXV; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, arts. 5(1), 5(4); African Charter on Human and Peoples' Rights, June 27,1981, OAU Doc. CAB/LEG/67/3/Rev. 5, art. 6, 7(1).

[39] *See, e.g.*, U.S. Department of State, Country Reports on Human Rights Practices (2004).

[40] *See, e.g.*, 22 U.S.C. § 2151n(a) (no assistance may be given to "the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including . . . prolonged detention without charges"); *see also* 7 U.S.C. § 1733; 22 U.S.C. §§ 262(d), 2304.

[41] *See Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, 2002 WL 319887 at *6 (S.D.N.Y. Feb. 28, 2002); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541–42 (N.D. Ca. 1987).

Paul v. Avril, 901 F. Supp. 330, 335 (S.D. Fla. 1994) (detention and abuse for three months violated arbitrary detention rule).

The Third Restatement of Foreign Relations Law summarizes these authorities as providing unequivocally that a state violates international law if, as a matter of policy, it practices, encourages, or condones "prolonged arbitrary detention." Third Restatement § 702, rptr. n.6. Petitioners have alleged that they are being detained arbitrarily, with no process. *See* FAP at ¶¶ 51–56, J.A. 0077-78; Khalid Pet. at ¶¶ 48-51, J.A. 1122-24.[42]

E. **Petitioners Pled Facts Sufficient To Establish Their Right To The Issuance Of The Writ Or, At Minimum, A Hearing On The Merits.**

The CSRTs failed to protect Petitioners' rights under the Fifth Amendment of the Constitution, and did not satisfy even the minimal procedural outline set forth in *Hamdi*.[43] Both as conceived and administered, the CSRTs were a cosmetic

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[42] *Sosa* recognized that although the "brief detention" there did not violate customary international law, prolonged arbitrary detention might do so. *Sosa*, 124 S. Ct. at 2768–69 (citing the Third Restatement). Petitioners are in their fourth year of internment without charges. In *Sosa*, the plaintiff was detained illegally for "less than a day," and then was transferred to lawful authorities who arraigned him. *Id.* The fact that the Supreme Court has not yet demarcated when detention without trial "cross[es] [the] line" lends support to Petitioners' plea that they be allowed to fully and fairly test the legality of their confinement. *Id.* at 2769.

[43] Nothing in *Hamdi* indicates that citizen-detainees are entitled to greater due process protections in *habeas* than are Petitioners. *Rasul* makes clear that Petitioners are entitled to fundamental constitutional protections. Once it is established that aliens are entitled to due process, the alien is afforded "the same constitutional protections of due process that we accord citizens." *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 309 (1970); *see also Shaughnessy v. United States*

device, constructed immediately following *Rasul*, in an effort to justify, retroactively, years of unlawful detention with no meaningful process—despite the "substantial prospect of perpetual detention" hanging on the outcome. *Hamdi*, 124 S. Ct. at 2641. Respondents' lack authority to detain Petitioners. Their internment is unquestionably unlawful. This Court should therefore reverse the decision of the District Court, and remand with directions to issue the writ forthwith. *See Groins v. Allgood*, 391 F.2d 692, 699-700 (5th Cir. 1968) (remanding and reversing with directions to issue writ where there was no hearing in district court, and holding that "under the peculiar circumstances of this case, the basic facts as to systematic exclusion of Negroes from the grand jury which indicted [Petitioner] cannot be disputed. It is especially desirable to bring this prolonged habeas corpus litigation to a conclusion without needless further delay. To remand this case for a hearing would be sheer formality."); 28 U.S.C. § 2106 (granting appellate court power to order such relief as "may be just under the circumstances"). Alternatively, this Court should remand these cases to the District Court with a legal conclusion as to the Constitutional inadequacy of the CSRTs, and an instruction directing the District Court to proceed forthwith to hear Petitioners' *habeas* claims. *See Rasul*,

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ex rel. Mezei, 345 U.S. 206, 212 (1953) (illegal aliens in the United States are entitled to deportation proceedings "conforming to traditional standards of fairness encompassed in due process of law").

124 S. Ct. at 2699 (reversing judgment of Appeals Court and remanding for the District Court to consider, in the first instance, the merits of petitioners' claims).[44]

1. *The District Court Failed To Assess The Adequacy Of The CSRTs.*

Absent an adequate process to justify the continued detention of those seized under the AUMF, *Hamdi* directed that "a court that receives a petition for writ of *habeas corpus* from an alleged enemy combatant must *itself* ensure that the minimum requirements of due process are achieved." 124 S. Ct. at 2651. The Supreme Court envisioned district courts "engaging in a fact finding process," that

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[44] "It is the general rule . . . . that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976). Nonetheless, as the *Singleton* Court made clear, "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Id.* at 121, 96 S.Ct. at 2877; *see also Proctor v. State Farm Mut. Auto. Ins. Co*, 675 F.2d 308, 325-26 (D.C. Cir. 1982). Departure from the *Singleton* rule may be warranted when "the issue is presented with sufficient clarity and completeness and its resolution will materially advance the progress of [an] already protracted litigation." *Katt v. Dykhouse*, 983 F.2d 690, 695 (6th Cir. 1992) (quoting *Pinney Dock and Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir.), *cert. denied*, 488 U.S. 880, 109 S.Ct. 196, 102 L.Ed.2d 166 (1988)). Here, petitioners have languished at Guantanamo for over three years. Further, because the question whether the CSRTs provide adequate due process was fully briefed below, "[t]his is not a case, therefore, where resolution of an issue for the first time on appeal would cause undue surprise or prejudice." *Grace v. Burger*, 665 F.2d 1193, 1197 n.9 (D.C. Cir. 1981), *aff'd in part, vacated in part on other grounds sub nom., U.S. v. Grace*, 461 U.S. 171, 103 S.Ct. 1702 (1983). Under such circumstances, "a remand to the District Court, which inevitably would result in a future appeal to this court, 'would be a waste of judicial resources.'" *Id.* (quoting *United States v. Aulet*, 618 F.2d 182, 186 (2d Cir. 1980)).

would "pay proper heed both to [ ] matters of national security . . . and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns." *Id.* at 2652. However, the Court below gave no indication that it reviewed the CSRT records for Petitioners; it did not substantively evaluate the CSRTs process.[45] In light of the allegations in the Petitions, the Court's failure is impermissible under *Hamdi*.

In *Hamdi*, the Supreme Court "reject[ed] the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts" in the realm of Executive detentions. 124 S. Ct. at 2650; *see also id.* at 2655 (Souter, J., concurring in part, dissenting in part) ("In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive branch of government, whose particular responsibility is to maintain security.") In so doing, the *Hamdi* plurality, joined by Justices Souter and Ginsburg, rejected Respondents' argument that due process rights of detainees extended only to a judicial inquiry into "whether legal authorization exists for the broader detention scheme," *Id.* at 2645; *see also id.* at 2660 (Souter, J., concurring

[45] Although it offered no analysis, the District Court nevertheless concluded that "the CSRTs provide each petitioner with much of the same process afforded by Article 5 of the Geneva Convention." J.A. 1019.

in part, dissenting in part), and then specified the process to which each detainee is entitled.

The Executive lacks authority to detain Petitioners; the District Court should be instructed to issue the writ. At a minimum, this Court should remand with an instruction to conduct an immediate full and fair *habeas* hearing.

2. *The CSRT Cannot Satisfy Respondents' Burden of Showing Adequate Process Has Been Provided Petitioners*.

Measured against even the minimal due process scheme required by *Hamdi*, the CSRTs are inadequate. Petitioners were afforded neither (1) notice of the factual basis for their classifications; (2) a fair opportunity to rebut Respondents' factual assertions; or (3) a neutral decision maker. *See* 124 S. Ct. at 2648.[46]

a. Petitioners Were Not Afforded Sufficient Notice of the Factual Bases of Their Detention.

The CSRT procedures provide "notice of the unclassified factual basis for the detainee's designation as an enemy combatant," in advance of the CSRT. J.A. 1208. Those procedures, however, were not promulgated until over *two and a half years* after Respondents seized Petitioners. Such inordinate delay, alone, violates the Petitioners' "right to notice . . . at a meaningful time and in a meaningful

[46] Justices Souter and Ginsburg joined the plurality's holding that these elements of fair process were essential. *See id.* (Souter, J., concurring in part, dissenting in part).

manner." *Hamdi*, 124 S. Ct. at 2649 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct 1983, 32 L.Ed.2d 556 (1972)).

Effective full and fair notice also was impossible given Respondents' evolving definition of enemy combatant.

In March 2002, Respondents described detainees as "enemy combatants that we *captured on the battlefield* seeking to harm U.S. soldiers or allies."[47] Following that definition, the Executive offered varying, and sometimes broader definitions. *Compare*, December 12, 2002 Memorandum from William J. Haynes II, General Counsel to DOD (defining enemy combatants as including "a member, agent, or associate of al Qaida or the Taliban")[48] and Wolfowitz Order at 1 ¶ a, J.A. 1207, *with Hamdi*, 124 S. Ct. at 2639 (observing "the Government has never provided any court with the full criteria it uses in classifying individuals as enemy combatants," and noting that the government had "made clear . . . that, for purposes of this case, [an] 'enemy combatant' . . . is an individual who, it alleges, was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States'

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[47] News Briefing by William J. Haynes II, General Counsel of DOD, DOD News Briefing on Military Commissions (Mar. 21, 2002), *available at* http://www.denfenselink.mil/transcripts/2002/t03212002_t0321sd.html (emphasis supplied).

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

there.") and J.A. 0256 ("individuals who were taken from an area of hostilities. . . ."). The Respondents' protean definition fails to give notice of the prohibited conduct and may "authorize and even encourage arbitrary and discriminatory enforcement." *See City of Chicago v. Morales*, 527 U.S. 41, 52 (1999).

b. Petitioners Were Not Afforded A Meaningful Opportunity to Rebut the Factual Bases for Respondents' Enemy Combatant Determinations.

Petitioners were denied access to counsel during the CSRT process. The *Hamdi* plurality stated that the Petitioner in that case "unquestionably has the right to access to counsel in connection with the proceedings on remand." 124 S. Ct. at 2652 (plurality); *see* Oct. 20, 2004 Order at 4, *Al Odah*, 02-CV-0828. The CSRT procedures provided merely for a "personal representative" to assist detainees. J.A. 1207 at ¶ c. "Personal representatives" are not lawyers and are not required to have any relevant training. *See* Secretary of the Navy's July 24, 2004 Implementation of Combatant Status Review Tribunal for Enemy Combatants Detained Guantanamo Bay Naval Base, Cuba ("CSRT Order") § C(3), J.A. 0269.

Petitioners also lacked any means to assess and challenge the classified information forming the bases for Respondents' CSRT determinations. As Judge Green noted, the exchange between Petitioner Ait Idir and the Tribunal President vividly demonstrates that Kafkaesque aspect of the CSRT. J.A. 1078-80. Respondents' interest in protecting national security has been fully addressed in the

Protective Order in place in the *habeas* litigation;[49] such an order could have been implemented during the CSRTs.[50]

The Petitioners lacked any meaningful opportunity to present evidence or call witnesses at the CSRT. The CSRT refused to allow Petitioner Ait Idir to call any witnesses or present any documentary evidence. J.A. 0455-56.

Even the "personal representative" of Petitioner Khalid objected that the CSRT made no effort to contact the four former detainees Khalid requested as witnesses. J.A. 1205-06.

Petitioner Lahmar requested evidence in the form of a document the CSRT identified as "Bosnian government document finding detainee not guilty of attempting to bomb the U.S. Embassy." J.A. 0400-01. The Tribunal President determined that the document was "not reasonably available." *Id.* However, those Bosnian court documents were appended as exhibits to Lahmar's *habeas* petition and multiple other District Court filings served on Respondents *before* the CSRTs

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[49] J.A. 0673; *See In re Guantanamo Detainee Cases*, 344 F. Supp.2d 174, 178, 191-92 (D.D.C. 2004).

[50] In a criminal proceeding, which similarly involves liberty interests, this Circuit has held that a defendant seeking classified information need show only that requested classified information is "at least 'helpful to the defense of [the] accused.'" *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61, 77 S. Ct. 623, 628, 1 L.Ed.2d 639 (1957)); *see also United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998).

were commenced. And the CSRT records in other instances attached pleadings from this case. *See, e.g.*, J.A. 0546.

Mr. Ait Idir's Tribunal informed him that documents indicating he resided in Croatia—not Bosnia—would be useful, but failed to assist him in obtaining them. The Tribunal President said, "I do not know how or what the procedure is, but you should really take the opportunity to get that information." J.A. 0479. Mr. Ait Idir responded, "How, when I am at GTMO?" J.A. 0479.

Had Petitioners been afforded counsel with access to classified information, they would have had an opportunity to rebut the web of allegations attempting to demonstrate "links" between the six, allegations that instead went unanswered because Petitioners had no access to the classified information and their "personal representatives" were almost entirely passive.

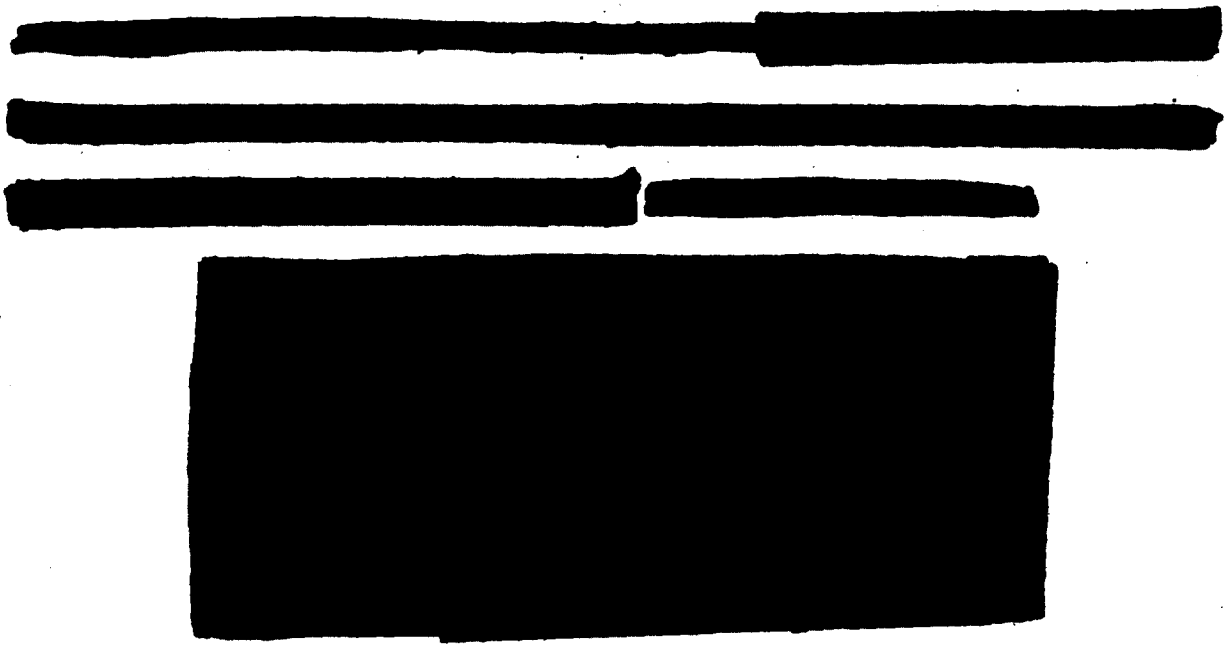
In the Fall of 2001, Petitioners Ait Idir, Boudella, Boumediene, and Nechla were friends who socialized frequently. None of them had ever met Petitioner Lahmar. Only Boumediene (head of the Red Crescent Society of the United Arab Emirates orphans department in Sarajevo) knew Bensayah, to whom, on rare occasions, he had made charitable donations of food and clothing for Bensayah's young children. Bensayah had known Lahmar for approximately one year after meeting in Zenica, Bosnia.

Despite those scant facts, the CSRT record illustrates how Respondents, from the start, characterized Petitioners as the "Algerian 6," suggesting that social relationships among them were sinister, and labeling them a "cell" that purportedly had plotted to blow up the U.S. Embassy in Bosnia. *See generally* Classified CSRT Records.

For example, on the basis of [redacted] frequently bearing the disclaimer that the content is "[redacted]," and conclusory statements unsupported by record evidence, Boudella was determined to be an enemy combatant by his CSRT largely because (i) he knew Boumediene, who had met Bensayah, who knew Lahmar, a purported leader of the terrorist Algerian Armed Islamic Front ("GIA"); and (ii) he had worked for charities believed to be associated with or "in a position to support" terrorism (although there was no CSRT evidence that Boudella had any control or influence over these organizations). Boudella did not know either Bensayah or Lahmar before their 2001 arrest. This "six degrees of separation" approach links untold individuals or organizations, and is not a process that properly can support a finding that Boudella is an enemy combatant who may therefore be indefinitely detained.

Further, substantial doubt has been cast by the [redacted] on the CSRT's determination with respect to Petitioner Lahmar's GIA affiliation. On October 19,

2004, Commander James Crisfield (Legal Adviser, CSRT) forwarded to his superior Colonel David Taylor (OARDEC FORWARD Commander) an e-mail captioned "POSSIBLE EXCULPATORY INFORMATION ON #[redacted] [Saber Lahmar]." *See Lahmar Classified CSRT Record*, October 19, 2004 E-mail from Crisfield to Taylor (J.A. 1228). The e-mail attached information [redacted]



J.A. 1229 (emphasis supplied).

Respondents provided this exculpatory evidence only to some members of Lahmar's Tribunal, and then only *after* the completion of his CSRT hearing. It was never provided to any of the other Boumediene Petitioners' Tribunals, despite the fact that their alleged "association" with supposed "GIA leader" Lahmar

formed, in significant part, the basis for their respective enemy combatant determinations.[51]

The effect of Petitioners' inability to examine, cross-examine, and rebut such information was compounded by the provision of plainly mistaken "facts" to the CSRT panels. For example, the classified record shows that the Boumediene Petitioners were arrested in Bosnia solely on the basis of an [redacted] letter asking the B-H authorities to take them into custody. The letter cited, but nowhere specified, "credible evidence" of a threat against the Embassy to support the request.[52] *See, e.g.*, J.A. 1901-04 (copies of this document appear in each Petitioner's CSRT record). Following the arrests in October 2001, B-H authorities undertook an investigation, and one of Bosnia's first requests was to [redacted] for information to support the U.S. allegations. J.A. 2129. The Bosnians received no reply, and finding no other basis in their investigation, the B-H authorities ultimately released all six. Then, several years later when the CSRT hearings were underway, an e-mail "To Everyone Involved with the Algerian Six

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[51] Indeed, each Petitioner faced a separate panel of different DOD officers. This process itself operated to ensure that exculpatory information provided to one panel would not become known to another, and that conclusions reached by one panel that questioned or weakened an "enemy combatant" finding would never become known to the other panels considering the same or related issues.

[52] The nature of this allegedly "credible evidence" is not identified or specified in the CSRT records of any of the Boumediene Petitioners.

([redacted])" responding to concerns about inadequate evidence supporting the allegations against the Boumediene Petitioners stated:

[redacted]

See J.A. 2128 (emphasis in original). This information – dispensed to all the panels considering the six Petitioners – was *wrong*. It relied on the B-H [redacted] request, which merely recited the words of the original U.S. letter – words proven to be inaccurate, effectively manufacturing "probable cause" out of thin air. And because of the inherent flaws in the CSRT process, this critical misstatement went wholly unchecked as each individual CSRT panel decided the Petitioners' fates.

c. The CSRTs Did Not Provide a Neutral Decision Maker.

Any pretense that the CSRTs were to determine the enemy combatant status of Petitioners in a neutral manner is belied by the weight accorded to the prior "multiple levels of review," made by Respondents.[53] *See* J.A. 1207. Executive officials repeatedly have made public pronouncements to the same effect. *See,*

[53] At oral argument before Judge Green, however, Respondents were unable to provide any written record of any of these "multiple levels of review." In response to Judge Green's question whether the prior decisions were reduced to writing, Respondents replied opaquely that they are "not precisely familiar with the extent

e.g., Linda D. Kozaryn, *U.S. Gains Custody of More Detainees*, American Forces Information Service (Jan. 28, 2002).

Due process requires a "neutral and detached judge in the first instance," not a tribunal convened after years of detention and after an elaborate secret process. *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 617 (1993) (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62, 93 S. Ct. 80, 84, 34 L.Ed.2d 267 (1972)). The Supreme Court unequivocally determined that "process is due . . . when the determination is made to *continue* to hold those who have been seized." *Hamdi*, 124 S. Ct. at 2649. The CSRTs could not remedy the damage wrought by years of detention without process because "[e]ven appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator," at the outset. *Id.* (citing *Ward*, 409 U.S. at 61).

The Tribunals were not neutral and made unsupported determinations favorable to Respondents. The Classified CSRT records for the Boumediene Petitioners contain no evidence linking them to any purported plot to bomb the U.S. Embassy. There is no evidence that any possessed maps, sketches, bombs or bomb-making components, weapons, or any other tangible evidence that would demonstrate their involvement in such a plan. Indeed, Ait Idir's CSRT determined there was no plot to attack the U.S. Embassy in Bosnia in 2001. J.A. 1991 ¶ 2(a).

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to which those prior determinations were papered in the form of formal decisions."

The Tribunal did not base its determinations solely on the information provided to it during the initial hearing. *Id.* At the close of the first session, the CSRT directed the Recorder to provide information to the Tribunal concerning the plot and, more specifically, how Ait Idir was linked to the plot. *Id.* The Recorder's response indicated that there was only a "suspected plot," against the U.S. Embassy. *Id.* (citing Exhibit R-27, J.A. 2106).

Ait Idir's CSRT concluded that (i) there was apparently no direct evidence of a plot against the U.S. Embassy (U.S. officials only "suspected" a plot); and (ii) the United States requested that Bosnia arrest and detain Ait Idir and the others based on those unsubstantiated suspicions. *Id.* Despite concluding that the alleged plot – which formed the sole basis for Ait Idir's arrest in 2001 – did not exist, his CSRT ignored its own conclusion and affirmed his enemy combatant status.

Boudella's CSRT also recognized the weaknesses in the classified exhibits purporting to demonstrate his involvement in the alleged embassy plot, noting that (i) Exhibit R-7, J.A. 1866, "provides no supporting evidence that the Detainee violated the articles of the B-H law that he was charged with violating"; (ii) Exhibit R-8, J.A. 1867-71, "also provides no supporting evidence that the Detainee committed the crimes with which he is charged"; and (iii) Exhibit R-26, J.A. 1925-27, "provides no supporting evidence" of involvement in a plot. *Boudella*

J.A. 0766.

Classified Summary of Basis for Tribunal Decision at para. 1(a), (b), and (l), J.A. 1800-04. Boudella's CSRT credited these exhibits only when read together with the [redacted] note from [redacted] which maintained that it had "credible evidence" that Petitioners posed an "imminent threat." *Encl. (2) to Boudella CSRT Decision Report* at R-19, J.A. 1901-04. Even so, the Boudella CSRT found the [redacted] only "somewhat persuasive" to its enemy combatant determination, and observed that the [redacted] provided "no specific evidence indicating how the Detainee is involved in this plot." *Boudella Classified Summary of Basis for Tribunal Decision* at para. 1(g), J.A. 1802.

The fact that this so-called "credible evidence" was never identified or presented to Petitioner Boudella's CSRT, or to counsel for Petitioners, yet its purported existence provided the apparent basis for the Boudella Tribunal's decision, is sufficient ground, standing alone, to find the CSRT unconstitutional as applied to him.

VIII. CONCLUSION.

In light of the arguments stated above, and given the obvious importance to all Guantanamo Petitioners of immediate resolution of whether the CSRTs are adequate, the need to reconcile this decision with the contrary holding of Judge Green, the interests of judicial economy, the fact that these issues were briefed extensively below and particularly because the Petitioners have been detained

without process for well over three years, this Court should reverse the Order of the Court below and issue a decision ordering the District Court to issue the writs, forthwith, or, alternatively, remand with instructions to hold an immediate hearing on the merits of the Petitions.

Respectfully submitted,

Stephen H. Oleskey /s/

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

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 13,904 words (which does not exceed the applicable 14,000 word limit).

Stephen H. Oleskey

Stephen H. Oleskey, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I have this 2nd day of May, 2005, caused the foregoing CORRECTED JOINT BRIEF OF APPELLANTS to be served upon the following persons by the Court Security Office.

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ADDENDUM

Fifth Amendment to the Constitution of the United States

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

DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

- 7 JUL 2004

MEMORANDUM FOR THE SECRETARY OF THE NAVY

SUBJECT: Order Establishing Combatant Status Review Tribunal

This Order applies only to foreign nationals held as enemy combatants in the control of the Department of Defense at the Guantanamo Bay Naval Base, Cuba ("detainees").

a. Enemy Combatant. For purposes of this Order, the term "enemy combatant" shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense.

b. Notice. Within ten days after the date of this Order, all detainees shall be notified of the opportunity to contest designation as an enemy combatant in the proceeding described herein, of the opportunity to consult with and be assisted by a personal representative as described in paragraph (c), and of the right to seek a writ of habeas corpus in the courts of the United States.

c. Personal Representative. Each detainee shall be assigned a military officer, with the appropriate security clearance, as a personal representative for the purpose of assisting the detainee in connection with the review process described herein. The personal representative shall be afforded the opportunity to review any reasonably available information in the possession of the Department of Defense that may be relevant to a determination of the detainee's designation as an enemy combatant, including any records, determinations, or reports generated in connection with earlier determinations or reviews, and to consult with the detainee concerning that designation and any challenge thereto. The personal representative may share any information with the detainee, except for classified information, and may participate in the Tribunal proceedings as provided in paragraph (g)(4).

d. Tribunals. Within 30 days after the detainee's personal representative has been afforded the opportunity to review the reasonably available information in the possession of the Department of Defense and had an opportunity to consult with the detainee, a Tribunal shall be convened to review the detainee's status as an enemy combatant.

e. Composition of Tribunal. A Tribunal shall be composed of three neutral commissioned officers of the U.S. Armed Forces, each of whom possesses the appropriate security clearance and none of whom was involved in the apprehension,

detention, interrogation, or previous determination of status of the detainee. One of the members shall be a judge advocate. The senior member (in the grade of O-5 and above) shall serve as President of the Tribunal. Another non-voting officer, preferably a judge advocate, shall serve as the Recorder and shall not be a member of the Tribunal.

f. Convening Authority. The Convening Authority shall be designated by the Secretary of the Navy. The Convening Authority shall appoint each Tribunal and its members, and a personal representative for each detainee. The Secretary of the Navy, with the concurrence of the General Counsel of the Department of Defense, may issue instructions to implement this Order.

g. Procedures.

(1) The Recorder shall provide the detainee in advance of the proceedings with notice of the unclassified factual basis for the detainee's designation as an enemy combatant.

(2) Members of the Tribunal and the Recorder shall be sworn. The Recorder shall be sworn first by the President of the Tribunal. The Recorder will then administer an oath, to faithfully and impartially perform their duties, to all members of the Tribunal to include the President.

(3) The record in each case shall consist of all the documentary evidence presented to the Tribunal, the Recorder's summary of all witness testimony, a written report of the Tribunal's decision, and a recording of the proceedings (except proceedings involving deliberation and voting by the members), which shall be preserved.

(4) The detainee shall be allowed to attend all proceedings, except for proceedings involving deliberation and voting by the members or testimony and other matters that would compromise national security if held in the presence of the detainee. The detainee's personal representative shall be allowed to attend all proceedings, except for proceedings involving deliberation and voting by the members of the Tribunal.

(5) The detainee shall be provided with an interpreter, if necessary.

(6) The detainee shall be advised at the beginning of the hearing of the nature of the proceedings and of the procedures accorded him in connection with the hearing.

(7) The Tribunal, through its Recorder, shall have access to and consider any reasonably available information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any reasonably available records, determinations, or reports generated in connection therewith.

(8) The detainee shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal. The Tribunal shall determine the

reasonable availability of witnesses. If such witnesses are from within the U.S. Armed Forces, they shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would affect combat or support operations. In the case of witnesses who are not reasonably available, written statements, preferably sworn, may be submitted and considered as evidence.

(9) The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issue before it. At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances. The Tribunal does not have the authority to declassify or change the classification of any national security information it reviews.

(10) The detainee shall have a right to testify or otherwise address the Tribunal in oral or written form, and to introduce relevant documentary evidence.

(11) The detainee may not be compelled to testify before the Tribunal.

(12) Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine in closed session by majority vote whether the detainee is properly detained as an enemy combatant. Preponderance of evidence shall be the standard used in reaching this determination, but there shall be a rebuttable presumption in favor of the Government's evidence.

(13) The President of the Tribunal shall, without regard to any other provision of this Order, have authority and the duty to ensure that all proceedings of or in relation to the Tribunal under this Order shall comply with Executive Order 12958 regarding national security information.

h. The Record. The Recorder shall, to the maximum extent practicable, prepare the record of the Tribunal within three working days of the announcement of the Tribunal's decision. The record shall include those items described in paragraph (g)(3) above. The record will then be forwarded to the Staff Judge Advocate for the Convening Authority, who shall review the record for legal sufficiency and make a recommendation to the Convening Authority. The Convening Authority shall review the Tribunal's decision and, in accordance with this Order and any implementing instructions issued by the Secretary of the Navy, may return the record to the Tribunal for further proceedings or approve the decision and take appropriate action.

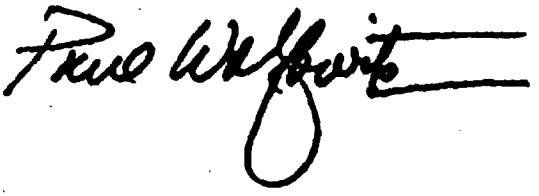
i. Non-Enemy Combatant Determination. If the Tribunal determines that the detainee shall no longer be classified as an enemy combatant, the written report of its decision shall be forwarded directly to the Secretary of Defense or his designee. The Secretary or his designee shall so advise the Secretary of State, in order to permit the Secretary of State to coordinate the transfer of the detainee for release to the detainee's

country of citizenship or other disposition consistent with domestic and international obligations and the foreign policy of the United States.

j. This Order is intended solely to improve management within the Department of Defense concerning its detention of enemy combatants at Guantanamo Bay Naval Base, Cuba, and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law, in equity, or otherwise by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

k. Nothing in this Order shall be construed to limit, impair, or otherwise affect the constitutional authority of the President as Commander in Chief or any authority granted by statute to the President or the Secretary of Defense.

This Order is effective immediately.



UNITED STATES PUBLIC LAWS
107th Congress - First Session
Convening January, 2001

PL 107-40 (SJRes 23)
September 18, 2001
AUTHORIZATION FOR USE OF MILITARY FORCE

Joint Resolution To authorize the use of United States Armed Forces against ıose responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed ɡainst the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United :ates exercise its rights to self-defense and to protect United States citizens ɔth at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of ıe United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the ıtional security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to ːter and prevent acts of international terrorism against the United States: Now, ıerefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

ec. 1

<< 50 USCA § 1541 NOTE >>

ECTION 1. SHORT TITLE.

his joint resolution may be cited as the "Authorization for Use of Military rce".

c. 2

<< 50 USCA § 1541 NOTE >>

EC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

c. 2(a)

a) IN GENERAL.--That the President is authorized to use all necessary and propriate force against those nations, organizations, or persons he determines anned, authorized, committed, or aided the terrorist attacks that occurred on ptember 11, 2001, or harbored such organizations or persons, in order to event any future acts of international terrorism against the United States by ɔh nations, organizations or persons.

ɔ. 2(b)

b) War Powers Resolution Requirements--

ɔ. 2(b)(1)

(1) SPECIFIC STATUTORY AUTHORIZATION.--Consistent with section 8(a)(1) of the r Powers Resolution, the Congress declares that this section is intended to

ec. 2(b)(1)
onstitute specific statutory authorization within the meaning of section 5(b) of
ne War Powers Resolution.
ec. 2(b)(2)
*225 (2) APPLICABILITY OF OTHER REQUIREMENTS.--Nothing in this resolution
ipercedes any requirement of the War Powers Resolution.
Approved September 18, 2001.
107-40, 2001 SJRes 23
ND OF DOCUMENT

Geneva Convention relative to the Protection of Civilian Persons in Time of War

Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August, 1949

***entry into force* 21 October 1950**

PART I

GENERAL PROVISIONS

Article 1

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

Article 2

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

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

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

Article 3

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

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

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

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

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

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

Article 4

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

The provisions of Part II are, however, wider in application, as defined in Article 13.

Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall not be considered as protected persons within the meaning of the present Convention.

Article 5

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

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power,

such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

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

Article 6

The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.

In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: I to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, and 143.

Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention. Article 7

In addition to the agreements expressly provided for in Articles 11, 14, 15, 17, 36, 108, 109, 132, 133 and 149, the High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision. No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them.

Protected persons shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken with regard to them by one or other of the Parties to the conflict.

Article 8

Protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.

Article 9

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

Office of the High Commissioner for Human Rights

International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966

***entry into force* 23 March 1976, in accordance with Article 49**

status of ratifications
declarations and reservations

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1 ⏩ ***General comment on its implementation***

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2 ⏩ ***General comment on its implementation***

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3 ⏩ ***General comment on its implementation***

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant. ⏩ ***General comment on its implementation***

Article 4 ⏩ ***General comment on its implementation***

1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3.

(a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

Article 9 ⏩ ***General comment on its implementation***

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation. ***General comment on its implementation***

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6 ***General comment on its implementation***

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7 ***General comment on its implementation***

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10 ⏩ ***General comment on its implementation***

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12 ⏩ ***General comment on its implementation***

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.