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ORAL ARGUMENT TO BE SCHEDULED

Nos. 05-5062 and 05-5063

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

LAKHDAR BOUMEDIENE, *ET AL.*,
APPELLANTS,
VS.
GEORGE W. BUSH, *ET AL.*,
APPELLEES.

PUBLIC

RIDOUANE KHALID,
APPELLANT,
VS.
GEORGE W. BUSH, *ET AL.*,
APPELLEES.

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

JOINT REPLY BRIEF OF APPELLANTS

Attorneys for Lakhdar Boumediene, et al.

Stephen H. Oleskey
Louis R. Cohen (Practicing in Washington D.C.)
Robert C. Kirsch
Douglas F. Curtis (Practicing in New York)
Melissa A. Hoffer
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
(617) 526-6000

Attorneys for Ridouane Khalid

Wesley Powell
James Hosking
Christopher Land
Clifford Chance US LLP
31 W. 52nd Street
New York, NY 10019
(212) 878-8000

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Statutes

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GLOSSARY

ATS ..... Alien Tort Statute

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

BOSNIA ..... Bosnia-Herzegovina

CSRT ..... Combatant Status Review Tribunal

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

J.A. ..... Joint Appendix

[Oral Argument to be Scheduled]

INTRODUCTION

Respondents selected Guantanamo for a prison to avoid any judicial oversight. Six men have languished, interned there since January 2002.[1] Their families, jobs and lives have been torn apart; none has been subject to any charges. Respondents' Brief ignores the question each man has asked repeatedly: "Why am I imprisoned at Guantanamo?"

Almost one year ago, the Supreme Court ruled in *Rasul* that each of these men is entitled to compel Respondents to answer that question to the satisfaction of a federal judge by invoking federal *habeas* jurisdiction. Respondents here ask this Court to treat that ruling as a hollow promise, to shield the President's internment of these men from meaningful judicial review.

Respondents' arguments distill to one simple proposition: aliens interned at Guantanamo have no rights under any source of law. Respondents' contention is

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[1] Contrary to the Government's position—for which it cites not a single case (*see* Resp. Br. at 8, n.1)—Mr. Khalid's appeal is not moot. Despite his release from U.S. custody, he stands to suffer collateral injuries from his illegal detention at Guantanamo and from the decision below. *See Carafas v. LaVallee*, 391 U.S. 234, 237-38 (1968); *see also United States v. Villamonte-Marquez*, 462 U.S. 579 (1983). Mr. Khalid's continued detention in France is but one of the collateral consequences of his illegal detention and the CSRT's unlawful determination that he is an enemy combatant. In addition, he may be prohibited from entering the United States and other countries or traveling on certain airlines. Moreover, "once the federal jurisdiction has attached in the District Court [with respect to a *habeas*

antithetical to the core values of our country, values for which our troops continue to fight and die, values we seek to instill in other nations.

Respondents are wrong. *Rasul* placed Guantanamo within the reach of our courts and Constitution. *Rasul* treats Guantanamo as American soil for purposes of applying the federal habeas statute. Respondents cannot avoid their statutory and constitutional obligations to justify the imprisonment of these six men. This Court should reverse the Order of the Court below and order the District Court to issue the writs, forthwith, or, alternatively, remand with instructions to hold an immediate hearing on the merits of the Petitions.

SUMMARY OF ARGUMENT

Rasul entitles Petitioners to Fifth Amendment protections, and neither *Eisentrager* nor *Verdugo* command a different result. The Combatant Status Review Tribunals ("CSRTs") failed to provide Petitioners with adequate notice, deprived Petitioners of any meaningful opportunity to rebut the charges against them, and applied to Petitioners a vague and overly broad definition of "enemy combatant," which lacked any nexus to the September 11, 2001 attacks. The

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petition], it is not defeated by the release of the petitioner prior to completion of proceedings on such application." *Carafas*, 391 U.S. at 238.

habeas statute affords Petitioners a direct cause of action to enforce their rights under international law.[2]

ARGUMENT

I. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT PROTECTS THE BOUMEDIENE PETITIONERS[3]

A. *Rasul* Applied The Rationale of the *Insular Cases*.

In footnote 15, the *Rasul* Court cited Justice Kennedy's *Verdugo* concurrence—including the *Insular Cases* cited there—to outline the rights available to men interned at Guantanamo. Those cases stand for the long-recognized principle that where the U.S. exercises sufficient governing authority, citizens and aliens alike have Constitutional rights. *See Rasul v. Bush*, 124 S. Ct. 2686, 2698 & n.15 (2004) (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring) and "cases cited therein").

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[2] This Court should reject Respondents' newfound complaint about the standard of review applied below. Rule 11 of the 2254 rules gave the trial judge discretion to apply the standard of Fed. R. Civ. P. 12(b)(6). Respondents were silent when he did so, and now contend he should have used the standard applied following a state court criminal conviction. *See* Resp. Br. at 49. Had Petitioners received the procedural protections afforded to prisoners in that context, they would not be at Guantanamo or in this proceeding.

[3] Petitioners opening noted Respondents' independent common law obligation to demonstrate a lawful basis for their detention. *See* Pets. Br. at 14 & n.13 (citing 28 U.S.C. § 2241(c)(1) and *Ex parte Bollman and Ex parte Swartwout*, 8 U.S. (4 Cranch) 75 (1807) (Marshall, C.J.)). Respondents silence in response concedes the point.

The principle unifying the *Insular Cases*—that fundamental rights apply where the United States exercises such extensive governing authority—applies here, notwithstanding the fact that the United States is not sovereign over Guantanamo.[4] That principle flows through more than a century of precedent. *See* Pets. Br. at 14-15.

The *Insular Cases* establish that where the United States wields ultimate control and authority, it must afford those Constitutional rights and protections fundamental to ordered liberty. *See, e.g., Downes v. Bidwell*, 182 U.S. 244, 291 (1901) (White, J., concurring in judgment) (United States power is limited by "inherent, although unexpressed, principles which are the basis of all free government, . . . restrictions of so fundamental a nature that they cannot be transgressed"). That principle applies as much to Guantanamo as it did to the Trust Territory of Micronesia, where the United States did not possess ultimate sovereignty, but to which this Court extended the Constitution's reach in *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977).

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[4] Respondents mistakenly assert that recognizing Petitioners' constitutional rights would "second-guess an Executive Branch determination regarding who is sovereign over a particular foreign territory" or "undermine the President's lead role in foreign policy." Resp. Br. at 19 (internal quotation marks and ellipsis omitted). Under *Rasul,* sovereign status remains a political question, while the reach of constitutional rights remains the purview of the Judiciary. Petitioners do not assert—and *Rasul* does not require—that the U.S. is the ultimate sovereign of Guantanamo Bay. The cases Respondents cite for the proposition that similar leases "do not affect a transfer of sovereignty" are irrelevant. Resp. Br. at 17.

> [T]here cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law. . . . Of course, the United States does not hold the Trust Territory in fee simple, as it were, but rather as a trustee; yet this is irrelevant to the question. That the United States is answerable to the United Nations for its treatment of the Micronesians does not give Congress greater leeway to disregard the fundamental rights and liberties of a people as much American subjects as those in other American territories. We thus find the actions of the United States in the Trust Territories constrained by due process.

569 F.2d at 618–19 (quotation marks and footnotes omitted). Cuba's "sovereignty" over Guantanamo is ultimately only titular. Only U.S. law applies there. *See* Pets. Amend. Supp. Opp. at 33 & n.71.

In *Juda v. United States*, 6 Cl. Ct. 441 (Cl. Ct. 1984), Marshall Islanders sought compensation for losses resulting from nuclear tests there. The Court refused to dismiss the Constitutional claims, despite the lack of U.S. sovereignty, because of the "unique" relationship of the United States to the Trust Territory. Rejecting the notion that only fundamental rights applied to territories over which the U.S. exercises governing authority, the Court held:

> The Bill of Rights incorporates protections to society that are basic to our constitutional system of government. These protections are rooted in the recognition that government power is subject to arbitrary abuse. . . . All of the restraints of the Bill of Rights are applicable to the United States wherever it has acted. The concept that the Bill of Rights and other constitutional protections against arbitrary government are to be applied selectively on a territorial basis cannot be justified in the 1980s.

Id. at 458.

Consistent with *Ralpho*, the Fifth Circuit repeatedly extended fundamental rights to citizens and non-citizens in the Canal Zone although the U.S. was not sovereign there, correctly treating that location as akin to an unincorporated territory. *See, e.g., Government of the Canal Zone v. Yanez P. (Pinto)*, 590 F.2d 1344, 1351 (5th Cir. 1979) (right of confrontations a fundamental requirement for a fair trial, and such right should be read as "implicit in congressional legislation dealing with trials in a territory not incorporated into the United States."); *United States v. Husband R. (Roach)*, 453 F.2d 1054, 1058 (5th Cir. 1971) ("In areas under the jurisdiction of the United States to which the Fifth Amendment is applicable, an alien is entitled to its protection to the same extent as a citizen."); *Kemp v. Government of Canal Zone*, 167 F.2d 938, 942 & n.1 (5th Cir. 1948) (citing to *Insular Cases* and commenting on application of certain constitutional rights in Canal Zone). As at Guantanamo, the United States acquired rights in the Canal Zone early in the 20th century. Similar to the Guantanamo lease, the 1903 Isthmian Canal Convention granted the U.S. "in perpetuity the use, occupation and control of a zone of land . . . for . . . the Canal . . ." Isthmian Canal Convention of 1903, U.S.-Pan., T.S. No. 431, 33 Stat. 2234, 2234-35 (Article II) (1903). The Convention also granted to the United States "all the rights, power, and authority within the zone . . . which the United States would possess and exercise if it were

the sovereign of the territory. . . ." *Id.* at 2235 (Article III). Ultimate sovereignty, however, was reserved to Panama, as it was to Cuba. *Id.*

In *Government of the Canal Zone v. Scott,* the Fifth Circuit, guided by the *Insular Cases*, recognized that the status of the territory—not the status of Scott as a U.S. citizen—controlled its rights analysis:

> [Scott's] argument disregards the territorial status of the Canal Zone. . . . The constitution does not require the extension of all protections of the bill of rights to territories governed by the United States. . . . [N]on-citizens and citizens of the United States resident in such territories are treated alike, since it is the territorial nature of the Canal Zone and not the citizenship of the defendant that is dispositive.

502 F.2d 566, 567-68 (5th Cir. 1974); *see also Yanez P. (Pinto)*, 590 F.2d at 1351 (fundamental rights are implicit in "legislation dealing with . . . a territory not incorporated into the United States"); *Husband R. (Roach)*, 453 F.2d at 1057 ("The Canal Zone is an unincorporated territory of the United States. Laws applicable in the Canal Zone are enacted by Congress . . . .").

B. Neither Eisentrager Nor Verdugo Bars Application Of Fifth Amendment Due Process Rights to Petitioners.

1. *After* Rasul, *Eisentrager Does Not Apply at Guantanamo.*

Rasul held that "nothing in *Eisentrager*, or in any of our other cases categorically excludes aliens detained in military custody outside the United States, from the 'privilege of litigation' in U.S. courts." *Rasul*, 124 S. Ct. at 2698 (citation omitted). Respondents nonetheless assert that *Eisentrager* still restricts availability

of even fundamental constitutional rights to the "sovereign territory of the United States." Resp. Br. at 13–16. Respondents ignore *Rasul's* conclusion that *Eisentrager* does not control because the rights determination does not turn on sovereignty-based categorical exclusions and bright lines. Which rights are afforded turns on a case-by-case analysis of the relationship of the U.S. to the particular territory. *See, e.g., Reid v. Covert*, 354 U.S. 1, 75 (1957); *Verdugo*, 494 U.S. at 277-78 (Kennedy, J., concurring). Pets. Br. at 18-19.

Rasul also noted that the *Eisentrager* petitioners were "at all times imprisoned outside the United States," while Guantanamo prisoners "have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control." 124 S. Ct. at 2693. That critical distinction, consistent with the cases cited in footnote 15, establishes that Guantanamo prisoners have rights because the degree of U.S. control over Guantanamo is different from that exercised at the Landsberg prison.

The relationship of the U.S. to the Landsberg prison in Germany further undermines Respondents' reliance on *Eisentrager*. Allied Forces exercised only temporary authority over the Landsberg prison following WWII. *See Gherebi v. Bush*, 374 F.3d 727 (9th Cir. 2004):

> Nor do we believe that the jurisdiction the United States exercised over Landsberg Prison in Germany is in any way analogous to the jurisdiction that this nation exercises over Guantanamo. When the Johnson petitioners were detained in Landsberg, the limited and

> shared authority the U.S. exercised over the Prison on a temporary basis nowhere approached the United States' potentially permanent exercise of complete jurisdiction and control over Guantanamo, including the right of eminent domain.

Id. at 734.

Landsberg housed war criminals from 1946 to 1958.[5] In 1946, the Supreme Commander of American Forces in Germany declared Landsberg a war criminal prison.[6] In September of 1949, the U.S. Military Government in occupied Germany was terminated; prisoners then fell under the joint control of the Allied High Commission (Great Britain, France, and the United States).[7] The prison was operated for only a very short period of time by occupying American forces. Plainly, temporary, joint control of the Landsberg prison is not comparable to the indefinite, total control the United States exercises over Guantanamo.

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[5] *See* Landsberg Prison for War Criminals, http://www.buergervereinigung-landsberg.org/English/warcriminals/warcriminals.shtml.

[6] *See id.*

[7] STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 92D CONG., DOCUMENTS ON GERMANY: 1944-1970, *Statement by the Department of State on the Establishment of the Federal Republic of Germany and the Entry into Force of the Occupation Statute*, at 166 (Comm. Print 1971); and, STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 92D CONG., DOCUMENTS ON GERMANY: 1944-1970, *Basic Principles for Merger of the Three Western German Zones of Occupation and Creation of an Allied High Commission, Signed at Washington, April 8, 1949*, at 150 (Comm. Print 1971).

Justice Kennedy's *Rasul* concurrence also rejected this Court's suggestion, *see Al Odah v. United States*, 321 F.3d 1134, 1140 (D.C. Cir. 2003), that Guantanamo is like the Landsberg prison in *Eisentrager*.

> 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.

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

In *Eisentrager*, "the scenes of [the prisoners'] offense, their capture, their trial and their punishment were all beyond the *territorial jurisdiction of any court of the United States*." 339 U.S. 763, 778 (1950) (emphasis added). *Rasul* determined Guantanamo is "within 'the territorial jurisdiction' of United States." *Rasul*, 124 S. Ct. at 2696 (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949). Therefore, fundamental Constitutional rights apply.[8]

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[8] Respondents cite to three instances in which this Court declined to extend constitutional protections to nonresident aliens on the ground that they did not have "substantial connections" with the United States. *See* Resp. Br. at 15 (citing *Jifry v. FAA*, 370 F.3d 1174, 1182-83 (D.C. Cir. 2004), *32 County Sovereign Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002), and *People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999)). None of those cases involved a multi-year internment. *Verdugo* itself, which held that detention for "only a matter of days" within the United States was insufficient to entitle the detainee to the protection of the Fourth Amendment, expressly reserved the

2. *Verdugo Does Not Bar the Application of Constitutional Rights to Petitioners Held in Guantanamo.*

Verdugo is consistent with the cited reasoning of the *Insular Cases*. It held only that the Fourth Amendment warrant clause does not extend to the property of an alien in Mexico. The United States exerts no governing authority over Mexico. The nature of the United States' relationship with Mexico would not support applying Fourth Amendment protections to aliens there.

The *Verdugo* dicta Respondents so heavily rely on—"we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States," Resp. Br. at 9, 14 (quoting *Verdugo*, 494 U.S. at 269)—must be understood in light of the narrow issue confronting that Court. The focus of that case was sovereign status, and the *Verdugo* Court accordingly spoke in terms of "sovereign territory;" it neither addressed nor resolved the different questions surrounding the rights of aliens imprisoned at Guantanamo, where the U.S. exercises "plenary and exclusive jurisdiction." *Rasul*, 124 S. Ct. at 2693. *Rasul* focused on those precise questions. The Court's description of the unique status of Guantanamo—recognizing that Guantanamo effectively "belongs to the

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question whether a respondent "might claim the protection of the Fourth Amendment if the duration of his stay in the United States were to be prolonged—by a prison sentence, for example." *Verdugo-Urquidez*, 494 U.S. at 271-72. At a minimum, the court left open the possibility that in circumstances such as Petitioners' constitutional rights may apply. *See id.*

United States" for these purposes, 124 S. Ct. at 2700 (Kennedy, J., concurring)—plainly clarifies and limits *Verdugo*'s holding.[9]

Respondents ignore the fact that *Rasul* looked to Justice Kennedy's *Verdugo* concurrence, *see* 124 S. Ct. at 2698, n.15, which rejected the "proposition . . . that the Constitution 'does not apply' overseas," and adopted a functional analysis that measures the process "due a defendant in the particular circumstances of a particular case." 494 U.S. at 277–78 (quoting *Reid v. Covert*, 354 U.S. 1, 74–75 (1957) (Harlan, J., concurring in judgment)). That functional analysis is wholly consistent with and draws upon the principles in the *Insular Cases*, cited in *Rasul*, *see supra* at § I. A. *See Rasul*, 124 S. Ct. at 2698, n.15.

Justice Kennedy joined the *Verdugo* majority because he was concerned with the practical difficulties of applying the Fourth Amendment in Mexico. *Cf.*

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[9] Justice Kennedy's *Verdugo* concurrence articulates an alternative rationale nearly irreconcilable with the majority he joined. Consequently, *Verdugo* has been interpreted as, in effect, a plurality opinion, in which three Justices argued that the Fourth Amendment should be available to aliens abroad who are subject to U.S. criminal laws, two Justices limited their discussion to the facts at issue, and four Justices endorsed a bright line rule that constitutional protection is limited to aliens within U.S. sovereign territory who have significant, voluntary contacts with the U.S. *See, e.g.*, Wayne R. Lafave et al., *Criminal Procedure* § 3.1(i) (3d ed. 1999) (given the fractured opinion in *Verdugo*, its application to "a foreign search of an alien's property made even without probable cause is less than clear."). The questionable significance of *Verdugo* explains why *Rasul* cited the *concurring* opinion in that case.

Verdugo, 494 U.S. at 276-78. Those concerns are not present here; the United States exercises all authority at Guantanamo and Cuba has none.

Petitioners' reading of *Rasul* is consistent with *Eisentrager*. *See* Resp. Br., at 23. *Rasul* decided an issue not presented in *Eisentrager* or *Verdugo*. *Eisentrager* involved claims of admitted enemy aliens, already adjudicated prisoners of war, and held outside the territorial jurisdiction of U.S. courts. *Verdugo* involved conduct in Mexico where the U.S. exerted no authority. In contrast, *Rasul* addressed the circumstances of Guantanamo, where the United States exercises every conceivable manifestation of control, save titular sovereignty. Because Guantanamo is within the territorial jurisdiction of U.S. courts, Petitioners there must be accorded fundamental constitutional protections.

Rasul applies directly here and controls in any conflict among it, *Eisentrager*, and *Verdugo,* since—"if a Supreme Court precedent 'has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." Resp. Br. at 23–24 (quoting *Tenet v. Doe*, 125 S. Ct. 1230, 1235 (2005)). To read *Rasul* as Respondents urge would violate a fundamental canon of interpretation: that decisions of the Supreme Court—particularly on critical matters like these—should not be "rendered meaningless." *See, e.g., Guardians Ass'n of New York*

City Police Dep't, Inc. v. Civil Serv. Comm'n of New York, 633 F.2d 232, 268 (2d Cir. 1980) (internal quotation marks omitted).

II. THE 2004 CSRT REVIEW FAILED TO PROVIDE ADEQUATE PROCESS

Respondents established the CSRT immediately after the decisions in *Rasul* and *Hamdi*, in large part to avoid judicial oversight at Guantanamo. The contention that CSRTs conducted after nearly three years of internment provide "notice" sufficient to satisfy the Fifth Amendment is hollow. The CSRT records show that the tribunals lacked evidence legally sufficient to support their Enemy Combatant determinations against Boumediene Petitioners. *See* J.A. 1218-2182.

A. Respondents Owed Petitioners Fifth Amendment Due Process.

Respondents offer no cases to support their remarkable assertion—one not advanced below—that Petitioners' due process rights "are plainly less extensive than those of American citizens in this country." Resp. Br. at 33. The absence of case support is revealing, but not surprising. Due process is among the fundamental rights shared equally by citizens and non-citizens within the territorial jurisdiction of the United States. *See Downes v. Bidwell*, 182 U.S. 244, 282 (1901). Neither the ongoing war on terror nor Respondents' procedurally deficient "enemy combatant" determinations diminishes Petitioners due process rights. Indeed, *Harisiades v. Shaughnessy*, cited by Respondents for the proposition that war allows distinctions between the rights of aliens and citizens, *see* Resp. Br. at

35, confirms that here, aliens "stand[] on an equal footing with citizens," and "may invoke the writ of *habeas corpus* to protect [their] personal liberty." 342 U.S. 580, 586 & n.9 (1952).[10]

B. The CSRTs Were Created to Avoid Judicial Oversight, Not to Afford Meaningful Due Process.

1. *Notice After 33 Months of Internment Is Not Adequate.*

Respondents' Orwellian euphemism for three years of *incommunicado* internment without process or charge is "pre-CSRT delay." Resp. Br. at 36. Respondents now argue that period is *irrelevant* to the validity of Petitioners' present detention. By this artifice, Respondents would deny Petitioners any reasonable notice of the conduct resulting in their interment. Such notice is a core element of our justice system. Due process must be "granted at a meaningful time and in a meaningful manner." *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2649 (2004) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)).[11] Respondents cannot cure their failure now.

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[10] Respondents conjure up a two-tiered system of due process limiting Petitioners, "[a]t most," to "a simple notice of the charge and an opportunity to be heard." Resp. Br. at 35. However, Respondents' only support for this miserly approach, *Yates v. District of Columbia*, 324 F.3d 724, 726 (D.C. Cir. 2003), addresses not liberty interests, but the due process rights of citizen teachers in continued public employment. It in no way addresses the issue of the level of due process rights to which aliens are entitled.

[11] Criminal proceedings, when liberty is at stake, require prompt due process. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) ("absent extraordinary circumstances," court must determine probable cause within 48 hours of arrest

2. *That The CSRTs Share Common Elements With Article V Tribunal Procedures Does Not Make Them Adequate.*

Respondents detailed comparison between the CSRTs and Regulation 190-8 procedure is unpersuasive, especially because the CSRTs acted absent legally sufficient evidence. *See* Resp. Br. at 30-33; J.A. 1218-2182. The absurdity of Respondents' clinging reliance on *Hamdi* dicta, 124 S. Ct. at 2651, is unavoidable, when one recognizes that on the day before Respondents interned them, the Bosnian Supreme Court had ordered the release of the Boumediene Petitioners following a 90 day international investigation. *See* Pets. Br. at 6. Article V

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without warrant); *United States v. Montalvo-Murillo*, 495 U.S. 711, 728 (1990) (the gravity of the deprivation of liberty imposed by physical detention requires that relief be speedy if it is to be effective) (*citing Stack v. Boyle*, 342 U.S. 1, 4 (1951)). Even in cases concerning deprivation of a property interest, due process generally requires a hearing *before* deprivation occurs. *See Lepre v. Dep't of Labor*, 275 F.3d 59, 69 (D.C. Cir. 2001). When notice follows deprivation, the government must justify its delay. *See National Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 208 (D.C. Cir. 2001) (requiring "an adequate showing to the court" before postponing notice of designation as terrorist organization). *Hamdi* states "process is due . . . when the determination is made to *continue* to hold those who have been seized." *Hamdi*, 124 S. Ct. at 2649; *see also id.* at 2660 (agreeing with "the terms of the plurality's remand" for a detainee challenging enemy combatant status) (Souter, J., concurring). Respondents made that determination no later than January 2002, when they seized Petitioners in Bosnia—notwithstanding a release order from the Bosnian Supreme Court. Process was due then—as would have been the case in any Article V-type proceeding advocated by Respondents, close in time to the initial decision to detain. Unsurprisingly, Respondents can cite no supporting authority for the astounding suggestion that Petitioners must show prejudice in this context. *See* Resp. Br. at 36. It is well-recognized that "[d]elay can lead to a less accurate outcome as witnesses become unavailable and memories fade." *New York v. Hill*, 528 U.S. 110, 117 (2000).

procedures, devised to accommodate "the fog of war," have no place in the secure context of Guantanamo. Petitioners' facts and Guantanamo's context mandated more process.

Because Respondents denied Petitioners any process for 33 months after imprisonment, the courts must "ensure that the minimum requirements of due process are achieved." *Hamdi*, 124 S. Ct. at 2651.

3. *Petitioners' Prohibition on Assistance of Counsel Further Undermined the CSRT Process*.

Respondents are wrong—a *Mathews*[12] balancing demonstrates that Petitioners should have been afforded counsel. The "personal representatives" were no substitute because: (a) they are neither advocates nor lawyers; and (b) they had neither the means nor the obligation to gather evidence, *see* J.A. 0279 at ¶ C.[13]

Respondents rely on *Wolff v. McDonnell*, 418 U.S. 539 (1974), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), to establish that counsel is generally not required

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[12] *See Mathews v. Eldridge*, 424 U.S. 319 (1976)

[13] Respondents direct the Court to the Army tribunals convened to determine prisoner-of-war status as examples for the process they contend was due the Petitioners. Notwithstanding the material distinguishing factors Petitioners identified above, Petitioners note that such tribunals, convened during the Vietnam War, included the right to counsel, who could confer confidentially with the detainee and any witnesses. *See Contemporary Practice of the United States Relating to International Law*, 62 Am. J. Int'l L. 754, 771-72 (1968) (reproducing "Criterion for Classification and Disposition of Detainees," Annex A of Directive Number 381-46 of December 27, 1967).

"[e]ven where the criminal punishment of U.S. citizens is at issue . . ." in administrative proceedings not unlike the CSRTs. Resp. Br. at 38. But the prison discipline and parole revocation proceedings in *Wolff* and *Gagnon* are inapposite. The CSRTs were the first "hearings" afforded Petitioners, and confirmed Petitioners would remain interned *indefinitely*. The prisoners in *Wolff* and *Gagnon* were entitled to diminished due process rights, because each *already had* been convicted of a state crime. *See Wolff*, 418 U.S. at 560; *Gagnon*, 411 U.S. at 789.

4. *The CSRTs Afforded No Meaningful Opportunity to Rebut Evidence Against Them*.

Respondents assert *carte blanche* authority to deny Petitioners all access to classified information, despite the risk of an indefinite (and possibly permanent) loss of liberty, *see* Resp. Br. at 40-42, and mischaracterize Petitioners' argument as a demand for "wholesale access" to classified information. Petitioners were owed what due process requires: evidence helpful to rebut unsupported allegations that they should be deemed enemy combatants and could be imprisoned, without charge, for life. *See United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989).

Respondents invoke the specter of unreviewable national security interests to support withholding classified information from Petitioners, their counsel, and from the Court as well. Incredibly, even in this case where the classified CSRT record has been shown to contain critical information, *see* Pets. Br. at 48-51, Respondents refuse to concede that *ex parte*, *in camera* review of classified

information should be permitted to reduce the prospect of an erroneous status determination.[14]

Respondents cite no authority to support their claimed authority to detain indefinitely, without any independent review of the classified evidence. Indeed the scant authority offered addresses only monetary or administrative—not liberty—interests. *See, e.g., Jifry v. F.A.A.*, 370 F.3d 1174, 1176-77 (2004) (revocation of airmen certificates by Transportation Safety Administration); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 159 (D.C. Cir. 2003) (designating organization as "Specially Designated Global Terrorist"); *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1239 (D.C. Cir. 2003) (designations as "foreign terrorist organizations"); *National Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 196 (D.C. Cir. 2001) (same).[15]

In analogous criminal or alien removal proceedings, where liberty is also at stake, providing counsel with access to classified information, or crafting

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[14] For the proposition that "this Court repeatedly has rejected due process challenges to the consideration of classified evidence ex parte and in camera," Resp. Br. at 42, Respondents cite numerous decisions in which the Court has undertaken just such review of the classified information relied on by the government for its determination. *See, e.g., Jifry*, 370 F.3d at 1181-82; *National Council*, 251 F.3d at 197 (citing 8 U.S.C. § 1189(b)(2)); *id.* at 202.

[15] The other decisions cited by Respondents do not implicate due process, but instead concern unrelated issues. *See North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (First Amendment right of access to hearing); and *CIA v. Sims*, 471 U.S. 159 (1985) (right to classified information under FOIA).

acceptable substitute procedures, is an indispensable due process requirement. *See, e.g., United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998) ("the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. III (1994), provides procedures designed to protect the rights of the defendant while minimizing the associated harm to national security."); *Rafeedie v. INS*, 795 F. Supp. 13, 19 (D.D.C. 1992) (due process violated in exclusion proceedings because, *inter alia*, opportunity to submit information and argument was "exercised in ignorance of the nature of the confidential information with which he has been charged," depriving "him of any opportunity to confront the critical adverse evidence.").[16]

5. *Respondents' Evolving Definitions of "Enemy Combatant" Denied Petitioners Due Process.*

Respondents now contend the Court should focus on only their most recent definition of "enemy combatant"—one created 33 months after Respondents caused Petitioners imprisonment—and then argue, by selective reference to a criminal law standard, that the definition need only "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." Resp. Br. at 37 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

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[16] Counsel access to classified information is critical here where overbroad and inconsistent classification determinations have been made with respect to material in Petitioners' classified CSRT files. With the exception of only a few single words, every sentence of "classified" information in Petitioners' opening brief filed under seal—citing and quoting directly from the "classified" CSRTs—was determined to be unclassified.

A definition constructed years after the deprivation of liberty can give no meaningful notice of what is prohibited.[17] Respondents inaccurately assert other definitions cited by Petitioners applied only to other prisoners, but Respondents publicly offered those definitions throughout Petitioners' imprisonment. *See* Pets. Br. at 43-45.

III. THE AUMF DOES NOT AUTHORIZE RESPONDENTS TO INTERN THE BOUMEDIENE PETITIONERS

Respondents' interpretation is inconsistent with the plain language and legislative history of the AUMF. That law authorizes the President to act against those who "planned, authorized, committed, or aided the terrorist attacks of 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, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001). The legislative history confirms Congress chose its words carefully, and granted authority where there exists a nexus between targeted individuals and the 9/11 attacks.

Congress declined to authorize the use of force against terrorist threats unconnected with 9/11. *See, e.g.*, 147 Cong. Rec. H5666 (daily ed. Sept. 14, 2001)

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[17] "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*, 408. U.S. at 108.

(statement of Rep. Cardin) ("This resolution limits [its authorization of military force] to respond to the September 11 attacks on our Nation."); *id.* at S9417 (statement of Sen. Feingold) ("It does not contain a broad grant of powers, but is appropriately limited to those entities involved in the attacks that occurred on September 11."); *id.* at S9416 (statement of Sen. Levin) ("[T]his authorization for the use of force is limited to the nations, organizations, or persons involved in the terrorist attacks of September 11. It is not a broad authorization for the use of military force against any nation, organization, or persons who were not involved in the September 11 terrorist attacks."). This unambiguous record belies Respondents' assertion that Petitioners could be detained if they were not associated with those involved with 9/11. *Cf.* Resp. Br. at 52.[18]

The AUMF is silent about what "support" for a 9/11 terrorist organization brings an individual under the AUMF. Compounding that ambiguity, Respondents misapply the "traditional laws of war," arguing that the AUMF extends beyond those individuals and organizations actively engaged in armed conflict against the United States and permits "the detention of members or supporters of hostile

[18] A White House draft of the AUMF that would have given the president authority to "deter and pre-empt *any future acts of terrorism and aggression* against the United States" (emphasis added) was rejected because it might justify military action unrelated to the 9/11 attacks. Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Force Against International Terrorism*, 43 HARV. INT'L L.J. 71, 73 (2002).

forces." Resp. Br. at 53. But every example cited involves an individual assisting military operations in a battlefield context. *See* Resp. Br. at 54. Petitioners' pleadings and CSRT files show they were living and working in Bosnia, were never combatants, and have never participated (directly or otherwise) in hostilities against the United States. *See* J.A. 1218-2182; Pets. Br. at 4-5.

Hamdi, which states that the power to detain actual combatants is an "important incident of war necessary to prevent a return to the battlefield," provides no support for detention of Petitioners, who were taken—in violation of Bosnian law[19]—from their families and jobs in a country allied with the U.S. The AUMF does not authorize "indefinite detention for the purpose of interrogation." *Hamdi*, 124 S. Ct. at 2641.

IV. THE HABEAS STATUE PROVIDES A CAUSE OF ACTION TO ENFORCE PETITIONERS' RIGHTS UNDER INTERNATIONAL LAW

The general *habeas* statute provides a cause of action to enforce rights incident to *habeas corpus*—*i.e.*, the right not to be unlawfully detained—even absent a treaty-based cause of action.[20] *See* Pets. Br. at 30-33. Respondents do not address the merits of this argument, implicitly conceding the point. Instead, they offer two contentions. *Initially*, Respondents note, as did Petitioners, that circuits

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[19] *See* Pets. Br. at 5-7.

[20] 28 U.S.C. § 2241(c)(3) (extends the writ to prisoners "in custody in violation of the Constitution or laws or treaties of the United States.").

reaching the issue have declined to enforce non self-executing treaties via *habeas corpus*. *See* Pets. Br. at 30 n.30. However, Respondents ignore that:

- this position is not the law of this Circuit;
- courts reaching the issue did so "in a rather cursory manner," *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 218 n.22 (3d Cir. 2003), without analysis; and
- cited *habeas* challenges collaterally attacked prior proceedings, which offered full Due Process protections, while here, Petitioners had *no* meaningful process. (*See supra*, Part II.)

See Pets. Br. at 30 n.30.

Respondents' "self-execution" argument ignores the cause of action against unlawful imprisonment, which the *habeas* statue offers, independent of any private right of action for damages or injunctive relief. Respondents conflate the question whether a treaty is "self-executing" with the question whether it affords a private right of action. *See* Pets. Br. at 31 n.31; *Medellin v. Dretke*, No. 04-5928, 2005 WL 1200824, at *16 (U.S. May 23, 2005) ("the questions of whether a treaty is self-executing and whether it creates private rights and remedies are analytically distinct.") (O'Connor, J., dissenting from dismissal as moot). *See* Pets. Br. at 32-33 (distinguishing self-execution from right of action). Here, neither question is relevant, since the *habeas* statute provides an independent cause of action.

Respondents attempt to evade the ICCPR's arbitrary detention prohibition by arguing that Guantanamo is beyond the "territory" of the United States within the meaning of the ICCPR, Resp. Br. at 60, but *Rasul* forecloses this argument. *See Rasul*, 124 S. Ct. at 2696.

Respondents' grab bag of arguments to avoid the *Paquete Habana* doctrine do not withstand scrutiny. First, there is no contrary domestic law in Guantanamo; Respondents resort to the AUMF for this purpose is unavailing. Second, Respondents ignore the customary international legal norms prohibiting arbitrary detention, *see* Pets. Br. at 35-39, and claim that (1) Petitioners failed to identify a customary international rule, and (2) the rule Petitioners *do* identify is unavailable after *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004). Respondents' second contention refutes the first, and Respondents' strained reading of *Sosa* undermines the second. *Sosa* itself makes clear: (1) that decision concerns *actions under the Alien Tort Statute* ("ATS"), not *habeas*, and (2) those norms of international law, cognizable as federal common law are predicated on categories available in 1789, which indisputably include *habeas* challenges. *See, e.g., Rasul*, 124 S. Ct. at 2696-97 nn.11-13 (citing Eighteenth and Nineteenth century *habeas* cases).

Third, *Sosa* does not address whether arbitrary detention is an enforceable norm of customary international law. *See* Resp. Br. at 62. *Sosa* only addresses whether the detention there supported an ATS damages action. *See Sosa*, 124 S.

Ct. at 2767-68. Courts have consistently found violations of this norm in circumstances much less egregious than here. *See* Pets. Br. at 38-39.

Fourth, Respondents assert customary international law is not enforceable via *habeas*, ignoring *Paquete Habana* and its progeny. They then observe accurately, but irrelevantly, that *Sosa* dealt with the ATS, and misconstrue a footnote in *Sosa* to preclude courts from enforcing federal common law. *See* Resp. Br. at 63; *cf. Sosa*, 124 S. Ct. at 2765 n.19 (comparing judicial authority under ATS to more circumscribed role under 28 U.S.C. § 1331 (federal question jurisdiction). Respondents' effort to limit the definition of "laws" as that term appears in Section 2231(c)(3) to mean only "statutes," contradicts the Supreme Court's interpretation of "laws" in Section 1331. *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 100 (1972) (giving "'laws' its natural meaning" and concluding that the term includes common law); *see also* Pets. Br. at 35 n.34.

Finally, if the Court accepts Respondents' claims that the laws of war apply to Petitioners (which Petitioners reject), then Petitioners also must benefit from corresponding rights and protections of those laws, *e.g.*, the Geneva Conventions.[21]

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[21] It is well settled that courts will override the Executive's treaty interpretation when necessary. *E.g.*, *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 136 (1989) (Brennan, J., concurring) (noting that Court was rejecting Executive's interpretation of Warsaw Convention); *Perkins v. Elg*, 307 U.S. 325, 328 (1939) (declining to adopt Executive's treaty interpretation); *Johnson v. Browne*, 205 U.S. 309, 318-21 (1907) (same).

See Pets. Br. at 28-30. Respondents strain to avoid this result. First, they assert the Geneva Conventions are not enforceable in *habeas*, again, confusing the availability of civil damages or injunctive relief with the Executive's burden to justify detention. *See* Resp. Br. at 30-33. *Second*, Respondents also recite that (1) *al Qaeda* is not a High Contracting Party to the Geneva Conventions, and (2) Petitioners were abducted, far from any "occupied territory."[22] Even the court below acknowledged (but ignored) its obligation to accept as true Petitioners' unqualified denial of *al Qaeda* links.

CONCLUSION[23]

For the foregoing reasons, this Court should reverse the Order of the Court below and order the District Court to issue the writs, forthwith, or, alternatively, remand with instructions to hold an immediate hearing on the merits of the Petitions.

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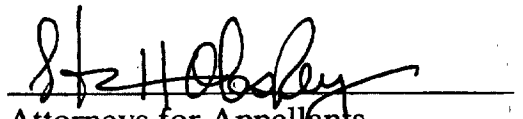
[22] It is for this same reason that Article II provides no authority for the Executive to detain Petitioners.

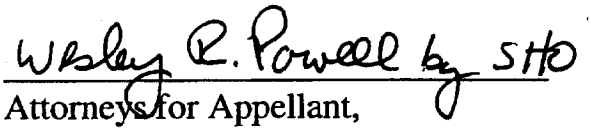
[23] Respondents failed to raise below their belated argument that the President is not a "proper *habeas* respondent," Resp. Br. at 64-65, and the issue is not properly before this Court. Nevertheless, Respondents' argument fails on the merits since it is the President who, under the AUMF, expressly was authorized to use force against—and detain, *see Hamdi*, 124 S. Ct. at 2635—those "he determines" planned, authorized, or committed the September 11, 2001 attacks. *See* AUMF. It is the President's erroneous determination that is at issue here.

Respectfully Submitted,



Attorneys for Appellants,
Lakhdar Boumediene, et al:

Stephen H. Oleskey
Louis R. Cohen (resident in D.C.)
Robert C. Kirsch
Douglas F. Curtis (Resident in N.Y.
Melissa A. Hoffer
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
Tel: (617) 526-6000
Fax: (617) 526-5000



Attorneys for Appellant,
Ridouane Khalid:

Wesley R. Powell
James Hosking
Christopher Land
Clifford Chance US LLP
31 West 52nd Street
New York, NY 10019-6131
Tel: (212) 878-8000
Fax: (212) 878-8378

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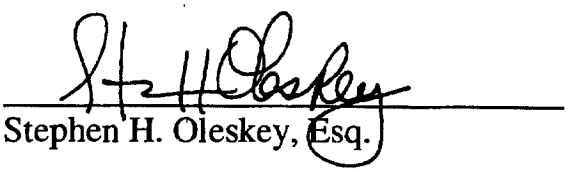
I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 6,872 words (which does not exceed the applicable 7,000 word limit).



Stephen H. Oleskey, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of June, 2005, caused the foregoing JOINT REPLY BRIEF OF APPELLANTS to be served upon the following persons via Federal Express.

Stephen H. Oleskey, Esq.

Eric David Miller, Esq.
Douglas N. Letter, Esq.
Robert Mark Loeb, Esq.
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001