[ORAL ARGUMENT TO BE SCHEDULED]

Nos. 05-5062, 05-5063

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

LAKHDAR BOUMEDIENE, et al.,
Petitioners-Appellants,

v.

GEORGE W. BUSH, et al.,
Respondents-Appellees.

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

BRIEF FOR THE FEDERAL GOVERNMENT APPELLEES

PAUL D. CLEMENT
Acting Solicitor General

PETER D. KEISLER
Assistant Attorney General

GREGORY G. KATSAS
Deputy Assistant Attorney General

DOUGLAS N. LETTER
(202) 514-3602
ROBERT M. LOEB
(202) 514-4332
ERIC D. MILLER
(202) 514-5735
Attorneys, Appellate Staff
Civil Division, Room 7268
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

1. In Khalid v. Bush, No. 04-CV-1142-RJL (D.D.C.), petitioners in the district court were Mourad Benchellali, Amel Benchellali, Nizar Sassi, Sassi Sassi, Ridouane Khalid, and Mohammed Khalid. Respondents were George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; Col. Nelson J. Cannon, Commander, Camp Delta. Charles B. Gittings, Jr., sought leave to file a brief as amicus curiae in the district court; Global Rights has filed an amicus brief in this Court.

2. In Boumediene v. Bush, 04-CV-1166-RJL (D.D.C.), petitioners in the district court were Lakhdar Boumediene, Abassia Bouadjmi, Mohammed Nechla, Badra Baouche, Emina Lahmar, Saber Lahmar, Sabiha Delic-Ait Idir, Mustafa Ait Idir, Anela Kobilica, Belkacem Bensayah, Emina Planja, and Hadj Boudella. Respondents were George W. Bush, President; Donald Rumsfeld, Secretary of Defense; Gen. Jay Hood, Commander, Joint Task Force, Guantanamo Bay, Cuba; Col. Nelson J. Cannon, Commander, Camp Delta. Charles B. Gittings, Jr., sought leave to file a brief as amicus curiae in the district court; Global Rights has filed an amicus brief in this Court.

B. Rulings Under Review

These consolidated appeals seek review of the memorandum opinion and order entered by Judge Leon on January 19, 2005 and reported at 355 F. Supp. 2d 311.

C. Related Cases

Many habeas and other cases have been filed in the District Court for the District of Columbia by or on behalf of detainees at Guantanamo Bay, Cuba.

1. In eleven of these habeas actions, Hicks (Rasul) v. Bush, No. 02-CV-0299-CKK; Al-Odah v. United States, No. 02-CV-0828-CKK; Habib v. Bush, No. 02-CV-1130-CKK; Kurnaz v. Bush, No. 04-CV-1135-ESH; Khadr v. Bush, No. 04-CV-1136-JDB; Begg v. Bush, No. 04-CV-1137-RMC; El-Banna v. Bush, No. 04-CV-1144-RWR; Gherebi v. Bush, No. 04-CV-1164-RBW; Anam v. Bush, No. 04-CV-1194-HHK; Almurbati v. Bush, No. 04-CV-1227-RBW; and Abdah v. Bush, No. 04-CV-1254-HHK, the district court (Green, J.) granted in part and denied in part the government's motions to dismiss. See In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005). That decision is at issue in cross-appeals currently pending in this Court (Nos. 05-5064 and 05-5095 through 05-5116). The Court has ordered those cross-appeals to be scheduled for oral argument together with the present appeals.

2. On January 31, 2005, Judge Green entered a separate unpublished order in the eleven Guantanamo Detainee Cases directing that petitioners' counsel be given access to classified information contained in the government's unredacted factual returns to the petitions. On March 14, the government filed a notice of appeal from the order. That appeal is pending before this Court as No. 05-5118.

3. The Al Odah, Rasul, and Habib cases, listed above, were previously before this Court in Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), and before the Supreme Court in Rasul v. Bush, 124 S. Ct. 2686 (2004).

4. In Hamdan v. Rumsfeld, No. 04-CV-1529-JR, the district court held that one of the Guantanamo Bay detainees could not lawfully be tried by a military commission for war crimes. See 344 F. Supp. 2d 152 (D.D.C. 2004). An appeal from that decision is pending in this Court (No. 04-5393) and was argued on April 7, 2005.

5. There are numerous other habeas cases brought by or on behalf of Guantanamo Bay detainees pending in the district court below: Belmar v. Bush, No. 04-1897 (J. Collyer); Al-Qosi v. Bush, 04-CV-1937 (J. Friedman); Al-Marri v. Bush, No. 04-2035 (J. Kessler); Paracha v. Bush, No. 04-2022 (J. Friedman); Zemiri v. Bush, No. 04-2046 (J. Kollar-Kotelly); Deghayes v. Bush, No. 04-CV-2215 (J. Collyer); Abdullah v. Bush, No. 05-CV-23 (J. Roberts); Mustapha v. Bush, No. 05-CV-22-JR (J. Robertson); Al-Joudi v. Bush, 05-CV-0301 (J. Kessler); Al-Mohammed v. Bush,

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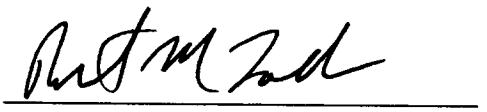
6. In addition, a habeas petition has been filed purportedly on behalf of all Guantanamo detainees who have not previously filed individual cases. Does 1-570 v. Bush, 05-CV-313C (J. Kollar-Kotelly).

7. Rasul v. Rumsfeld, No. 04-CV-1864-RMU, a Bivens case brought by a former Guantanamo Bay detainee, is pending in the district court below.

Counsel is not aware at this time of any other related cases within the meaning of D.C. Cir. Rule 28(a)(1)(C).



Robert M. Loeb
Counsel for Appellants

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GLOSSARY

ATS ..... Alien Tort Statute

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

CSRT ..... Combatant Status Review Tribunal

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

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

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

JA. ..... Joint Appendix

[ORAL ARGUMENT TO BE SCHEDULED]

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

Nos. 05-5062, 05-5063

LAKHDAR BOUMEDIENE, et al.,
Petitioners-Appellants,

v.

GEORGE W. BUSH, et al.,
Respondents-Appellees.

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

BRIEF FOR THE FEDERAL GOVERNMENT APPELLEES

STATEMENT OF JURISDICTION

In these habeas actions, the district court had jurisdiction under 28 U.S.C. §§ 1331 and 2241. On February 18, 2005, the district court entered a final judgment dismissing the petitions. Petitioners filed timely notices of appeal on February 22, 2005. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Due Process Clause of the Fifth Amendment applies to aliens captured abroad and held at Guantanamo Bay, Cuba.

2. If so, whether due process permits such aliens to be detained as enemy combatants based on formal adjudications conducted by Combatant Status Review Tribunals.

3. Whether the President, acting as Commander in Chief and pursuant to the congressionally approved Authorization for Use of Military Force (AUMF), was authorized to detain petitioners as enemy combatants.

4. Whether the International Covenant on Civil and Political Rights (ICCPR), the Fourth Geneva Convention, or customary international law are judicially enforceable through habeas corpus.

5. If so, whether those international provisions prohibit the detention of petitioners as enemy combatants.

6. Whether the President is a proper respondent in these habeas cases.

STATEMENT OF THE CASE

Petitioners are aliens captured abroad during military operations against al Qaeda and the Taliban. They are being held as enemy combatants at Guantanamo Bay, Cuba. In habeas actions, petitioners asserted that their detention violates the

Fifth Amendment, the AUMF, the ICCPR, the Fourth Geneva Convention, and customary international law. The district court granted the government's motion to dismiss these claims.

PROVISIONS AT ISSUE

The relevant texts of the Fifth Amendment, the AUMF, the Fourth Geneva Convention, the ICCPR, and Army Regulation 190-8 are set forth in an addendum to this brief.

STATEMENT OF FACTS

1. On September 11, 2001, the United States endured a foreign attack more savage, deadly, and destructive than any other sustained by the Nation in its history. That morning, members of the al Qaeda terrorist network hijacked four commercial airliners and crashed three of them into targets in the Nation's financial center and its seat of government. The fourth plane crashed in a field in Pennsylvania after passengers resisted the hijackers. The attacks killed almost 3,000 people, injured thousands more, destroyed billions of dollars in property, and exacted a heavy toll on the Nation's infrastructure and economy.

The President took immediate action to defend the country and prevent additional attacks, and Congress swiftly approved his use of "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." AUMF, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001).

The President ordered U.S. Armed Forces to subdue both the al Qaeda terrorist network and the Taliban regime that harbored it in Afghanistan. Although our troops have removed the Taliban from power and dealt al Qaeda forces a heavy blow, armed combat with al Qaeda and the Taliban remains ongoing. Many courageous Americans have been killed and wounded in combat, and many more continue to put themselves in harm's way in our mission to defeat al Qaeda and the Taliban and to protect this Nation from further attacks.

During these conflicts, the United States, consistent with the law and settled practice of armed conflict, has seized many hostile persons and detained a small proportion of them as enemy combatants. Approximately 520 of these enemy combatants are being held at the U.S. Naval Base at Guantanamo Bay, Cuba. Each of the Guantanamo Bay detainees was captured abroad and is a foreign national.

2. Each Guantanamo Bay detainee has received a formal adjudicatory hearing before a Combatant Status Review Tribunal (CSRT). Those tribunals, established pursuant to written orders by the Deputy Secretary of Defense and the Secretary of the Navy, were created specifically "to determine, in a fact-based proceeding, whether the individuals detained * * * at the U.S. Naval Base

Guantanamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation." JA 266.

During the CSRT proceedings, each detainee received substantial procedural protections modeled upon Army Regulation 190-8, which governs hearings under Article 5 of the Third Geneva Convention. Among other things, each detainee received notice of the unclassified factual basis for his designation as an enemy combatant and an opportunity to testify, call witnesses, and present relevant and reasonably available evidence. JA 271. Each detainee also received assistance from one military officer designated as his "personal representative for the purpose of assisting the detainee in connection with the [CSRT] review process." JA 1207. Another military officer, the recorder of each tribunal, is also required to present any evidence which might "suggest that the detainee should not be designated as an enemy combatant." JA 277. Each tribunal comprised three military officers sworn to render an impartial decision and in no way "involved in the apprehension, detention, interrogation, or previous determination of status of the detainee." JA 268. Each tribunal decision was subject to mandatory review first by the CSRT Legal Advisor and then the CSRT Director. JA 276. Out of 558 CSRTs, 38 have resulted in determinations that detainees are not enemy combatants. See CSRT Summary, http://www.defenselink.mil/news/Mar2005/d20050329csrt.pdf.

3. Many of the Guantanamo Bay detainees have filed habeas corpus actions. In Rasul v. Bush, 215 F. Supp.2d 55, 65-73 (D.D.C. 2002), the district court dismissed two such actions on the ground that, under Johnson v. Eisentrager, 339 U.S. 763 (1950), neither the federal habeas statute (28 U.S.C. § 2241) nor the general federal question statute (28 U.S.C. § 1331) extends habeas corpus jurisdiction to aliens held outside the sovereign territory of the United States.

This Court affirmed the jurisdictional dismissal. Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003). Citing Eisentrager, it agreed that "no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees." 321 F.3d at 1141. This Court further concluded that, under Eisentrager and other precedents, the Fifth Amendment does not apply to aliens held outside the sovereign territory of the United States, including aliens held at Guantanamo Bay, Cuba. See id. at 1140-44.

The Supreme Court reversed this Court on jurisdictional grounds and remanded the matter to the district court. Rasul v. Bush, 124 S. Ct. 2686 (2004). The Court reasoned that, on the question of "statutory jurisdiction" under 28 U.S.C. § 2241, Eisentrager had implicitly rested on the narrow construction of the habeas statute adopted in Ahrens v. Clark, 335 U.S. 188 (1948), and was therefore implicitly overruled on that question by Braden v. 30th Judicial Circuit Court of

Kentucky, 410 U.S. 484 (1973). See Rasul, 124 S. Ct. at 2694-95. The Court further reasoned that the text of the habeas statute, which was conceded to apply extraterritorially to American citizens at Guantanamo Bay, "draws no distinction between Americans and aliens." Id. at 2696. Finally, after "hold[ing] that § 2241 confers * * * jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base," the Court adopted a parallel construction of 28 U.S.C. § 1331. Id. at 2698-99. In concluding its opinion, the Court stressed that it had resolved only the question of jurisdiction, and had not addressed the merits of any Fifth Amendment or other claim raised by the detainees:

> Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now. What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. Answering that question in the affirmative, we reverse the judgment of the Court of Appeals and remand for the District Court to consider in the first instance the merits of petitioners' claims.

Id. at 2699.

4. After the remand in Rasul, numerous other Guantanamo Bay detainees filed their own habeas petitions. To date, two district courts have resolved dispositive motions in these cases.

a. In the order under review here, the district court dismissed the claims of seven Guantanamo Bay detainees raised in two habeas corpus actions, Boumediene v. Bush and Khalid v. Bush. JA 999-1032.[1] First, the court held that petitioners' detention is authorized by the AUMF and consistent with the President's war powers under Article II of the Constitution. JA 1007-12. The court then held that, under Eisentrager and its progeny, Fifth Amendment and other constitutional protections are unavailable to aliens outside United States sovereign territory, including aliens held at Guantanamo Bay, Cuba, and that nothing in Rasul implicitly overruled that settled principle. JA 1012-19. The court further held that petitioners had identified no applicable statutes, regulations, or treaties that create judicially enforceable rights. JA 1019-26. Finally, the court held that petitioners could not

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[1] The Khalid appeal is now moot because the only appellant in that case, petitioner Ridouane Khalid, was released from Guantanamo Bay and repatriated to France while this appeal was pending. See Boumediene Br. 7 & n.7. Khalid errs in contending (id. at 8 n.8) that his "continued detention in France," by the French authorities for possible criminal prosecution under French law, somehow keeps alive his present habeas action against putative United States custodians.

assert claims under customary international law, because such law is not judicially enforceable in the face of contrary legislative and executive action. JA 1026-32.

b. In a separate order, Judge Green granted in part and denied in part motions to dismiss eleven habeas cases brought by or on behalf of 54 Guantanamo Bay detainees. In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005). Cross-appeals from that decision are pending in this Court (Nos. 05-5064, 05-5095 through 05-5116) and have been consolidated with the Boumediene and Khalid appeals for purposes of oral argument.

SUMMARY OF ARGUMENT

Petitioners in this case are aliens who were captured overseas and are being held at Guantanamo Bay because they have been determined to be members or supporters of al Qaeda or associated forces engaged in armed conflict against the United States. The district court correctly dismissed their habeas petitions.

I. The Due Process Clause is inapplicable to aliens captured abroad and held at Guantanamo Bay, Cuba.

A. The Supreme Court has been "emphatic" in rejecting "the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990); see, e.g., Johnson v. Eisentrager, 339 U.S. 763, 781-85 (1950).

B. Under Eisentrager and its progeny, the applicability of the Fifth Amendment turns on whether the United States is sovereign, not whether it merely exercises control, over the territory at issue. See, e.g., Verdugo, 494 U.S. at 269. The United States is not sovereign over Guantanamo Bay; it operates a naval base there, pursuant to written agreements with Cuba, which expressly recognize Cuban sovereignty. Thus, petitioners have no claim to Fifth Amendment rights.

C. Petitioners err in suggesting that a footnote in Rasul v. Bush, 124 S. Ct. 2686 (2004), implicitly overruled the Fifth Amendment holding of Eisentrager. Rasul by its terms addressed only questions regarding statutory jurisdiction, and expressly declined to address any Fifth Amendment or other substantive constitutional question. Moreover, to construe a single, oblique footnote as implicitly overruling decades of settled precedent would be utterly implausible and would violate various governing interpretive principles. The other authorities cited by petitioners are even more inapposite.

II. The CSRT procedures satisfy any possibly applicable due process requirements.

A. In Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004), the Court established the extent of process due to an American citizen held in this country as an enemy combatant. The CSRT procedures exceed even that standard: they afford notice

to the detainee of the unclassified factual basis for his enemy combatant designation; they provide the detainee an opportunity to testify, call witnesses, and introduce evidence to rebut the Government's case; and they ensure a fair and impartial tribunal. The CSRT procedures afford more process to aliens abroad than the Hamdi plurality said was constitutionally sufficient for citizens held as enemy combatants in this country.

B. The specific procedures criticized by petitioners are not constitutionally problematic.

1. Petitioners received fair notice of the basis for their enemy combatant designation, and there is nothing impermissibly vague about the "enemy combatant" definition used by the CSRTs, which is keyed to the membership in or support of Taliban or al Qaeda forces.

2. The Constitution does not mandate that captured enemy combatants be given access to attorneys or to classified information. Attorneys are not constitutionally required for administrative CSRT proceedings, particularly where each detainee is afforded a personal representative. Moreover, the Supreme Court repeatedly has stressed the importance of protecting classified information, and this Court repeatedly has permitted its consideration by tribunals in camera and ex parte. Petitioners' claims are also contrary to longstanding historical practice.

Finally, petitioners have failed to show that they lacked a meaningful opportunity to present evidence or call witnesses.

3. The CSRTs afford a neutral decisionmaker, and petitioners' contrary assertions are entirely unsupported.

C. The district court properly declined to conduct its own factfinding based on petitioners' mere allegation that their CSRTs misjudged the facts. That approach to factfinding would violate garden-variety habeas and administrative law rules, and is particularly inappropriate and unsupportable in the sensitive context of enemy combatant determinations.

III. Petitioners' detention is consistent with the AUMF, which authorizes the President to take action against all "organizations" that "planned, authorized, committed, or aided" the September 11 attacks. Al Qaida is such an organization, and the CSRTs determined that petitioners were "part of or supporting Al Qaida forces, or associated forces that are engaged in hostilities against the United States." In any event, petitioners' detention as enemy combatants is permissible under the President's inherent constitutional authority as Commander in Chief.

IV. The district court correctly rejected petitioners' international law claims. Petitioners rely on the Fourth Geneva Convention and the ICCPR, but neither of these treaties creates judicially enforceable rights. Moreover, neither treaty is

applicable to petitioners. Petitioners' customary international law claims fail because of contrary legislative or executive determinations, because petitioners have not identified a clear rule of customary international law that would prohibit their detention, and because customary international law is not enforceable through habeas corpus.

V. The President is not a proper respondent in this litigation. Under settled law, suits challenging executive action must proceed against his subordinates.

STANDARD OF REVIEW

The district court's order rests on legal rulings subject to de novo review. See, e.g., United States v. Bookhardt, 277 F.3d 558, 564 (D.C. Cir. 2002).

ARGUMENT

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

The district court correctly concluded that petitioners, as aliens captured and held outside the sovereign territory of the United States, have no due process or other constitutional rights.

A. The Fifth Amendment Is Inapplicable To Aliens Outside The Sovereign Territory Of The United States

It is well-established that the Fifth Amendment (including its Due Process Clause) does not apply extraterritorially to aliens. In Johnson v. Eisentrager, 339

U.S. 763 (1950), after addressing the constitutional and statutory scope of habeas corpus (id. at 777-81), the Supreme Court addressed the distinct question whether aliens outside the sovereign territory of the United States possess "substantive constitutional rights" in general (id. at 781) and Fifth Amendment rights in particular (id. at 781-85). The Court emphatically held that they do not. It explained that extraterritorial application of the Fifth Amendment to aliens is unsupported by constitutional text (id. at 782), would produce various untoward consequences (id. at 782-84), and is entirely unprecedented:

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it.

Id. at 784-85 (citation omitted).

Subsequent decisions have reaffirmed this holding. In United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), in holding that the Fourth Amendment does not apply to searches of alien property conducted abroad, the Court reasoned in part that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States," and, citing Eisentrager, it described that rejection as "emphatic." Id. at 269; see also id. at 275 (Kennedy, J.,

concurring) ("[T]he Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory."). Similarly, in Zadvydas v. Davis, 533 U.S. 678 (2001), in reaffirming that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders," the Court cited both Eisentrager and Verdugo for the proposition that the "Fifth Amendment's protections do not extend to aliens outside the territorial boundaries" of the United States. Id. at 693.

This Court has applied those principles in various contexts. See, e.g., Jifry v. FAA, 370 F.3d 1174, 1182 (D.C. Cir. 2004) ("The Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections."); 32 County Sovereignty Comm. v. Dep't of State, 292 F.3d 797, 799 (D.C. Cir. 2002) (a "'foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise'") (quoting People's Mojahedin Org. of Iran v. Department of State, 182 F.3d 17, 22 (D.C. Cir. 1999)). Moreover, in Al Odah, it specifically concluded that the Fifth Amendment is inapplicable to aliens held at Guantanamo Bay, Cuba. See 321 F.3d at 1140-44. Although the Supreme Court

rejected this Court's broader holding that habeas jurisdiction was entirely unavailable, see Rasul, 124 S. Ct. at 2693-98, that Court expressly declined to address any Fifth Amendment or other substantive constitutional question, see id. at 2699.

B. Guantanamo Bay Is Outside The Sovereign Territory Of The United States

1. Petitioners err in contending (Br. 14) that the extraterritorial application of the Constitution does not turn on what they disparage as "notions of technical sovereignty." As the district court recognized (JA 1013), under Eisentrager and its progeny, the applicability of the Fifth Amendment to aliens turns on whether the United States is sovereign, not whether it merely exercises control, over the territory at issue. See, e.g., Verdugo, 494 U.S. at 269 (aliens not "entitled to Fifth Amendment rights outside the sovereign territory of the United States" (emphasis added)). In Eisentrager itself, the petitioners were aliens imprisoned at a U.S. military base in Germany, which was controlled by the U.S. Army. See 339 U.S. at 766. Despite that control, the Court stressed that the aliens "at no relevant time were within any territory over which the United States is sovereign," id. at 778 (emphasis added), and, on that basis, it held that application of the Fifth Amendment would be impermissibly "extraterritorial" (id. at 784). As this Court has explained, "under Eisentrager, control is surely not the test. Our military forces

may have control over the naval base at Guantanamo, but our military forces also had control over the Landsberg prison in Germany." Al Odah, 321 F.3d at 1143.

2. The district court correctly held (JA 1013) that the United States is not sovereign over Guantanamo Bay, Cuba. To the contrary, it operates a naval base at Guantanamo Bay only pursuant to the terms of written agreements between this Nation and Cuba. See Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, T.S. No. 418 (6 Bevans 1113) (Lease); Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, T.S. No. 426 (6 Bevans 1120) (Supplemental Lease); Treaty on Relations with Cuba, May 29, 1934, U.S.-Cuba, 48 Stat. 1682, T.S. No. 866. Under the terms of those agreements, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba" over the leased area, and "Cuba consents" to United States control over that area, but only "during the period" of the lease. Lease art. III. Moreover, the United States is prohibited from establishing certain "commercial" or "industrial" enterprises over that area. Supplemental Lease art. III.

Courts repeatedly have concluded that provisions such as these do not effect a transfer of sovereignty. For example, in Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948), the Supreme Court concluded that a leased military base in Bermuda, over which the United States had "substantially the same" rights as it has

over the base in Guantanamo Bay (id. at 383), was "beyond the limits of national sovereignty." Id. at 390. Although the Court held the Fair Labor Standards Act applicable to the base, it did so only after discerning a specific congressional intent to apply the statute "on foreign territory." See id. Similarly, in United States v. Spelar, 338 U.S. 217 (1949), the Supreme Court held that the "foreign country" exception to the Federal Tort Claims Act applied to a U.S. military base in Newfoundland because the governing lease had "effected no transfer of sovereignty." Id. at 221-22. The lease terms were "the same" as the ones at issue in Vermilya-Brown. See id. at 218. With respect to Guantanamo Bay specifically, the Eleventh Circuit has held that aliens there "have no First Amendment or Fifth Amendment rights." Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1428 (11th Cir. 1995); see also id. at 1425 ("We disagree that 'control and jurisdiction' is equivalent to sovereignty."). Finally, in Al Odah, this Court similarly held that aliens at Guantanamo Bay have no Fifth Amendment rights, on the ground that "Cuba—not the United States—has sovereignty" there. 321 F.3d at 1143.

This characterization of Guantanamo Bay, consistent with the views of the Executive Branch, is also appropriate because the "determination of sovereignty over an area is for the legislative and executive departments." Vermilya-Brown, 335 U.S. at 380; see also People's Mojahedin, 182 F.3d at 24 ("'Who is the sovereign,

de jure or de facto, of a territory, is not a judicial, but a political question.'") (quoting Jones v. United States, 137 U.S. 202, 212 (1890)). If courts were to second-guess an Executive Branch determination regarding who is sovereign over a particular foreign territory, they would not only undermine the President's "lead role * * * in foreign policy," First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767 (1972), but also "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments." Crosby v. National Foreign Trade Council, 530 U.S. 363, 381 (2000); see also American Ins. Ass'n v. Garamendi, 539 U.S. 396, 413 (2003).

3. Nothing in Rasul upsets these settled principles. As explained above, the Supreme Court addressed only the extent to which the habeas statute applies extraterritorially, and expressly reserved all substantive constitutional questions. See 124 S. Ct. at 2699. Moreover, in discussing the particular legal status of Guantanamo Bay, the Court expressly acknowledged that the United States exercises control, but "not 'ultimate sovereignty,'" over the leased area. See id. at 2693 (emphasis added). And in concluding that such control was sufficient to establish habeas jurisdiction even as to aliens, the Court focused on the distinctive language of the habeas statute, see id. at 2696, as well as the "'extraordinary territorial ambit' of the writ at common law," id. at 2697 n.12 (citation omitted).

None of that even remotely suggests what extraterritoriality principles should apply in the Fifth Amendment context, much less implicitly overrules the numerous precedents governing precisely that question. Indeed, the fact that the Court was addressing the extraterritorial reach of the writ only underscores that Guantanamo Bay lies outside the territorial sovereignty of the United States.

4. Even if Guantanamo Bay were somehow treated as sovereign United States territory, petitioners still would not have Fifth Amendment rights. In Verdugo, the Supreme Court held that aliens "receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." 494 U.S. at 271 (emphases added); see also Jifry, 370 F.3d at 1182; People's Mojahedin, 182 F.3d at 22. The Court further held that "lawful but involuntary" presence in the United States "is not of the sort to indicate any substantial connection with our country" for constitutional purposes. Verdugo, 494 U.S. at 271. Applying that rule, the Court denied Fourth Amendment protection to an alien who was being detained in the United States against his will, but who had "no previous significant voluntary connection with the United States." Id. (emphasis added). Similarly, here, petitioners' presence at Guantanamo Bay is involuntary, and the detainees do not claim to have any previous significant connections with this country. Such limited and involuntary

contact does not trigger constitutional protections under Verdugo, even if Guantanamo Bay were erroneously treated as United States territory.

C. Petitioners Misread Rasul And Other Cases

Despite Eisentrager's square holding that the Fifth Amendment is inapplicable to aliens outside United States sovereign territory, and despite Rasul's express refusal to address any substantive constitutional questions, petitioners nonetheless contend (Br. 9-12) that a footnote in Rasul confers Fifth Amendment rights on aliens held at Guantanamo Bay. Petitioners further claim support (Br. 13-19) from the Insular Cases; the splintered opinions in Reid v. Covert, 354 U.S. 1 (1957); Ralpho v. Bell, 569 F.2d 607 (D.C. Cir. 1977); and a concurring opinion in Verdugo. Petitioners misread each of these precedents.

1. Rasul cannot fairly be construed to address the extraterritorial application of the Fifth Amendment. In their briefs to the Supreme Court, the petitioners in Rasul expressly declined to address the "substantive scope of the Fifth Amendment." Reply Br. for Pet., Al Odah v. United States, No. 03-343 (S.Ct.), 2004 WL 768555, at 16. The Supreme Court itself twice framed the "narrow" question presented as "whether United States courts lack jurisdiction to consider" habeas challenges brought by aliens held at Guantanamo Bay. 124 S. Ct. at 2690; see id. at 2693 ("whether the habeas statute confers a right to judicial review of the

legality of Executive detention of aliens" at Guantanamo Bay). The Court's analysis of Eisentrager focused on the phrase "within their respective jurisdictions," as used in the habeas statute and precedents such as Ahrens and Braden. See id. at 2693-95. Its analysis of extraterritoriality similarly focused on the habeas statute and on historical habeas practice. See id. at 2696-97. The Court then stated its holding: "We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base." Id. at 2698. And, at the end of its opinion, the Court once again emphasized that "only" the question of jurisdiction was "presently at stake"; it declined to decide "[w]hether" any further proceedings would be necessary on remand; and it instructed the lower courts "to consider in the first instance the merits" on remand. Id. at 2699.

Against all of this, petitioners place dispositive weight on a single, oblique footnote, which states: "Petitioners' allegations * * * unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. § 2241(c)(3)." Id. at 2698 n.15. That footnote cannot fairly be read as an implicit repudiation of the substantive holdings in Eisentrager, Verdugo, and their numerous predecessors and progeny. As an initial matter, such a reading would be inconsistent with the repeated assurances throughout Rasul that habeas jurisdiction

was the "only" question raised in or resolved by the Court. Moreover, footnote 15 is appended to a paragraph focused entirely on the question of statutory jurisdiction under 28 U.S.C. § 2241, and to a sentence asserting what "[p]etitioners contend" for jurisdictional purposes. Id. at 2698. To say that these allegations are sufficient for jurisdictional purposes, a reading of footnote 15 strongly suggested by context, establishes only that they are not "wholly insubstantial" or "frivolous" on the merits. See, e.g., Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 88 (1998); Bell v. Hood, 327 U.S. 678, 682-83 (1946). On the other hand, to construe footnote 15 as implicitly overruling the substantive Fifth Amendment holding of Eisentrager, thereby jettisoning decades of settled law in a single ambiguous sentence, would be implausible in the extreme and would, not coincidentally, violate a slew of familiar interpretive principles: that "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used," Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994); that the Supreme Court, like Congress, ordinarily "does not * * * hide elephants in mouseholes," Whitman v. American Trucking Ass'n, 531 U.S. 457, 468 (2001); and, perhaps most fundamentally, that 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," Tenet v. Doe, 125 S. Ct. 1230, 1235 (2005); see Sierra Club v. EPA, 322 F. 3d 718, 725 (D.C. Cir. 2003) ("failure to [overrule] expressly is dispositive" – lower courts cannot consider whether one Supreme Court precedent "impliedly overrules" another).

2. The other precedents cited by petitioners are even further afield. The Insular Cases address the extent to which federal constitutional protections apply in United States territories "not incorporated into the Union." See, e.g., Balzac v. People of Porto Rico, 258 U.S. 298, 312-13 (1922); Dorr v. United States, 195 U.S. 138, 149 (1904). The territories at issue in those cases were governed by Congress pursuant to its constitutional power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" (Art. IV, § 3, cl.2 (emphasis added)). See Dorr, 195 U.S. at 140. The Supreme Court held that only "certain fundamental rights declared in the Constitution," including the Fifth Amendment but excluding the Sixth and Seventh Amendments, apply to such unincorporated United States territories. See Balzac, 258 U.S. at 304-05, 312-13.

The Insular Cases say nothing about the availability of constitutional rights in areas where the United States is not sovereign. As noted above, the United States does by definition exercise sovereignty over its own unincorporated territories. In

the case of Puerto Rico, for example, the United States acquired sovereignty after the Spanish-American War, see Treaty of Paris, U.S.-Spain, art. II, 30 Stat. 1754 (Apr. 11, 1899) (Spain "cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indes"), and Congress, in exercising its Article IV power to legislate in United States territory, has extended most federal statutes to Puerto Rico, see 48 U.S.C. § 734. Similar treaties and statutes governed the Philippines when Dorr was decided. See 195 U.S. at 143. And, of course, no other nation has a greater claim to sovereignty in territories of the United States. Here, by contrast, the lease makes clear that Cuba retains sovereignty over Guantanamo Bay.

3. Reid v. Covert, 354 U.S. 1 (1957), a case concerning the rights of citizens overseas, produced no majority opinion and is inapplicable here in any event. Reid involved the question whether spouses of Army personnel stationed abroad could invoke the Fifth and Sixth Amendments. A plurality of the Court concluded that "citizens abroad" are generally protected by the Bill of Rights. See 354 U.S. at 5-6. The narrower controlling opinions agreed with respect to the Fifth and Sixth Amendments but, even as to the rights of citizens, cautioned against wholesale extraterritorial application of the Constitution. See id. at 75 (Harlan, J., concurring in the judgment). Moreover, in Verdugo, a majority of the Court

specifically rejected the proposition that Reid has any bearing on the constitutional rights of aliens. See 494 U.S. at 270. In reaffirming Eisentrager's "emphatic" rejection of extraterritorial application of the Fifth Amendment to aliens, the Court specifically limited Reid to the proposition that "citizens stationed abroad could invoke the protection of the Fifth and Sixth Amendments." Id. at 269-270 (emphasis added).

4. Ralpho is precisely akin to the inapposite Insular Cases. In Ralpho, this Court held that the Due Process Clause protects residents of Micronesia, a Pacific archipelago governed by the United States under a trusteeship established by the United Nations. See 569 F.2d at 612-13. The Court explained that Micronesia is a "'Territory * * * belonging to the United States'" within the meaning of Article IV, and, citing the Insular Cases, it described the people of Micronesia as being "as much American subjects as those in other American territories." Id. at 618-19. As this Court later explained, Ralpho "establishes nothing" relevant to the entirely distinct legal circumstances that prevail at Guantanamo Bay, Cuba. See Al Odah, 321 F.3d at 1144.

5. Finally, petitioners err in claiming support from Justice Kennedy's concurrence in Verdugo. Justice Kennedy in Verdugo joined in full a majority opinion that expressly reaffirmed the "emphatic" Fifth Amendment holding of

Eisentrager (494 U.S. at 269), so his separate concurrence is entitled to no precedential weight. In any event, even on its own terms, his Verdugo concurrence does not help petitioners here. In that concurrence, Justice Kennedy stressed that Eisentrager, and not Reid, governs "extraterritorial application of the Constitution" where the "person claiming its protection is * * * an alien." Id. at 275. Moreover, citing the controlling concurrence in Reid, he stressed that even citizens do not necessarily enjoy the full measure of constitutional rights abroad, and, citing the Insular Cases, he stressed that Congress need not "implement all constitutional guarantees" even "in its territories." Id. at 277-78. Finally, he noted the unexceptional proposition that the Fifth Amendment would apply to aliens not abroad, but during a domestic criminal trial in an Article III court. See id. at 278.

* * * *

The Fifth Amendment is inapplicable to aliens captured abroad and held at Guantanamo Bay, Cuba. On that ground alone, this Court should reject on the merits the due process claims raised here by petitioners.

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

Even if the Fifth Amendment had some limited application to aliens held at Guantanamo Bay, the CSRT process would readily satisfy any due process

requirements for detaining such aliens as enemy combatants. Petitioners' constitutional claims thus fail on that entirely independent ground as well.

A. The CSRTs Afford More Process Than That Guaranteed Even To Citizens In This Country

1. In Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004), the Supreme Court addressed the extent of process due to an American citizen held in this country as an enemy combatant. The plurality opinion stated that such a citizen "must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." Id. at 2648. The plurality derived that result by applying the balancing test set forth in Mathews v. Eldridge, 424 U.S. 319 (1976), which considers the nature of the affected private interest, the nature of the affected government interest, and the "burdens the Government would face in providing greater process." 124 S. Ct. at 2646. In so doing, the plurality stressed that "substantial interests lie on both sides of the scale." Ibid. In particular, it recognized the "weighty" and "sensitive" government interests in capturing and detaining enemy combatants (id. at 2647), which "by 'universal agreement and practice,' are 'important incident[s] of war.'" Id. at 2640 (quoting Ex parte Quirin, 317 U.S. 1, 28 (1942)). The plurality also acknowledged that these "core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." Id. at 2647.

Given these considerations, and the obvious "exigencies" of conducting armed hostilities, the plurality recognized that, beyond the "core" due process requirements of notice and a fair opportunity for rebuttal, "enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." Id. at 2649. In particular, the plurality specifically approved the consideration of hearsay evidence, the creation of a "presumption in favor of the Government's evidence," and the exclusive focus on a "combatant's acts." Id. at 2649-50. Moreover, the plurality strongly suggested that "the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal" and, as an example, it cited the tribunals constituted under Army Regulation 190-8 to adjudicate prisoner-of-war status under Article V of the Third Geneva Convention. See id. at 2651. In the "absence of such process," the plurality concluded that a habeas court "must itself assure that the minimum requirements of due process are achieved." Id. Nonetheless, it stressed that courts always must proceed with "caution" in this sensitive area (id. at 2652), warned that any "factfinding process" must be both "prudent and incremental" (id.), and specifically disapproved the "quite extensive discovery" (id. at 2646) that the district court had ordered.

2. The CSRTs would easily satisfy the due process requirements that the Hamdi plurality said would be constitutionally sufficient for American citizens held in this country. They afford notice: the recorder of a tribunal "shall provide the detainee in advance of the proceedings with notice of the unclassified factual basis for the detainees' designation as an enemy combatant." JA 1208. They afford a fair opportunity to rebut the Government's case: the detainee has a "right to testify or otherwise address the Tribunal in oral or written form, and to introduce relevant documentary evidence," JA 1209; the detainee "shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal," JA 1208; and the detainee "shall be allowed to attend all proceedings," except as to "matters that would compromise national security if held in the presence of the detainee," ibid. Finally, they afford a neutral decisionmaker: each CSRT is composed of three military officers, "none of whom was involved in the apprehension, detention, interrogation, or previous determination of status of the detainee." JA 1207-08.

As the district court explained (JA 1019 n.16), the CSRT procedures "provide each petitioner with much of the same process afforded by Article 5 of the Geneva Conventions," as implemented by provisions in Army Regulation 190-8, which was cited by the Hamdi plurality with approval. For example, the CSRT

and Army Regulation 190-8 procedures have the following features in common, among others:

- Tribunals are composed of three commissioned officers plus a non-voting officer who serves as recorder;[2]
- Tribunal members are sworn to faithfully and impartially execute their duties;[3]
- The detainee has the right to attend the open portions of the proceedings;[4]
- An interpreter is provided if necessary;[5]
- The detainee has the right to call witnesses if reasonably available, question witnesses called by the tribunal, and testify or otherwise address the tribunal;[6]
- The detainee may not be forced to testify;[7]

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[2] Compare JA 1207 and JA 268-69 with JA 1216.

[3] Compare JA 1208 and JA 274 with JA 1216.

[4] Compare JA 1208 and JA 271 with JA 1217.

[5] Compare JA 1208 and JA 271 with JA 1217.

[6] Compare JA 1208-09 and JA 271 with JA 1217.

[7] Compare JA 1209 and JA 271 with JA 1217.

- The tribunals make decisions by majority vote;[8]
- The decision is made based on a preponderance of the evidence;[9]
- The tribunals create a written report of their decision;[10] and
- The tribunal record is reviewed by the Staff Judge Advocate for legal sufficiency.[11]

In several respects, the CSRTs provide even greater procedural protections than those required for Article 5 Tribunals. For example:

- The CSRTs contain express qualifications to ensure the tribunal's independence. See JA 1207-08. There are no comparable qualifications for Article 5 Tribunals.
- The CSRTs provide the detainee a personal representative to assist him in preparing his case. See JA 269, 1207. There is no such requirement in Article 5 Tribunals.
- In CSRTs, the Recorder is obligated to search government files for, and provide to the Tribunal, any "evidence to suggest that the detainee

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[8] Compare JA 1209 and JA 274 with JA 1217.

[9] Compare JA 1209 and JA 273 with JA 1217.

[10] Compare JA 275 with JA 1217.

[11] Compare JA 1209 and JA 269, 276 with JA 1217.

should not be designated as an enemy combatant." See JA 277. There is no such requirement in Article 5 Tribunals.

- In CSRTs, the detainee is provided with an unclassified summary of the evidence supporting his detention in advance of the hearing. See JA 271, 274, 1208. There is no such requirement in Article 5 Tribunals.
- CSRTs allow the detainee to introduce relevant documentary evidence. See JA 271, 1209. Article 5 Tribunals provide no analogous guarantee.
- Every CSRT decision is automatically reviewed by a higher authority, who may return the record to the tribunal for further proceedings. See JA 276, 1209. There is no counterpart provision for Article 5 Tribunals.

Under the standards set forth in the plurality opinion in Hamdi, these procedural protections would be more than sufficient to adjudicate even whether an American citizen in this country may be held as an enemy combatant.

3. The CSRT procedures are even more clearly constitutional as applied to aliens held abroad. Assuming such aliens have any due process rights at all, those rights are plainly less extensive than those of American citizens in this country. As

noted above, the existence and scope of constitutional rights turn on the extent to which aliens "have come within the territory of the United States and established 'substantial connections' with this country, * * * [and] 'accepted some societal obligations.'" Jifry, 370 F.3d at 1182-83 (quoting Verdugo, 494 U.S. at 271, 273). Thus, the Supreme Court has cautioned that, even within the United States, it is a mistake to conclude that "all aliens are entitled to enjoy all the advantages of citizenship or, indeed, * * * that all aliens must be placed in a single homogeneous legal classification." Mathews v. Diaz, 426 U.S. 67, 78 (1976). For example, an alien who is temporarily "paroled" into the United States while seeking admission "has no constitutional rights regarding his application," and "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." Landon v. Plasencia, 459 U.S. 21, 32 (1982). Thus, in Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), the Court held that the Government's two-year exclusion and detention of Mezei, without any hearing at all, was constitutionally permissible. Mezei was an alien who had been a 25-year resident of the United States and who left the country to visit his dying mother. See id. at 208. His constitutional rights cannot be deemed any less than those of aliens captured during armed hostilities and held at Guantanamo Bay.

The distinction between the rights of citizens and aliens, which permeates immigration law generally, is even more significant during times of armed conflict. The Supreme Court has never suggested that the rights of aliens captured during an armed conflict approach the rights of citizens. To the contrary, in Harisiades v. Shaughnessy, 342 U.S. 580 (1952), it explained that "[w]ar, of course, is the most usual occasion" for distinguishing between the rights of aliens and citizens. Id. at 586-87; see also Eisentrager, 339 U.S. at 769 ("[E]ven by the most magnanimous view, our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens."); Hamdi, 124 S. Ct. at 2673 (Scalia, J., dissenting) (noting that his analysis "appl[ies] only to citizens").

Given these various considerations, we submit that even if aliens held at Guantanamo Bay are entitled to some degree of constitutional due process, it is less than the degree of due process that the Hamdi plurality afforded to citizens on American soil. At most, this Court should require a simple notice of the charges and an opportunity to be heard. See Yates v. District of Columbia, 324 F.3d 724, 726 (D.C. Cir. 2003) ("the basic elements of constitutional due process [are]: notice and the opportunity to be heard"). As explained above, the CSRT process vastly exceeds that elemental due process standard.

B. Petitioners' Objections To CSRT Procedures Are Meritless

At the end of their brief (Br. 43-54), petitioners identify various perceived flaws in the CSRT procedures that, in their view, establish a due process violation. Petitioners are incorrect on each point.

1. Petitioners Received Fair Notice Of The Basis For Their Designation As Enemy Combatants

Petitioners begin with two perfunctory challenges to the adequacy of notice of the basis for their detention as enemy combatants. First, petitioners assert (Br. 43-44) that "inordinate delay" before the beginning of their CSRT proceedings deprived them of fair notice. However, petitioners do not explain how any delay affected the notice that each in fact was given or how it prejudiced any defense that any petitioner might have wished to present. And whatever the reasons for pre-CSRT delay, petitioners do not explain how it is relevant to the validity of their present detention.

Petitioners next contend (Br. 44-45) that the governing "enemy combatant" definition was either unsettled or vague. However, the governing definition was established in the formal orders establishing the CSRT procedures:

> 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.

JA 1207, 268. Moreover, each petitioner received notice not only of this "enemy combatant" definition but also of the unclassified factual basis for his designation as an enemy combatant under the definition. JA 271. And despite petitioners' erroneous suggestion to the contrary, the possibility of "varying" definitions for other enemy combatants (Br. 44), such as the American citizen at issue in Hamdi, in no way suggests that the Guantanamo Bay detainees lacked adequate notice of the basis for their detention as enemy combatants.

Petitioners err further to the extent they suggest that the governing "enemy combatant" definition is unconstitutionally vague. Even where the criminal liability of American citizens is at issue, due process requires only that the government "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and "provide explicit standards" to prevent arbitrary enforcement. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); see also id. at 110 ("mathematical certainty from our language" neither required nor possible). Moreover, "speculation about vagueness in possible hypothetical situations not before the Court will not support a facial attack" for vagueness, at least where a provision is clear "'in the vast majority of its intended applications.'" Hill v. Colorado, 530 U.S. 703, 733 (2000) (citation omitted). Under these standards, the

governing "enemy combatant" designation, which in pertinent part encompasses individuals who were "part of or supporting Taliban or al Qaeda forces," is more than sufficiently precise.

2. Petitioners Received A Meaningful Opportunity To Present Their Respective Cases

Petitioners next argue that they were denied a meaningful opportunity to contest their enemy combatant designations. Petitioners complain that they were denied access to counsel during the CSRT process (Br. 45), that they were denied access to classified information (Br. 45-46), and that they were unable to obtain certain items of evidence (Br. 46-51). None of these contentions establishes a due process violation.

a. Captured enemy combatants have no constitutional right to an attorney. Even where the criminal punishment of American citizens is at issue, there is generally no right to counsel in administrative proceedings not unlike the CSRTs. See, e.g., Wolff v. McDonnell, 418 U.S. 539, 569-70 (1974) (prison disciplinary hearing); Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973) (parole revocation hearing). As Judge Friendly has explained, these cases recognize that counsel might unduly polarize, delay, and impede an objective assessment of the facts: "Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the

limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty." Friendly, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267, 1288 (1975). Such concerns are greatly magnified here, where the issue is not the administration of domestic prisons, but the ability of the Executive Branch to carry out essential elements of its war powers abroad.

Petitioners' alleged right to administrative counsel is even more implausible because the CSRTs afford each detainee a personal representative. That individual is a "military officer, with the appropriate security clearance" assigned to the detainee "for the purpose of assisting the detainee" in the CSRT process. JA 1207. Moreover, the personal representative "shall not have been involved in the apprehension, detention, interrogation, or previous determination of status" of the detainee. JA 269. The personal representative has access to all Government files (JA 1207) and may attend the entire CSRT proceeding (JA 1208), even where classified information is at issue. The personal representative fulfills some of the most important functions of counsel: he is required to "explain the nature of the CSRT process to the detainee, explain his opportunity to present evidence and assist the detainee in collecting relevant and reasonably available information and in preparing and presenting information to the Tribunal." JA 279. Finally, the personal representative may "comment upon classified information that bears upon

the detainee's status if it would aid the Tribunal's deliberations." JA 275. That is more than constitutionally sufficient, in a hearing to determine the simple factual question whether an alien detainee has supported al Qaeda or the Taliban.

Petitioners err in claiming a right to counsel based on Hamdi. As explained above, that case involved an American citizen detained within the territorial sovereignty of the United States. Moreover, Hamdi himself had been afforded no administrative process analogous to the CSRTs; judicial proceedings were thus the only means of ensuring an "enemy combatant" determination before a neutral decisionmaker; and, in that context, the government did not dispute a "right of access to counsel" in connection with proceedings on remand. See 124 S. Ct. at 2651-52. Hamdi in no way suggests that aliens held abroad, and afforded a "personal representative" in proceedings before a neutral military decisionmaker, would additionally be entitled to an attorney.

b. Petitioners fare no better in their alleged right of access to classified information. Nothing in the Constitution requires United States armed forces, as a condition of being able to capture and then detain suspected al Qaeda terrorists abroad, to afford those suspected terrorists (or their counsel) wholesale access to classified information about this Nation's intelligence sources and methods against

al Qaeda. Not surprisingly, petitioners cite no support for that remarkable proposition.

The Supreme Court repeatedly has held that the "'Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.'" CIA v. Sims, 471 U.S. 159, 175 (1985) (quoting Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (per curiam)). As the Commander-in-Chief, the President has "authority to classify and control access to information bearing on national security," which "exists quite apart from any explicit congressional grant." Department of the Navy v. Egan, 484 U.S. 518, 527 (1988). Moreover, even a "small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.' To induce some sources to cooperate, the Government must tender as absolute an assurance of confidentiality as it possibly can." Sims, 471 U.S. at 175; see Snepp, 444 U.S. at 512. So, for "'reasons * * * too obvious to call for enlarged discussion,' the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it." Egan, 484 U.S. at 529 (quoting Sims, 471 U.S. at 170).

Applying these precedents, this Court repeatedly has rejected due process challenges to the consideration of classified evidence ex parte and in camera, even in cases involving aliens who are present in and have significant contacts with this country, and even where such aliens have significant liberty or property interests at stake. See, e.g., Jifry, 370 F.3d at 1183-84; Holy Land Foundation v. Ashcroft, 333 F.3d 156, 164 (D.C. Cir. 2003); People's Mojahedin Org. of Iran v. Department of State, 327 F.3d 1238, 1242-43 (D.C. Cir. 2003); National Council of Resistance of Iran v. Department of State, 251 F.3d 192, 208 (D.C. Cir. 2001). It has done so partly because it is "'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation," Jifry, 370 F.3d at 1183 (quoting Haig v. Agee, 453 U.S. 280, 307 (1981)); partly because of "the primacy of the Executive in controlling and exercising responsibility over access to classified information," Holy Land, 333 F.3d at 164; and partly because "the courts are often ill-suited to determine the sensitivity of classified information," People's Mojahedin, 327 F.3d at 1242.

The courts also have recognized, even outside the specific context of classified information, the importance of protecting other sensitive information in the ongoing hostilities against al Qaeda. For example, in Center for National Security Studies v. Department of Justice, 331 F.3d 918 (D.C. Cir. 2003), this

Court construed Exemption 7(A) of the Freedom of Information Act to protect from disclosure the names of aliens detained pending their removal from this country as part of the law enforcement investigation following the September 11 attacks. Similarly, in North Jersey Media Group v. Ashcroft, 308 F.3d 198 (3d Cir. 2002), the Third Circuit rejected an alleged First Amendment right of access to the immigration hearings for those aliens. Both cases turned in principal part on concern about the destructive capacity of al Qaeda, see CNSS, 331 F.3d at 928 ("America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore"); about its ability to conduct intelligence operations, ibid. ("A complete list of names informing terrorists of every suspect detained by the government at any point during the September 11 investigation would give terrorist organizations a composite view of the government investigation"); about the possibility that "disclosure would deter or hinder cooperation" of potential informants (id. at 929); and about the ensuing need for significant deference to "the executive's judgment in prosecuting the national response to terrorism" (id. at 932). See also Zadvydas, 533 U.S. at 696 ("terrorism" warrants "heightened deference to the judgments of the political branches with respect to matters of national security"); North Jersey Media, 308

F.3d at 219 ("To the extent that the Attorney General's national security concerns seem credible, we will not lightly second-guess them.") .

Hamdi recognizes similar concerns in the enemy combatant context. In that case, the plurality criticized the district court for approving "quite extensive discovery" (124 S. Ct. at 2646) into communications between the United States and the Northern Alliance regarding the circumstances of Mr. Hamdi's capture. See id. at 2637 (discovery demand); id. at 2648 (rejecting "process apparently envisioned by the District Court"). The plurality acknowledged the dangerous possibility that "discovery into military operations" would "intrude on the sensitive secrets of national defense," and it specifically held that, "[t]o the extent that these burdens are triggered by heightened procedures, they are properly taken into account." Ibid.

Finally, petitioners' claim is inconsistent with longstanding historical practice. Throughout American history, the process granted to aliens captured on a foreign battlefield has been no more than the rudimentary procedures reflected in Article 5 of the Third Geneva Convention and Army Regulation 190-8 – which affords access only to those proceedings that are open, JA 1217. It understandably does not afford access to classified information, precisely because an Article 5 hearing, like a CSRT hearing, may lead to the release of detainee, potentially enabling him to

rejoin the enemy. Nor does it afford a right to counsel at all, much less a right to counsel with access to classified information. These settled traditional practices preclude recognition of the novel due process rights asserted here by petitioners. See Medina v. California, 505 U.S. 437, 443-46 (1992).

Even where the constitutional rights of citizens on American soil are at issue, this Court has strained to reserve the question whether courts can ever compel the Executive Branch to supply a lawyer with classified information in order to facilitate civil litigation. See Stillman v. CIA, 319 F.3d 546, 548-49 (D.C. Cir. 2003). There is plainly no warrant for affording such an extraordinary right of access here, contrary to Article II, analogous prcedents, historical practice, and simple common sense.

c. Petitioners err in contending that they lacked a "meaningful opportunity to present evidence or call witnesses" (Br. 46). As we have explained, the CSRTs guarantee each detainee's right "to call witnesses if reasonably available" and "to introduce relevant documentary evidence." JA 1208-09. Petitioners' few anecdotal complaints (Br. 46-47) do not establish any deprivation of this right. They assert that petitioner Ait Idir was unable to present evidence, but fail to mention that Ait Idir himself "elected not to participate in the Tribunal." JA 455. Petitioner Khalid (who has been released in any event) was unable to call certain witnesses, but only

because they too had been released, and thus were no longer subject to the jurisdiction of the United States. JA 1176-77. Finally, when petitioner Lahmar sought to introduce a Bosnian government document, the State Department actually contacted the Bosnian government, in an unsuccessful effort to obtain the document. JA 401. The inability to produce such evidence would not establish a constitutional violation even in the context of domestic criminal trials, see, e.g., United States v. Zabaneh, 837 F.2d 1249, 1259-60 (5th Cir.1988), much less in the context of foreign administrative proceedings by the United States military to justify the non-punitive detention of alien enemy combatants.

More generally, petitioners suggest (Br. 47-51) that additional evidence might have undermined the conclusion that they are enemy combatants. To the extent that this claim amounts to anything more than a repetition of petitioners' argument that they should have been granted access to classified information, it is simply an attack on the manner in which the CSRT weighed the evidence. But as we explain in more detail below, the district court properly declined to second-guess the CSRT's factual judgments.

3. The CSRTs Afforded A Neutral Decisionmaker

Finally, petitioners contend (Br. 51-54) that the CSRTs did not provide neutral decisionmakers. But as we have explained, each CSRT was composed of

officers who were not involved in any way "in the apprehension, detention, interrogation, or previous determination of status" of the detainees (JA 1207-08) and who swore an oath to discharge their duties faithfully and impartially (JA 1208). Petitioners present no evidence that these officers violated that oath. Instead, they contend only that the CSRTs made what petitioners characterize as "unsupported decisions favorable to Respondents" (Br. 52). Such assertions plainly fail to demonstrate any unconstitutional bias. See, e.g., Rafferty v. NYNEX Corp., 60 F.3d 844, 847-48 (D.C. Cir. 1995) (per curiam).

C. The District Court Properly Declined To Conduct Or Review Factfinding

1. At various points in their due process discussion, petitioners suggest that their designation as enemy combatants was factually "mistaken" (Br. 50) or "unsupported" (Br. 52). However, petitioners stop short of explicitly contending, as an independent basis for due process relief, that there was legally insufficient evidence to support the CSRT determinations. Petitioners' hesitancy to make that argument is understandable, both because there is ample evidence to support the CSRT determinations, see JA 1662-1779 (Boumediene); 1218-1346 (Lahmar); 1347-1486 (Bensayah); 1487-1661 (Nechla); 1780-1968 (Boudella); 1969-2182 (Ait Idir); 1165-1206 (Khalid), and because, in any event, fact-based sufficiency claims are simply not cognizable in this context. See, e.g., Yamashita v. Styer, 327 U.S.

1, 8 (1946) ("If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts."); Ex parte Quirin, 317 U.S. 1, 25 (1942) ("We are not here concerned with any question of the guilt or innocence of petitioners."). Yamashita and Quirin involved military commissions authorized to impose criminal punishments for war crimes (including the death penalty), even on combatants who were American citizens. If Article II considerations foreclose sufficiency review on habeas in that context, as the Supreme Court twice held, then the same considerations likewise foreclose sufficiency review here, where CSRTs make determinations affecting only the non-punitive detention of aliens captured and held abroad as enemy combatants.

2. Despite declining to seek fact-based review of CSRT determinations for evidentiary sufficiency, petitioners even more boldly contend (Br. 12-13) that the habeas courts must simply "accept" their "allegations" that they are not in fact enemy combatants, despite the CSRTs' considered judgments to the contrary. Petitioners cannot possibly suggest that such mere "allegations" entitle them to habeas relief. Instead, petitioners appear to suggest (as did Judge Green) that such allegations entitle a habeas court to engage in its own factfinding. Br. 41-42; see In re Guantanamo Detainee Cases, 355 F. Supp. 2d at 477-78. That suggestion

reflects a profound misunderstanding of the proper scope of review and factfinding in habeas corpus.

Despite petitioners' inapt citation of Conley v. Gibson, 355 U.S. 41 (1957), a non-habeas case involving motions to dismiss under Fed. R. Civ. P. 12(b)(6), as opposed to factual returns under 28 U.S.C. § 2243, a habeas court may not simply "accept" well-pleaded "allegations" in a habeas petition (Br. 12) and proceed with de novo factfinding on that basis. In no case in this country could a prisoner simply allege his factual innocence and then re-try his case to the habeas court. To the contrary, even in a garden-variety habeas action governed by 28 U.S.C. § 2254, a habeas petitioner seeking an evidentiary hearing must identify facts bearing on the existence of an independent constitutional violation, rather than on the merits of his case. See, e.g., Herrera v. Collins, 506 U.S. 390, 400 (1993) ("habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution – not to correct errors of fact"); Townsend v. Sain, 372 U.S. 293, 317 (1963) ("the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus"). Moreover, any prior factfinding "shall be presumed to be correct," 28 U.S.C. § 2254(e)(1), and the habeas court "shall not hold an evidentiary hearing" absent either an intervening and retroactive change in law or a "factual predicate that could not have been previously

discovered through the exercise of due diligence," id. § 2254(e)(2)(A) (emphasis added). And even where one of those narrow exceptions is present, a habeas petitioner still must demonstrate, as a condition of obtaining an evidentiary hearing, that the proffered "facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." Id. § 2254(e)(2)(B).

Petitioners make no attempt to satisfy these habeas requirements for an evidentiary hearing. Their self-serving allegations of factual innocence, unconnected to any colorable constitutional violation, are not cognizable under Herrera and Townsend. Nor do petitioners identify any intervening change in law or newly discovered evidence that could not have been previously discovered through due diligence. And as noted above, petitioners stop short of contending even that no reasonable CSRT could have found them to be enemy combatants, much less contending that new evidence of a constitutional error would demonstrate that proposition by clear and convincing evidence.

Petitioners' demand for district court factfinding is equally inconsistent with settled administrative law principles. Under those principles, had the CSRTs violated due process in any respect (which they did not), the proper course would

not have been for the district court to usurp a factfinding process permissibly committed to the military. Instead, the proper course would have been to identify any legal defects and then remand, with instructions as necessary, thus enabling the Executive Branch to carry out its responsibilities under proper procedures. See, e.g., INS v. Ventura, 537 U.S. 12 (2002); Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

Finally, petitioners' demand for district court factfinding, based on nothing more than "allegations" that the CSRTs misjudged the facts, are particularly indefensible in the sensitive context at issue here. As explained above, the Supreme Court has made clear that the capture and detention of enemy combatants, by "'univeral agreement and practice,'" are "'important incidents of war.'" Hamdi, 124 S. Ct. at 2640 (plurality) (quoting Quirin, 317 U.S. at 28). Accordingly, enemy combatant determinations may be entrusted to a "properly constituted military tribunal" (id. at 2651), and, even in the absence of such a tribunal, any judicial factfinding in this context must be "both prudent and incremental" (id. at 2652). Those requirements are not even remotely satisfied by petitioners' proposed system of habeas-factfinding-on-demand, limited only by their own willingness to allege not that their military process was unconstitutional, but that it generated erroneous results in their individual cases.

III. THE PRESIDENT WAS AUTHORIZED TO DETAIN PETITIONERS

The Boumediene petitioners contend (Br. 20-27) that the AUMF does not authorize their detention. Specifically, they assert that the AUMF authorizes the President to detain only the "limited" class of persons consisting of "those involved in the planning and execution of the September 11 attacks and those who harbored such persons or organizations." Br. 20. According to the Boumediene petitioners, their detention is unauthorized because they assertedly do not fall within this "limited" class. This reasoning is wrong on several grounds.

First, petitioners ignore the plain language of the AUMF. By its terms, that provision authorizes the President to use "all necessary and appropriate force" not only against the specific "individuals" that "planned, authorized, committed, or aided" the September 11 attacks, but also against all "nations" or "organizations" that were so involved in the attacks. See 115 Stat. at 224 (President may 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"). Al Qaeda is clearly such an "organization," and the CSRTs determined that petitioners were "part of or supporting Al Qaida forces, or associated forces that are engaged in hostilities against the United

States." See, e.g., JA 342. The AUMF therefore expressly authorizes their detention.

Petitioners futher err in claiming (Br. 20-22) that Hamdi supports their atextual construction of the AUMF. In Hamdi, the plurality looked to the text of the AUMF and traditional laws of war in upholding the President's authority to detain individuals who were "part of or supporting forces hostile to the United States" and who had themselves "engaged in an armed conflict against the United States." 124 S. Ct. at 2639-42; see also id. at 2678-80 (Thomas, J., dissenting). Nothing in Hamdi even remotely suggests, however, that the AUMF encompasses only those individuals. Nor do traditional laws of war suggest such an implied limitation. To the contrary, the laws of war have long permitted the detention of members or supporters of hostile forces. See, e.g., In re Territo, 156 F.2d 142, 144-45 (9th Cir. 1946) (upholding capture and detention of "all persons who are active in opposing an army," including a private performing manual labor in an army engineering corps); Instructions for the Government of Armies of the United States in the Field (Lieber Code), Apr. 24, 1863, Art. 15 ("Military necessity * * * allows of the capturing" of "every armed enemy" and in addition "every enemy of importance to the hostile government, or of peculiar danger to the captor."); W. Winthrop, Military Law and Precedents 789 (2d ed. 1920) ("class of persons"

subject to detention includes "civil persons * * * in immediate connection with an army, such as clerks, telegraphists, aeronauts, teamsters, laborers, messengers, guides, scouts, and men employed on transports and military railways"); J.R. Baker & H.G. Crocker, The Laws of Land Warfare Concerning the Rights And Duties of Belligerents 35 (1919) ("Persons belonging to the auxiliary departments of an army * * * such as commissariat employees, military police, guides, balloonists, messengers, and telegraphists * * * are still liable to capture.").

Petitioners similarly err in contending (Br. 23) that the AUMF is inapplicable because they were captured in Bosnia. As the district court correctly concluded, the AUMF "does not place geographic parameters on the President's authority." JA 1011. Nor do the laws of war, which have long permitted the capture and detention of enemy forces wherever they are found. For example, in Ex Parte Quirin, 342 U.S. 1 (1942), the Supreme Court upheld of the detention of enemy combatants apprehended within the United States.

Petitioners further suggest (Br. 23-24) that the AUMF is inapplicable because they are citizens of a "friendly nation." The AUMF contains no such limitation, however, and both Hamdi and Quirin upheld the detention of even United States citizens who had chosen to join hostile forces. See Hamdi, 124 S. Ct. at 2643 (plurality) (discussing Quirin).

Finally, even apart from the AUMF, petitioners' detention is also independently justified by the President's constitutional authority. By its terms, Article II of the Constitution vests "[t]he executive Power" of the United States in the President (Art. II, § 1, cl. 1), whom it designates as the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States" (Art. II, § 2, cl. 1). Construing these provisions, the Supreme Court has long held that the President, as Commander in Chief, "is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effective to harass and conquer the enemy." Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850) (emphases added); see, e.g., The Prize Cases, 67 U.S. (2 Black) 635, 668, 670 (1862) (when the Nation is attacked, "the President is not only authorized but bound to resist force by force," and "[h]e must determine what degree of force the crisis demands"); Campbell v. Clinton, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring) ("the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected"). Indeed, the Congress itself, in promulgating the AUMF to confirm the President's warmaking powers, stressed that "the President has authority under the Constitution to take action to deter and prevent acts of

international terrorism." AUMF preamble, 115 Stat. at 224 (emphasis added). And in Hamdi, the plurality formally reserved the question of Article II authority, given the clear applicability of the AUMF, but nonetheless stressed that the "[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" 124 S. Ct. at 2640 (quoting Quirin, 317 U.S. at 28).

IV. THE DISTRICT COURT CORRECTLY REJECTED PETITIONERS' INTERNATIONAL LAW CLAIMS

The district court correctly rejected petitioners' claims based on treaties and customary international law.

A. The Treaties Petitioners Invoke Do Not Create Judicially Enforceable Rights

A treaty "is primarily a compact between independent nations." Head Money Cases, 112 U.S. 580, 597 (1884). Judicial enforcement of treaties is not presumed. Rather, absent a clear contrary intent, a treaty "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." Ibid.; see also Whitney v. Robertson, 124 U.S. 190, 194-195 (1888); Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 937 (D.C. Cir. 1988).

Petitioners invite this Court (Br. 34) to judicially enforce the ICCPR. However, the Supreme Court has squarely held that the ICCPR is "not self-executing and so [does] not itself create obligations enforceable in the federal courts." Sosa v. Alvarez-Machain, 124 S. Ct. 2737, 2768 (2004). That conclusion reflects the Senate's express decision to make the ICCPR not self-executing, see 138 Cong. Rec. 8071 (Apr. 2, 1992), and the President's formal transmittal statement that the ICCPR therefore "would not * * * become effective as domestic law," see Message from the President of the United States Transmitting Four Treaties Pertaining to Human Rights, S. Exec. Docs. Nos. 95-C, D, E, F, at vi (1978).

The Fourth Geneva Convention, also invoked by petitioners (Br. 28-29), likewise is not judicially enforceable. The text of that treaty focuses exclusively on traditional enforcement through diplomacy conducted state-to-state: Article 1 imposes enforcement responsibilities on the "High Contracting Parties" themselves; Article 9 provides for oversight by "Protecting Powers"; Article 12 directs the Protecting Powers to "lend their good offices with a view to settling [any] disagreement" regarding treaty scope or application; Article 30 gives to protected persons "every facility for making application to Protecting Powers"; Article 101 gives detainees "the right to apply * * * direct to the representatives of the

Protecting Powers"; and Article 149 provides for dispute resolution through a chosen "umpire." Moreover, the Convention is explicit to the extent that it contemplates any judicial enforcement at all: Article 146 requires Contracting States to enact criminal penalties for "grave breaches" of the Convention and to prosecute offenders for such breaches. None of these provisions even remotely contemplates private enforcement in court.

No court of appeals has construed the Fourth Geneva Convention as granting individuals judicially enforceable rights. This is not surprising, as courts of appeals have unanimously construed the parallel Third Geneva Convention, which deals with prisoners of war, not to create judicially enforceable rights. See Hamdi v. Rumsfeld, 316 F.3d 450, 468-69 (4th Cir. 2003), rev'd on other grounds, 124 S. Ct. 2633 (2004); see also Al Odah, 321 F.3d at 1147 (Randolph, J., concurring); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808-810 (D.C. Cir. 1984) (Bork, J., concurring); Eisentrager, 339 U.S. at 789 (holding that the 1929 Geneva Convention, governing prisoners of war, does not create judicially enforceable rights). Finally, to the extent the Convention has any ambiguity on this point, the construction followed by the Executive Branch should warrant deference. See El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999) ("Respect is

ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty.").

Petitioners contend (Br. 30) that the habeas statute makes these treaties judicially enforceable. That argument has been rejected by every court of appeals to consider it. As the Sixth Circuit has explained, "the reference to 'treaties of the United States' in § 2241 cannot be construed as an implementation of non-self-executing provisions of treaties so as to render them judicially enforceable." Bannerman v. Snyder, 325 F.3d 722, 724 (6th Cir. 2003); accord Poindexter v. Nash, 333 F.3d 372 (2d Cir. 2003) (ICCPR is not enforceable in habeas); Wesson v. United States Penitentiary Beaumont, 302 F.3d 343 (5th Cir. 2002) (same); Hain v. Gibson, 287 F.3d 1224 (10th Cir. 2002) (same); United States ex rel. Perez v. Warden, 286 F.3d 1059 (8th Cir. 2002) (same); cf. Al Odah, 321 F.3d at 1146 (Randolph, J., concurring). Against this unacknowledged authority, petitioners rely on a footnote in Ogbudimkpa v. Ashcroft, 342 F.3d 207, 218 n.22 (3d Cir. 2003), which they say "implied that the habeas statute creates a separate right of action to vindicate rights under non-self-executing treaties" (Br. 30). Nothing in Ogbudimkpa supports that assertion. On the contrary, the court expressly declined to address the issue. See id. at 218 n.22.

B. The Cited Treaty Provisions Are Inapplicable

The treaty provisions cited by petitioners are inapplicable in any event. The ICCPR does not apply extraterritorially: Article 2.1 states that "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." (emphasis added). As we have explained, Guantanamo Bay, Cuba is not within the "territory" of the United States, so the ICCPR by its terms is inapplicable to United States action there. Nor can the ICCPR be extended to United States activity at Guantanamo Bay based on mere control, both because Article 2.1 expressly requires territoriality in addition to "jurisdiction," and because that formulation was established precisely to foreclose application of the ICCPR to areas such as "occupied territories" or "leased territories," where a signatory country would be acting "outside its territory," although perhaps "technically within its jurisdiction for certain purposes." See UN Doc. E/CN.4/SR.138, at 10 (1950).

The Fourth Geneva Convention is also inapplicable here. Article 2 of that treaty, which petitioners do not cite, explains that the Convention applies to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties" and to "all cases of partial or total occupation of the territory of a High Contracting Party." Petitioners' detention is

part of the armed conflict between the United States and al Qaeda. This is not a conflict "between two or more of the High Contracting Parties," because al Qaeda, a non-state terrorist organization, is not and could not be a party to the Fourth Geneva Convention. Nor does petitioners' detention arise from a case of "occupation of the territory of a High Contracting Party." Petitioners were captured in Bosnia and Pakistan, countries that the United States has never occupied. The Fourth Geneva Convention thus confers no rights on them.

C. Customary International Law Does Not Prohibit Petitioners' Detention

Petitioners contend (Br. 35-39) that their detention violates a rule of customary international law prohibiting "arbitrary detention." The district court properly rejected this argument, because customary international law cannot overcome a legislative or executive determination. See JA 1027-28. As the Supreme Court has explained, customary international law may be applied by courts only "[w]here there is no treaty, and no controlling executive or legislative act or judicial decision." Paquete Habana, 175 U.S. 677, 700 (1900). Because their detention is explicitly authorized by the AUMF, petitioners cannot invoke customary international law to challenge it. See Garcia-Mir v. Meese, 788 F.2d 1446, 1453-55 (11th Cir. 1986).

In any event, petitioners have failed to identify a rule of customary international law that would prohibit their detention. They invoke a putative rule against "arbitrary detention," but this is precisely the kind of vague standard that Sosa held is not enforceable as federal common law. Specifically, the Supreme Court held that, in the context of the Alien Tort Statute (28 U.S.C. § 1350), "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." 124 S. Ct. at 2765. Given the longstanding and widespread practice of detaining enemy combatants, that demanding standard of acceptance cannot possibly be satisfied here. Moreover, with respect to specificity, Sosa itself held that "a general prohibition of 'arbitrary' detention" is far too "broad" a rule to be enforceable as federal common law. See id. at 2768.

Nor may petitioners establish the existence of such a rule by citing the U.N.'s Universal Declaration of Human Rights or the ICCPR. See Br. 37. The Supreme Court has explained that the Declaration "does not of its own force impose obligations of international law" (Sosa, 124 S. Ct. at 2767), and as we noted above, the ICCPR was ratified with an express reservation that it would not be judicially enforceable.

Finally, customary international law is not enforceable through habeas. In Sosa, the Supreme Court held that the jurisdictional grant in the ATS confers a limited implied power to enforce customary international law as federal common law. See 124 S. Ct. at 2755-61. However, the Court relied heavily on both the text of the ATS, which encompasses violations of "the law of nations or a treaty," and the distinctive history of that particular provision. Moreover, the Court expressly limited its holding to the ATS and, in so doing, reaffirmed the traditional rule that other jurisdictional grants do not give federal courts the power to develop and apply rules of customary international law as federal common law. Id. at 2765 n.19; see Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) ("vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law"). Thus, as one court already has concluded, Sosa makes "the articulating of new international law violations" under federal common law an enterprise "unique" to the ATS. In re South African Apartheid Litig., 346 F. Supp. 2d 548, 554 n.18 (S.D.N.Y. 2004). In contrast, habeas corpus affords relief to those in custody in violation of "the Constitution or laws or treaties of the United States" (28 U.S.C. § 2241(c)(3)); the statutory term "laws" is most naturally read in context to refer to statutes; and habeas is not now,

and has never been, a vehicle for the articulation and enforcement of common law norms, whether domestic or international.

V. THE PRESIDENT IS NOT A PROPER HABEAS RESPONDENT

The dismissal of the President should be affirmed not only for the reasons set forth above, but also on the alternative ground that federal courts have "'no jurisdiction * * * to enjoin the President in the performance of his official duties'" or otherwise to compel the President to perform any official act. Franklin v. Massachusetts, 505 U.S. 788, 803 (1992) (plurality opinion) (quoting Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1866)). The district court did not reach this question, but the issue was preserved below and thus may properly be considered here. See Texas Rural Legal Aid, Inc. v. Legal Servs. Corp., 940 F.2d 685, 697-98 (D.C. Cir. 1991).

Although the Supreme Court has left open the question whether the President may be ordered to perform a purely "ministerial" duty, see Franklin, 505 U.S. at 802, the relief petitioners seek here – primarily, their release from custody – is far from ministerial. As the Seventh Circuit recently explained, in a habeas case brought by an alien enemy combatant, naming the President as a respondent was "improper" because "[s]uits contesting actions of the executive branch should be

brought against the President's subordinates." Al-Marri v. Rumsfeld, 360 F.3d 707, 708 (7th Cir. 2004).

Moreover, the President is not the immediate custodian of any detainee, and is thus an improper habeas respondent on that additional ground as well. See, e.g., Rumsfeld v. Padilla, 124 S. Ct. 2711, 2720 (2004); Rooney v. Secretary of the Army, 405 F.3d 1029, 2005 WL 1017836, *3 (D.C. Cir. 2005).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

PAUL D. CLEMENT
Acting Solicitor General

PETER D. KEISLER
Assistant Attorney General

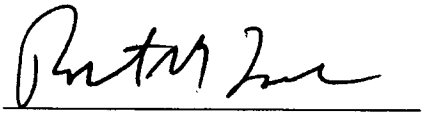
GREGORY G. KATSAS
Deputy Assistant Attorney General

DOUGLAS N. LETTER
(202) 514-3602
ROBERT M. LOEB
(202) 514-4332
ERIC D. MILLER
(202) 514-5735
Attorneys, Appellate Staff
Civil Division, Room 7268
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

May 25, 2005

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

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 13,922 words (which does not exceed the applicable 14,000 word limit).



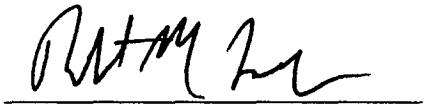
Robert M. Loeb

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2005, I caused copies of the foregoing brief to be served upon counsel of record by causing copies to be sent by Federal Express to the following counsel:

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

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



Robert M. Loeb

ADDENDUM

Fifth Amendment 1a

Authorization for Use of Military Force 2a

Geneva Convention Relative to the Protection of
Civilian Persons in Time of War 4a

International Covenant on Civil and Political Rights 8a

Army Regulation 190-8 . . . . . 10a

Constitution of the United States

Amendment V

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 any person be subject for the same offence to be twice put in jeopardy of life or limb; 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.

Public Law 107–40
107th Congress

Joint Resolution

Sept. 18, 2001
[S.J. Res. 23]

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

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

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

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

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

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

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

Authorization for Use of Military Force.
50 USC 1541 note.

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force".

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

President.

(a) IN GENERAL.—That the President is authorized 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.

(b) WAR POWERS RESOLUTION REQUIREMENTS.—

(1) SPECIFIC STATUTORY AUTHORIZATION.—Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS.—Nothing in this resolution supercedes any requirement of the War Powers Resolution.

Approved September 18, 2001.

LEGISLATIVE HISTORY—S.J. Res. 23 (H.J. Res. 64):

CONGRESSIONAL RECORD, Vol. 147 (2001):
Sept. 14, considered and passed Senate and House.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 37 (2001):
Sept. 18, Presidential statement.

○

Geneva Convention Relative to the Protection of Civilian Persons in Time of War
August 12, 1949, 6 U.S.T. 3516

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 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 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.

The Parties to the conflict shall facilitate to the greatest extent possible the task of the representatives or delegates of the Protecting Powers.

The representatives or delegates of the Protecting Powers shall not in any case exceed their mission under the present Convention. They shall, in particular, take account of the imperative necessities of security of the State wherein they carry out their duties.

* * * * *

Article 12. In cases where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.

For this purpose, each of the Protecting Powers may, either at the invitation of one Party or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for protected persons, possibly on neutral territory suitably chosen. The Parties to the conflict shall be bound to give effect to the proposals made to them for this purpose. The Protecting Powers may, if necessary, propose for approval by the Parties to the conflict, a person belonging to a neutral Power or delegated by the International Committee of the Red Cross, who shall be invited to take part in such a meeting.

* * * * *

Article 30. Protected persons shall have every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them.

These several organizations shall be granted all facilities for that purpose by the authorities, within the bounds set by military or security considerations.

Apart from the visits of the delegates of the Protecting Powers and of the International Committee of the Red Cross, provided for by Article 143, the Detaining or Occupying Powers shall facilitate as much as possible visits to protected persons by the representatives of other organizations whose object is to give spiritual aid or material relief to such persons.

* * * * *

Article 101. Internees shall have the right to present to the authorities in whose power they are, any petition with regard to the conditions of internment to which they are subjected.

They shall also have the right to apply without restriction through the Internee Committee or, if they consider it necessary, direct to the representatives of the Protecting Power, in order to indicate to them any points on which they may have complaints to make with regard to the conditions of internment.

Such petitions and complaints shall be transmitted forthwith and without alteration, and even if the latter are recognized to be unfounded, they may not occasion any punishment.

Periodic reports on the situation in places of internment and as to the needs of the internees,may be sent by the Internee Committees to the representatives of the Protecting Powers.

* * * * *

Article 146. The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a ' prima facie ' case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

* * * * *

Article 149. At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.

If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.

Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.

International Covenant on Civil and Political Rights
opened for signature December 16, 1966, 999 U.N.T.S. 171

Article 2

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 9

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.

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.

Headquarters
Departments of the Army,
the Navy, the Air Force,
and the Marine Corps
Washington, DC
1 October 1997

***Army Regulation 190–8**
***OPNAVINST 3461.6**
***AFJI 31–304**
***MCO 3461.1**

Effective 1 November 1997

Military Police

Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees

By Order of the Secretary of the Navy:

TOGO D. WEST,JR.
Secretary of the Army

By Order of the Secretary of the Air Force:

RICHARD A. COLEMAN
Colonel, USAF
Chief of Security Police

By Order of the Secretary of the Navy:

LT GENERAL J.L. JONES, USMC
Marine Corps Deputy Chief of Staff for Plans, Policies and Operations

J.L. JOHNSON
Admiral, United States Navy
Chief of Naval Operations
Acting

J.S. Mobley
Rear Admiral, United States Navy
Director, Navy Staff

History. This printing publishes a revision of this publication. Because the publication has been extensively revised the changed portions have not been highlighted.

Summary. This regulation implements Department Of Defense Directive 2310.1 and establishes policies and planning guidance for the treatment, care, accountability, legal status, and administrative procedures for Enemy Prisoners of War, Civilian Internees, Retained Persons, and Other Detainees. This regulation is a consolidation of Army Regulation 190-8 and Army Regulation 190-57 and incorporates SECNAV Instruction 3461. 3 and Air Force Joint Instruction 31-304. Policy and procedures established herein apply to the services and their capabilities to the extent that they are resourced and organized for enemy prisoner of war operations.

Applicability. This is a multi-service regulation. It applies to the Army, Navy, Air Force and Marine Corps and to their Reserve components when lawfully ordered to active duty under the provisions of Title 10 United States Code.

Proponent and exception authority. The proponent of this regulation is the Deputy Chief of Staff for Operations and Plans. The proponent has the authority to approve exceptions to this regulation that are consistent with controlling law and regulation. Proponents may delegate the approval authority, in writing, to a division chief within the proponent agency in the grade of colonel or the civilian equivalent.

Army management control process. The Regulation contains management control provisions in accordance with AR 11-2, but does not contain checklists for conducting management control. Reviews are used to accomplish assessment of management controls.

Supplementation. Army supplementation of this regulation and establishment of command or local forms is prohibited without prior approval from HQDA (DAMO-ODL), WASH DC 20310. Navy, Marine Corps and Air Force supplementation of this regulation is authorized, but is not required. If supplements are issued, major or second echelon commands will furnish one copy of each supplement to their headquarters, as follows: Navy, to the Chief of Naval Operations (N511), 2000 Navy Pentagon, Washington DC 20350-2000, Marine Corps, to the Commandant of the Marine Corps, HQ USMC (POS-10) 2 Navy Annex, Washington DC, 20380-1775 11), and Air Force, to HQ USAF/SPO, 1340 Air Force Pentagon, Washington, DC 20330-1340.

Suggested Improvements. Users are invited to send comments and suggested improvements through channels as follows: HQDA (DAMO-ODL), WASH DC 20310-0440.

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Chapter 1
Introduction

1–1. Purpose

a. This regulation provides policy, procedures, and responsibilities for the administration, treatment, employment, and compensation of enemy prisoners of war (EPW), retained personnel (RP), civilian internees (CI) and other detainees (OD) in the custody of U.S. Armed Forces. This regulation also establishes procedures for transfer of custody from the United States to another detaining power.

b. This regulation implements international law, both customary and codified, relating to EPW, RP, CI, and ODs which includes those persons held during military operations other than war. The principal treaties relevant to this regulation are:

(1) The 1949 Geneva Convention Relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GWS).

(2) The 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GWS SEA).

(3) The 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW).

(4) The 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC), and In the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence.

1–2. References

Required and related publications and prescribed and referenced forms are listed in appendix A.

1–3. Explanation of abbreviations and terms

Abbreviations and special terms used in this regulation are explained in the glossary.

1–4. Responsibilities

a. The Secretaries of the Military Departments. The Secretaries will—

(1) Develop internal policies and procedures consistent with this regulation in support of the Department of Defense (DOD), EPW/CI and other detainee programs.

(2) Ensure that appropriate training, as required, pursuant to DOD Directive 5100.77 is provided so that the principles of the Geneva Conventions, and the rights and obligations thereunder, are known by members of their service.

(3) Ensure that suspected or alleged violations of the international law of war are promptly reported and investigated per DOD Directive 5100.77.

(4) Conduct a periodic review of the EPW, CI and RP Program and training to ensure compliance with the law of war.

b. The Secretary of the Army (SA). The Secretary of the Army is the DOD Executive Agent (EA) for administering the DOD EPW, CI and RP Program. The SA, in coordination with the Assistant Secretary of Defense, International Security Affairs (ASD-ISA), will plan and develop the policy and coordinate the operation of the programs.

c. The Army Deputy Chief of Staff for Operations and Plans (DCSOPS). DCSOPS has primary Headquarters, Department of the Army (HQDA) staff responsibility for the EPW, CI and RP programs. The DCSOPS will-

(1) Develop and disseminate policy guidance for the treatment, care, accountability, legal status, and processing of EPW, CI, RP, and ODs.

(2) Report suspected or alleged violations of law committed by or against military personnel or civilians.

(3) Provide HQDA staff supervision for National Prisoner of War Information Center (NPWIC).

(4) Develop plans for the initial assignment and replacement of block internment serial numbers (ISNs) from the NPWIC to the Branch PWIC and for the assignment of the theater code section of the ISN.

(5) Provide necessary reports, coordination, technical advice, and staff assistance to:

(a) The Office of the Secretary of Defense (OSD).

(b) The Joint Chiefs of Staff (JCS).

(c) The military departments.

(d) Unified commands.

(e) Department of State and other Federal agencies.

(f) The International Committee of the Red Cross (ICRC).

(g) Protecting powers.

d. The Army Judge Advocate General (TJAG). The TJAG will provide HQDA guidance and advice to commanders on the legal aspects of the EPW, CI and RP program. TJAG will-

(1) Conduct liaison in coordination with the ASA-ISA, the Department of State, the Department of Justice, and other Federal agencies; the JCS; the Defense Intelligence Agency (DIA); the military departments; the ICRC; the Protecting Powers; and other detaining powers, as required.

(2) Provide advice and assistance to commanders on legal aspects of reported violations by EPW, CI, RP, and ODs.

(3) Provide theater guidelines for any EPW, CI and RP claims against the U.S. Government.

(4) Provide guidance regarding GPW Article 5 Tribunals.

e. Deputy Chief of Staff for Logistics (DCSLOG). The DCSLOG will ensure logistical resources are available to support EPW operations.

f. The Assistant Secretary of the Army Financial Management (ASA-FM&C). The ASA-FM&C will establish the policies and procedures governing entitlement, control, and accounting for pay, allowances, and personal funds for EPW, CI, RP, and ODs per the provisions of the GPW and GC.

g. Combatant Commanders, Task Force Commanders and Joint Task Force Commanders. Combatant Commanders, Task Force Commanders and Joint Task Force Commanders have the overall responsibility for the EPW, CI and RP program, operations, and contingency plans in the theater of operation involved to ensure compliance with international law of war. DOD Directive 2310.1 provides that persons captured or detained by the U.S. Military Services shall normally be handed over for safeguarding to U.S. Army Military Police, or to detainee collecting points or other holding facilities and installations operated by U.S. Army Military Police as soon as practical. U.S. Army Military Police have units specifically organized to perform the long-term functions associated with EPW/CI internment. Commanders must ensure the proper force structure is included in any joint operational plans. Commanders at all levels will ensure that all EPW, CI, RP, and ODs are accounted for and humanely treated, and that collection, evacuation, internment, transfers, release, and repatriation operations are conducted per this regulation. Combatant Commanders, Task Force Commanders and Joint Task Force Commanders will—

(1) Provide for an EPW, CI and RP camp liaison and assistance program to ensure the protection of U.S. interests per the Geneva Conventions upon the capture and transfer of EPW, CI, RP, and ODs to a host or other nation.

(2) Plan and procure logistical support to include: transportation, subsistence, personal, organizational and Nuclear, Biological & Chemical (NBC) clothing and equipment items, mail collection and distribution, laundry, and bath for EPW, CI and RP.

(3) Collect and dispose of captured enemy supplies and equipment through theater logistics and Explosive Ordnance Disposal (EOD) channels.

(4) Coordinate for acquisition of real estate, and as required, for planning, design, contracting, and construction of facilities for EPW, CI and RP with the Theater or JTF Engineer.

(5) Establish guidance for the use, transport, and evacuation of EPW, CI, RP, and ODs in logistical support operations.

(6) Identify requirements and allocations for Army Medical units in support of the EPW, CI and RP Program, and ensure that the

medical annex of OPLANs, OPORDs and contingency plans includes procedures for treatment of EPW, CI, RP, and ODs. Medical support will specifically include:

(a) First aid and all sanitary aspects of food service including provisions for potable water, pest management, and entomological support.

(b) Preventive medicine.

(c) Professional medical services and medical supply.

(d) Reviewing, recommending, and coordinating the use and assignment of medically trained EPW, CI, RP and OD personnel and medical material.

(e) Establishing policy for medical repatriation of EPW, CI and RP and monitoring the actions of the Mixed Medical Commission.

h. U. S. Army Criminal Investigation Command (USACIDC). USACIDC will provide criminal investigative support to EPW, CI and RP Camp Commanders per AR 195-2.

1–5. General protection policy

a. U.S. policy, relative to the treatment of EPW, CI and RP in the custody of the U.S. Armed Forces, is as follows:

(1) All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation.

(2) All persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is determined by competent authority.

(3) The punishment of EPW, CI and RP known to have, or suspected of having, committed serious offenses will be administered IAW due process of law and under legally constituted authority per the GPW, GC, the Uniform Code of Military Justice and the Manual for Courts Martial.

(4) The inhumane treatment of EPW, CI, RP is prohibited and is not justified by the stress of combat or with deep provocation. Inhumane treatment is a serious and punishable violation under international law and the Uniform Code of Military Justice (UCMJ).

b. All prisoners will receive humane treatment without regard to race, nationality, religion, political opinion, sex, or other criteria. The following acts are prohibited: murder, torture, corporal punishment, mutilation, the taking of hostages, sensory deprivation, collective punishments, execution without trial by proper authority, and all cruel and degrading treatment.

c. All persons will be respected as human beings. They will be protected against all acts of violence to include rape, forced prostitution, assault and theft, insults, public curiosity, bodily injury, and reprisals of any kind. They will not be subjected to medical or scientific experiments. This list is not exclusive. EPW/RP are to be protected from all threats or acts of violence.

d. Photographing, filming, and video taping of individual EPW, CI and RP for other than internal Internment Facility administration or intelligence/counterintelligence purposes is strictly prohibited. No group, wide area or aerial photographs of EPW, CI and RP or facilities will be taken unless approved by the senior Military Police officer in the Internment Facility commander's chain of command.

e. A neutral state or an international humanitarian organization, such as the ICRC, may be designated by the U.S. Government as a Protecting Power (PP) to monitor whether protected persons are receiving humane treatment as required by the Geneva Conventions. The text of the Geneva Convention, its annexes, and any special agreements, will be posted in each camp in the language of the EPW, CI and RP.

f. Medical Personnel. Retained medical personnel shall receive as a minimum the benefits and protection given to EPW and shall also be granted all facilities necessary to provide for the medical care of EPW. They shall continue to exercise their medical functions for the benefit of EPW, preferably those belonging to the armed forces upon which they depend, within the scope of the military laws and regulations of the United States Armed Forces. They shall be provided with necessary transport and allowed to periodically visit EPW situated in working detachments or in hospitals outside the EPW camp. Although subject to the internal discipline of the camp in which they are retained such personnel may not be compelled to carry out any work other than that concerned with their medical duties. The senior medical officer shall be responsible to the camp military authorities for everything connected with the activities of retained medical personnel.

g. Religion.

(1) EPW, and RP will enjoy latitude in the exercise of their religious practices, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities. Adequate space will be provided where religious services may be held.

(2) Military chaplains who fall into the hands of the U.S. and who remain or are retained to assist EPW, and RP, will be allowed to minister to EPW, RP, of the same religion. Chaplains will be allocated among various camps and labor detachments containing EPW, RP, belonging to the same forces, speaking the same language, or practicing the same religion. They will enjoy the necessary facilities, including the means of transport provided in the Geneva Convention, for visiting the EPW, RP, outside their camp. They will be free to correspond, subject to censorship, on matters concerning their religious duties with the ecclesiastical authorities in the country of detention and with international religious organizations. Chaplains shall not be compelled to carry out any work other than their religious duties.

(3) Enemy Prisoners of War, who are ministers of religion, without having officiated as chaplains to their own forces, will be at liberty, whatever their denomination, to minister freely to the members of their faith in U.S. custody. For this purpose, they will receive the same treatment as the chaplains retained by the United States. They are not to be obligated to do any additional work.

(4) If EPW, RP, do not have the assistance of a chaplain or a minister of their faith. A minister belonging to the prisoner's denomination, or in a minister's absence, a qualified layman, will be appointed, at the request of the prisoners, to fill this office. This appointment, subject to approval of the camp commander, will take place with agreement from the religious community of prisoners concemed and, wherever necessary, with approval of the local religious authorities of the same faith. The appointed person will comply with all regulations established by the United States.

1–6. Tribunals

a. In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

b. A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

c. A competent tribunal shall be composed of three commissioned officers, one of whom must be of a field grade. The senior officer shall serve as President of the Tribunal. Another non-voting officer, preferably an officer in the Judge Advocate General Corps, shall serve as the recorder.

d. The convening authority shall be a commander exercising general courts-martial convening authority.

e. Procedures.

(1) 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 the oath to all voting members of the Tribunal to include the President.

(2) A written record shall be made of proceedings.

(3) Proceedings shall be open except for deliberation and voting by the members and testimony or other matters which would compromise security if held in the open.

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(4) Persons whose status is to be determined shall be advised of their rights at the beginning of their hearings.

(5) Persons whose status is to be determined shall be allowed to attend all open sessions and will be provided with an interpreter if necessary.

(6) Persons whose status is to be determined shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal. Witnesses shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would affect combat or support operations. In these cases, written statements, preferably sworn, may be submitted and considered as evidence.

(7) Persons whose status is to be determined have a right to testify or otherwise address the Tribunal.

(8) Persons whose status is to be determined may not be compelled to testify before the Tribunal.

(9) Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine the status of the subject of the proceeding in closed session by majority vote. Preponderance of evidence shall be the standard used in reaching this determination.

(10) A written report of the tribunal decision is completed in each case. Possible board determinations are:

(a) EPW.

(b) Recommended RP, entitled to EPW protections, who should be considered for certification as a medical, religious, or volunteer aid society RP.

(c) Innocent civilian who should be immediately returned to his home or released.

(d) Civilian Internee who for reasons of operational security, or probable cause incident to criminal investigation, should be detained.

f. The recorder shall prepare the record of the Tribunal within three work days of the announcement of the tribunal's decision. The record will then be forwarded to the first Staff Judge Advocate in the internment facility's chain of command.

g. Persons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed. The record of every Tribunal proceeding resulting in a determination denying EPW status shall be reviewed for legal sufficiency when the record is received at the office of the Staff Judge Advocate for the convening authority.

1–7. The National Prisoner of War Information Center (NPWIC)

The NPWIC will—

a. Forward blocks of ISNs to designated Branch PWIC in Theater and CONUS, as required.

b. Obtain and store information concerning EPW, CI and RP, and their confiscated personal property. Information will be collected and stored on each EPW, CI, and RP captured and detained by U.S. Armed Forces. This includes those EPW, RP, who were captured by the United States but are in custody of other powers and those who have been released or repatriated. EPW, CI and RP cannot be forced to reveal any information however they are required to provide their name, rank, serial number and date of birth. The Geneva Convention requires the NPWIC to collect and store the following information for EPW, RP:

(1) Complete name.
(2) ISN.
(3) Rank.
(4) Serial number.
(5) Date of birth.
(6) City of birth.
(7) Country of birth.
(8) Name and address of next of kin.
(9) Date of capture.
(10) Place of capture.
(11) Capturing unit.
(12) Circumstances of capture.
(13) Location of confiscated personal property.
(14) Nationality.
(15) General statement of health.
(16) Nation in whose armed services the individual is serving.
(17) Name and address of a person to be notified of the individual's capture.
(18) Address to which correspondence may be sent.
(19) Certificates of death or duly authenticated lists of the dead.
(20) Information showing the exact location of war graves together with particulars of the dead.
(21) Notification of capture.
(22) List of personal articles of value not restored upon repatriation.

c. Obtain and store information concerning CI and ODs who are kept in the custody of U.S. Armed Forces who are subjected to assigned residence, or who were interned and then released. The following information will be collected:

(1) Any particulars that may assist in the individual's identification. This information shall include at least the person's surname, first names, place and date of birth, nationality, last residence and distinguishing characteristics, the first name of the father and the maiden name of the mother, the date, place and nature of the action taken with regard to the individual, the address at which correspondence may be sent and the name and address of the person to be informed.

(2) The individual's personal data for notification of his or her internment, state of health, and changes to this data.

(3) Certificates of death or authenticated lists of the dead and information showing the location of graves.

(4) Authenticated lists of personal valuables left by these protected persons.

(5) Information pertaining to children living in territories occupied by the United States. This will include all data necessary for identifying children whose identity is in doubt.

d. Process all inquiries concerning EPW and RP captured by U.S. Armed Forces.

e. Make reports to the ICRC, the State Department, and other Federal agencies as required.

f. Provide to the adverse party via the ICRC's Central Tracing Agency (CTA) all pertinent information pertaining to EPW, CI, and RP, in custody of the U.S. Armed Forces.

g. Transmit via the CTA/ICRC/PP, all official documents and information on judicial proceedings concerning EPW and RP captured, interned, retained or detained by U.S. Armed Forces.

h. Information and Property Transfers.

(1) In response to an inquiry, the NPWIC will forward all information and documents to the CTA or PP.

(2) Valuables and personal property which can be returned to a released or repatriated person will be forwarded through the CTA or PP.

(3) Valuables and personal property of deceased EPW/RP, which can be released, will be forwarded to the next of kin through the CTA or PP.

i. The ICRC/PP transmits information, documents, and personal effects to the State it represents as follows:

(1) If civilians are concerned, to their countries of origin and/or residence.

(2) If combatants or EPW, CI, and RP are concerned, to their country of origin or to the Power on which they depend.

1–8. The Branch PWIC

a. The Branch PWIC functions as the field operations agency for the NPWIC. It is the central agency responsible to maintain information on all EPW, CI and RP and their personal property within an assigned theater of operations or in CONUS.

b. The Branch PWIC serves as the theater repository for information pertaining to:

(1) Accountability of EPW, CI, and RP and implementation of DOD policy.