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

Nos. 05-5064, and consolidated cases 05-5095 through 05-5116

KHALED A.F. AL ODAH, *et al.*,

Petitioners/Appellants/Cross-Appellees,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents/Appellees/Cross-Appellants.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS/APPELLEES/CROSS-APPELLANTS URGING REVERSAL OF DENIAL OF MOTION TO DISMISS

Daniel J. Popeo
Richard A. Samp
(D.C. Bar No. 367194)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

Dated: April 27, 2005

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

A. PARTIES AND *AMICI*

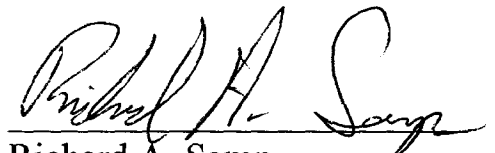
All parties and *amici curiae* appearing before the district court and/or in this Court are listed in the brief for Respondents/Appellees/Cross-Appellants.

B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the brief for Respondents/ Appellees/Cross Appellants, filed April 27, 2005.

C. RELATED CASES

Cases related to this appeal are listed in the brief for Respondents/ Appellees/Cross-Appellants. This case was before the Court on a prior occasion. *See Al Odah v. United States,* 321 F.3d 1134 (D.C. Cir. 2003), *rev'd and remanded sub nom., Rasul v. Bush,* 124 S. Ct. 2686 (2004).



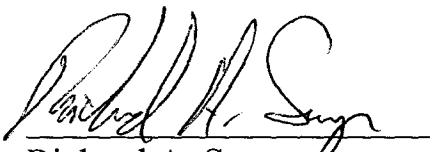
Richard A. Samp
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Counsel for *amici curiae*

April 27, 2005

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Circuit Rule 29(b), Fed.R.App.P. 26.1, and Circuit Rule 26.1, the undersigned counsel states that *amici curiae* Washington Legal Foundation and Allied Educational Foundation are non-profit corporations; they have no parent corporations, and no publicly-held company has a 10% or greater ownership interest.



Richard A. Samp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

Statutes, Regulations and Constitutional Provisions:

Miscellaneous:

Page

* Authorities on which we chiefly rely are marked with asterisks

GLOSSARY

AUMF	Authorization for the Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001)
Slip Op.	January 31, 2005 District Court Opinion by Judge Green
Third Geneva Convention	Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting America's security. To that end, WLF has appeared before this Court and other federal courts to ensure that the federal government possesses the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Rumsfeld v. Padilla,* 124 S. Ct. 2711 (2004); *Hamdi v. Rumsfeld,* 124 S. Ct. 2633 (2004); *Rasul v. Bush,* 124 S. Ct. 2686 (2004); *Hamdan v. Rumsfeld*, No. 04-5393 (D.C. Cir., dec. pending). WLF also filed an *amicus curiae* brief in this case when it was before the Court in 2003.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in the federal courts on national security-related issues on a number of occasions.

Amici are concerned that, if the rights asserted by Appellants under the U.S. Constitution and the Geneva Conventions are recognized by the federal courts, the Executive Branch will be deprived of the flexibility necessary to confront the imminent threats posed to national security by terrorist groups

throughout the world. Moreover, if the liberty interests protected by the U.S. Constitution are deemed to extend to Appellants -- aliens who have never lived in the United States, have no claim to the protections of our society, and are accused of taking up arms against the United States -- *Amici* fear the result will be a watering-down of those important liberty interests for all Americans.

STATEMENT OF THE CASE

The United States has been at war with militant Islamists since September 11, 2001, when al Qaeda's murderous and unprovoked attack on American civilians resulted in nearly 3,000 deaths. Immediately thereafter, Congress enacted a resolution expressing its support of the President's 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." Authorization for Use of Military Force ("AUMF"), Pub.L. No. 107-40, 115 Stat. 224 (2001). President Bush has determined that al Qaeda and the Taliban are such organizations; he has authorized the use of force against al Qaeda, the Taliban, and their operatives in Afghanistan and throughout the world. The military campaign against al Qaeda and the Taliban continues unabated, and they continue to pose a substantial threat to national security. Based in part on the authority granted under the

AUMF, the U.S. military has taken into custody numerous al Qaeda and Taliban operatives. Several hundred of those operatives, including each of the Appellants, are being detained at U.S. military facilities in Guantanamo Bay, Cuba.

The President has determined that al Qaeda detainees are not entitled to the protections of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135 (the "Third Geneva Convention") because al Qaeda is not a state party to the Geneva Conventions.[1] He has further determined that the Third Geneva Convention *does* apply to Taliban detainees but that they are ineligible for prisoner-of-war status under Article Four of the Convention because Taliban forces were not organized in compliance with Article Four prerequisites. Slip. Op. 71. He has further determined that although none of the Guantanamo Bay detainees is "entitled to POW privileges, they are to be provided many of the privileges as a matter of policy" and are to be treated "humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the Third Geneva

---

[1] *See* Memorandum from the President, "Humane Treatment of al Qaeda and Taliban Detainees" (February 7, 2002), available at http://www.library.law.pace.edu/research/020207_bushmemo.pdf. The district court agreed with that determination. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2205), Slip. Op. 70.

Convention of 1949." *See* Office of the White House Press Secretary, Fact Sheet: "Status of Detainees at Guantanamo," *available at* www.whitehouse.gov/news/releases/2002/02/20020207-13.html.

Three suits (challenging detention of 16 Guantanamo Bay detainees) were filed in the district court in 2002. All 16 detainees challenged the military's determination that they were "enemy combatants" who had fought against the United States. This Court affirmed the district court's dismissal of those claims, finding that the federal courts had no jurisdiction to entertain habeas corpus petitions from foreigners who lacked "presence or property" in this country. *Al Odah v. United States,* 321 F.3d 1134, 1141 (D.C. Cir. 2003). In June 2004, the Supreme Court reversed that jurisdictional ruling and remanded the case to allow the district court "to consider in the first instance the merits of [the detainees'] claims." *Rasul v. Bush,* 124 S. Ct. 2686, 2699 (2004).

Following the Supreme Court's decision, additional Guantanamo Bay detainees filed suit in federal district court, seeking release from custody. By the end of July 2004, 13 cases involving more than 60 detainees were pending before eight district court judges in the District of Columbia.

In July 2004, the United States established an administrative procedure whereby Guantanamo Bay detainees (including all of the Appellants) could

challenge the military's determination that they had engaged in hostilities against the United States or its coalition partners. The procedures permit a detainee to go before a Combatant Status Review Tribunal ("CSRT"), be informed of the factual basis for his detention, submit evidence in an effort to demonstrate that he had not fought against the United States, and obtain the assistance of a translator and a "Personal Representative" in presenting his case. Slip Op. 10-12. Since that date, virtually all Guantanamo Bay detainees have had CSRT proceedings offered to them, and several have been released based on CSRT determinations that they were not, in fact, enemy combatants.[2]

In October 2004, the government moved to dismiss each of the 13 cases. On January 19, 2005, Judge Richard Leon dismissed the two cases assigned to him, concluding that "no viable legal theory exists by which it could issue a writ of habeas corpus" to Guantanamo Bay detainees. *Khalid v. Bush*, 355 F. Supp. 2d 311, 314 (D.D.C. 2005).[3]

---

[2] Those releases were in addition to the many Guantanamo Bay detainees who have been released because the military determined (in connection with separate, on-going review proceedings) that they no longer posed a threat to national security.

[3] The petitioners in Judge Leon's cases have appealed to this Court from the dismissal order. Case Nos. 05-5062, 05-5063. Although those cases appear to have been consolidated for purposes of oral argument with all other Guantanamo Bay detention cases, they are proceeding under a separate briefing schedule.

The motions to dismiss the 11 other cases were transferred for decision to Senior Judge Joyce Hens Green. Disagreeing with Judge Leon, Judge Green on January 31, 2005 denied the motions to dismiss in substantial part. First, she held that the aliens being held at Guantanamo Bay possess enforceable rights under the Fifth Amendment's Due Process Clause, despite their lack of ties to the United States. Slip Op. 18-38. Judge Green held that that conclusion was mandated by *Rasul*'s statement that the habeas petitions "unquestionably 'describe custody in violation of the Constitution or laws or treaties of the United States,'" Slip Op. 35 (quoting *Rasul,* 124 S. Ct. at 2698 n.15), and because Guantanamo Bay "must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply." *Id.* at 38.

She proceeded to apply a "*Mathews v. Eldridge* balancing test"[4] to determine the amount of process that is due under the Fifth Amendment to alleged enemy combatants challenging the factual predicate underlying a decision to place them in detention. She determined that the Fifth Amendment requires that a nonresident alien being held as an enemy combatant receive fair notice of the factual basis for his classification and a fair opportunity to rebut the government's factual assertions before a neutral decisionmaker. Slip. Op. 39-42. Judge

[4] *See Mathews v. Eldridge,* 424 U.S. 31 (1976).

Green then concluded that the CSRT procedures -- which provide detainees an opportunity to challenge their "enemy combatant" classification -- failed in a number of respects to satisfy those due process requirements. *Id.* 45-68.

Judge Green also determined that those Appellants being held as alleged Taliban fighters had stated a valid claim under the Third Geneva Convention. *Id.* 68-73. She held that rights created under the Third Geneva Convention are individually enforceable, and that the Convention requires that Appellants who were Taliban fighters be treated as prisoners of war until such time as they receive an individualized determinations from a "competent tribunal" that they do not qualify for prisoner-of-war status. *Id.*[5]

Finally, Judge Green dismissed other constitutional, statutory, and treaty-based claims raised by various of the Appellants, including alleged violations of the Sixth, Eighth, and Fourteenth Amendments; the U.S. Constitution's Suspension Clause (art. I, § 9, cl. 2); the Alien Tort Statute; the Administrative Procedure Act; and Army Regulation 190-8. *Id.* 73-74.

This Court subsequently granted both sides an interlocutory appeal from

---

[5] Judge Green did not explain how Appellants' Third Geneva Convention claims relate to the principal relief Appellants seek: release from custody. Winning prisoner-of-war status would not, of course, bring an end to Appellants' detention.

various aspects of Judge Green's January 31 order, as well as from other orders issued by Judge Green.[6] This brief focuses exclusively on the January 31 order, addressing Judge Green's rulings that: (1) nonresident aliens being detained at Guantanamo Bay may properly invoke the Due Process Clause to challenge their detentions; (2) the CSRT procedures do not adequately protect their due process procedural rights to challenge the factual predicates for their detentions; and (3) private litigants are permitted to file suit in federal courts to enforce rights created under the Third Geneva Convention.

SUMMARY OF ARGUMENT

The law in this circuit could not be clearer that the protections of the Fifth Amendment's Due Process Clause do not extend to aliens, such as Appellants, who have no meaningful contacts with the United States. Accordingly, Judge Green erred in declining to dismiss Appellants' due process claims. Judge Green relied on the Supreme Court's *Rasul* decision for the proposition that Fifth Amendment rights extend to nonresident aliens being held at Guantanamo Bay. But the Court explicitly stated in *Rasul* that it was *only* deciding whether the federal courts have jurisdiction to determine the legality of Guantanamo Bay

---

[6] Case Nos. 05-5064 and Nos. 05-5095 though 05-5116 all are appeals and cross-appeals from various aspects of Judge Green's rulings.

detentions, not whether detainees are entitled to Fifth Amendment protections. *Rasul,* 124 S. Ct. at 2699. In the absence of any indication that the Court was deciding the constitutional issue, Judge Green was bound (as is this panel) to follow circuit precedent. Moreover, Judge Green's reliance on long-term American control over Guantanamo Bay was misplaced. As the Court made clear in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), a nonresident alien who otherwise lacks constitutional protections does not suddenly acquire them when he is transferred to a detention facility within the United States for law enforcement purposes. Accordingly, regardless of the degree of American control over Guantanamo Bay, al Qaeda and Taliban fighters who lack constitutional protections when captured on a foreign battlefield do not acquire such rights upon their transfer to Guantanamo Bay.

Even if Judge Green were correct that Appellants are entitled to some due process protections, they have been afforded all the process they are due under the Fifth Amendment. The CSRT procedures established by the Defense Department provide detainees with notice of the nature of the charges against them and a fair opportunity to contest those charges. Due process does not require more; indeed, Appellants cannot point to any examples in the history of warfare in which a detaining power has afforded suspected enemy combatants with a

greater opportunity to protest their innocence. Judge Green's statement that due process requires that enemy combatants be granted the assistance of trained lawyers is particularly off-base; such a requirement would be impossible to satisfy in any large-scale war and would effectively prevent the military from detaining the hundreds of thousands of enemy combatants that it has taken into custody in past wars.

Finally, Judge Green erred in failing to dismiss claims raised by Appellants under the Third Geneva Convention. The text of the Convention makes clear that Congress intended any enforcement to take place by diplomatic means, not by means of federal court suits filed by individuals being detained as enemy combatants. Federal appeals courts that have considered the issue have overwhelmingly concluded that the Geneva Conventions do not contemplate private rights of action. Indeed, the Supreme Court held in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that the 1929 predecessor to the Third Geneva Convention did not permit private enforcement, and Appellants can point to nothing in Congress's subsequent ratification of the Third Geneva Convention suggesting that it intended to adopt such a major change in the means of enforcement.

ARGUMENT

I. GUANTANAMO BAY DETAINEES DO NOT POSSESS ENFORCEABLE CONSTITUTIONAL RIGHTS

Pursuant to the powers conferred on him by the AUMF, President Bush for the past 3 ½ years has been carrying out a world-wide military campaign against militant Islamists. During the course of that campaign, United States forces have taken into custody thousands of individuals engaged in combat against this country and its allies; several hundred of those enemy combatants are now being detained at Guantanamo Bay. Appellants do not seriously contest the President's authority to detain enemy combatants for the duration of hostilities; the Supreme Court resoundingly affirmed that authority in its *Hamdi* decision last June. Rather, they contend that the Fifth Amendment prohibits the military from detaining them as enemy combatants without due process of law -- by which they mean a formal opportunity to challenge the military's determination that they are, in fact, enemy combatants.

That contention is without merit. Binding precedent from both this Court and the Supreme Court could not be clearer that the protections of the Fifth Amendment's Due Process Clause do not extend to aliens, such as Appellants, who have no meaningful contacts with the United States. For example, in

Eisentrager, the Supreme Court rejected efforts by German civilians -- arrested in China and imprisoned as war criminals in an American facility in Germany after World War II -- to win release by asserting a violation of their Fifth Amendment rights. While acknowledging that aliens with strong ties to American society, such as those living in this country as resident aliens, are entitled to certain constitutional protections, the Court said that the German prisoners were entitled to no such protections:

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it should scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. *Cf. Downes v. Bidwell*, 182 U.S. 244 [(1901)]. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it.

Eisentrager, 339 U.S. at 784. The Court later described *Eisentrager*'s "rejection of extraterritorial application of the Fifth Amendment" as "emphatic." *Verdugo-Urquidez,* 494 U.S. at 269.

It is true, of course, that the petitioners in *Eisentrager* had been determined by a military tribunal to be German combatants who had violated the laws of war. But that fact does not serve to distinguish *Eisentrager* because each of the Appellants similarly has been determined, following a CSRT proceeding, to be an enemy combatant. Appellants, of course, challenge the adequacy of their

proceedings, but so too did the petitioners in *Eisentrager*; and the Supreme Court responded not by undertaking a due process examination of the adequacy of those proceedings, but by holding categorically that the petitioners were not entitled to *any* Fifth Amendment protections.

If *Eisentrager*'s prohibition on extraterritorial application of the Fifth Amendment were deemed limited to cases involving admitted enemy combatants, then *any* overseas alien challenging his detention by military authorities could evade *Eisentrager* entirely simply by denying that he is an enemy combatant. Such a rule would eviscerate one of the principal purposes of *Eisentrager*: to prevent aliens captured in battle from using the federal courts to "fetter[]" our field commanders by "call[ing them] to account in their own civil courts and divert[ing their] attention from the military offensive abroad to the legal defensive at home"; and from fomenting "conflict between judicial and military opinion." *Eisentrager,* 339 U.S. at 779.

This Court has explicitly rejected efforts to confine *Eisentrager* to cases in which the petitioners' status as enemy combatants is unchallenged. *See Harbury v. Deutch,* 233 F.3d 596 (D.C. Cir. 2000), *rev'd on other grounds sub nom., Christopher v. Harbury*, 536 U.S. 403 (2002). In *Harbury,* the plaintiff sought to sue high government officials for violations of her alien husband's Fifth

Amendment rights, alleging that they were complicit in his torture and death while he was in Guatemala. The Court relied on *Eisentrager* and *Verdugo-Urquidez* in holding that the plaintiff could not raise her Fifth Amendment claims in federal court. *Id.* at 604. The Court rejected the plaintiff's argument that *Verdugo-Urquidez* was distinguishable because its discussion of the Fifth Amendment was *dicta* (the case involved Fourth Amendment claims) and that *Eisentrager* was distinguishable because it involved the rights of enemy aliens in wartime. This Court explained:

> Harbury also correctly observes that *Eisentrager* -- the case relied on by *Verdugo-Urquidez* [for its pronouncement that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States," *Verdugo-Urquidez,* 494 U.S. at 269] -- concerned rights of enemy aliens during wartime. But the Supreme Court's extended and approving citation of *Eisentrager* suggests that its conclusions regarding extraterritorial application of the Fifth Amendment are not so limited.

Harbury, 233 F.3d at 604. This language from *Harbury* cannot be dismissed as *dicta*. The quoted language was unquestionably part of the Court's holding; the Court refused to hear the plaintiff's torture claims even though her husband was neither an enemy alien nor an enemy combatant. While recognizing that *Verdugo-Urquidez*'s discussion of the Fifth Amendment was "*dicta*," the Court nonetheless deemed the *dicta* "authoritative" and thus relied on it in dismissing

the plaintiff's Fifth Amendment claim. *Id.* at 604. In sum, *Verdugo-Urquidez* and *Eisentrager* cannot be distinguished on the ground that the Appellants deny that they are enemy combatants.

Similarly, this Court in *Al Odah* interpreted *Eisentrager* as holding that rights conferred by the First, Second, Fourth, Fifth, and Sixth Amendments "are not held by aliens outside the sovereign territory of the United States, regardless of whether they are enemy aliens." *Al Odah,* 321 F.3d at 1140-1141. The Court went on to note that other D.C. Circuit decisions were "firmer still" in their rejection of extraterritorial application of constitutional rights to nonresident aliens:

> Citing *Eisentrager,* we held in *Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960), that "non-resident aliens . . . plainly cannot appeal to the protection of the Constitution or laws of the United States." The law of the circuit now is that a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." *People's Mojahedin Org. v. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999); *see also 32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002).

Id. at 1141.

Judge Green deemed herself at liberty to ignore this "law of the circuit" because, in her view, it was overruled by the Supreme Court's *Rasul* decision. Slip Op. 34-38. She based that conclusion on the following footnote in *Rasul*:

> Petitioners' allegations -- that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing -- unquestionably describe "custody in violation of the Constitution or laws of the United States." 28 U.S.C. § 2241(c)(3).

Rasul, 124 S. Ct. at 2698 n.15.

According to Judge Green, "This comment stands in sharp contrast to the declaration in *Verdugo-Urquidez* relied upon by the D.C. Circuit in *Al Odah* that the Supreme Court's 'rejection of extraterritorial application of the Fifth Amendment [has been] emphatic.' [*Verdugo-Urquidez*], 494 U.S. at 269." Slip Op. at 35. Based on Footnote 15, Judge Green concluded that *Rasul* had overruled this Circuit's emphatic rejection of the extraterritorial application of the Fifth Amendment.

Judge Green erred in several fundamental respects. First, there is no doubt that Footnote 15 is *dicta*. Indeed, immediately after its statement in the footnote that the petitioners had stated a valid claim for relief under the habeas corpus statute, *Rasul* made clear in its concluding paragraph that it was deciding *only* the issue of jurisdiction, the sole issue presented by the petition on which the Court had granted review:

> 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.

Rasul, 124 S. Ct. at 2699 (emphasis added). Judge Green was not at liberty (nor is this panel) to ignore "the law of the circuit" on the basis of *dicta* in a Supreme Court opinion. Rather, the law of the circuit remains binding until changed by an *en banc* decision of this Court or overruled by the Supreme Court.

Moreover, Judge Green has read far more into Footnote 15 than the Supreme Court could possibly have intended. The Court never focused on the Guantanamo Bay detainees' constitutional claims; rather, it merely quoted from the federal habeas statute, which addresses "custody in violation of the Constitution *or* laws *or* treaties of the United States." 28 U.S.C. § 2241(c)(3) (emphasis added). Indeed, in the sentence immediately preceding the footnote, the Court did not mention constitutional rights *at all* but rather said merely that the petitioners "contend that they are being held in custody in violation of *the laws* of the United States." *Rasul,* 124 U.S. at 2698 (emphasis added). Accordingly, there is simply no basis for Judge Green's statement that, in light of Footnote 15, "it is difficult to imagine" that the Supreme Court did not believe that the Guantanamo detainees were entitled to constitutional protections. Slip

Op. at 35.[7]

Finally, regardless of the intended meaning of Footnote 15, it is undeniable that the circumstances underlying Appellants' detention have changed considerably since the footnote was written. The footnote makes reference to allegations that the detainees were being held "without access to counsel" and "without being charged with any wrongdoing." Appellants can no longer make those same allegations. Within the past year, each of the Appellants has had access to counsel, and each has been found -- following a CSRT proceeding -- to be an "enemy combatant" 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."[8] Accordingly, even if *Rasul*

---

[7] Judge Green also stated that *Rasul* must have intended to confer constitutional protections on the Guantanamo Bay detainees because:

> Had the Supreme Court intended to uphold the D.C. Circuit's rejection in *Al Odah* of underlying constitutional rights, it is reasonable to assume that the majority would have included in its opinion at least a brief statement to that effect, rather than delay the ultimate resolution of this litigation and require the expenditure of additional resources in the lower courts.

Slip Op. at 35. To the contrary, such an assumption is totally *unreasonable.* Rather, it is much more reasonable to take the Supreme Court at its word that it was only deciding the jurisdictional issue, based on its normal practice of deciding only those issues that are properly presented for review.

[8] *See Order Establishing Combatant Status Review Tribunal* (July 7, 2004).

could be deemed to have determined that the Fifth Amendment applies extraterritorially under the circumstances as alleged in that case, that determination would have limited application to the very different set of circumstances that exist today.

In an effort to distinguish *Eisentrager, Verdugo-Urquidez,* and D.C. Circuit precedent, Judge Green pointed to Guantanamo Bay's alleged "special nature," such that even though the United States indisputably does not exercise sovereignty over the area, it should be treated "as the equivalent of sovereign U.S. territory where fundamental constitutional rights exist." Slip Op. at 34. But Judge Green's reliance on long-term American control over Guantanamo Bay was misplaced. In determining the circumstances under which a detained alien is entitled to constitutional protections, the Court has never focused exclusively or even primarily on the location of his detention. Rather, the most important criterion has been the degree to which the alien is "identi[fied] with our society"; the greater the identity, the more generous is the allocation of rights. *Eisentrager*, 339 U.S. at 770. A nonresident alien who otherwise lacks constitutional protections does not suddenly acquire them simply because, for law enforcement or national security reasons, he is transferred into an area that has long been under American control. Indeed, in *Verdugo-Urquidez,* a Mexican citizen taken into custody in Mexico was transported to the United States for trial on narcotics

charges. Despite his physical presence in the United States, the Court nonetheless held that the Mexican was not entitled to invoke Fourth Amendment protections against unreasonable searches and seizures in connection with the search of his Mexican residence. The Court distinguished cases that had conferred substantial constitutional rights on aliens under other circumstances, explaining:

> These cases, however, establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country. . . . Respondent is an alien who has had no previous significant voluntary connection with the United States, so these cases avail him not.

Verdugo-Urquidez, 494 U.S. at 271.

If physical presence within the United States was insufficient to confer constitutional protections on Verdugo-Urquidez, then surely Appellants' detention in an area under American control but outside the sovereign territory of the United States is insufficient by itself to confer such protections on Appellants. If al Qaeda and Taliban fighters lacked constitutional protections when captured on a foreign battlefield -- and they surely did -- then they did not magically acquire such rights solely by virtue of their transfer to Guantanamo Bay.

II. THE CSRT PROCEEDINGS FULLY SATISFIED WHATEVER DUE PROCESS PROTECTIONS APPELLANTS MAY POSSESS

Even if Judge Green were correct that Appellants are entitled to some due

process protections, they have been afforded all the process they are due under the Fifth Amendment. The CSRT procedures established by the Defense Department provide detainees with notice of the nature of the charges against them and a fair opportunity to contest those charges. Due process does not require more.

The federal government's brief thoroughly explains the numerous procedural rights afforded the Guantanamo Bay detainees under the CSRT procedures and how those rights ensure that the detainees have a fair opportunity to contest their designation as enemy combatants. Rather than repeating all those arguments here, *amici* wish to highlight a few brief points.

Judge Green correctly recognized that any analysis of the process due under the Fifth Amendment requires a balancing of the interests of the individual invoking the Fifth Amendment (and the risk of the erroneous deprivation of those interests) against the competing interests of the government (including the burdens imposed on the government by any mandated process requirements). Slip Op. 38-39. But her analysis of those interests erred in several significant respects. First, her analysis failed to take into account that the detainees are nonresident aliens; rather, she evaluated the strength of the detainees' liberty interests as though they were American citizens.[9] But even if one assumes that

---

[9] The district court held that because (in its view) the facts in *Hamdi* were largely identical to those facing Appellants, "*Hamdi* forms both the starting point

nonresident aliens are entitled to *some* constitutional protections, there can be little doubt that the Constitution is more solicitous of the life, liberty, and property of American citizens than it is of nonresident aliens. For example, in rejecting due process claims asserted by resident aliens who were detained during the course of deportation proceedings, the Supreme Court recently explained, "'In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Demore v. Kim,* 538 U.S. 510, 521 (2003) (quoting *Mathews v. Diaz,* 426 U.S. 67, 79-80 (1976)). *Verdugo-Urquidez* explicitly rejected the contention that the equal protection component of the Fifth Amendment requires aliens to be afforded the same constitutional rights as citizens. *Verdugo-Urquidez,* 494 U.S. at 273. As the district court recognized, "the most basic fundamental rights" protected under the Constitution, such as the right not to be deprived of life, liberty, or property without due process of law, are ones "for which the people of this country have fought and died for well over

---

and the core of this Court's consideration of what process is due to the Guantanamo detainees in these cases." Slip Op. 39. Although it made note on one occasion that Hamdi was a U.S. citizen and that the Guantanamo detainees were not, *id.*, it attached no significance to that fact in undertaking its due process analysis. The Court applied to Appellants' procedural due process claims the same *Mathews v. Eldridge* "balancing" analysis that the Supreme Court had applied to an American citizen in *Hamdi.*

two hundred years." Slip Op. 37. It makes little sense to suggest, as did the district court, that nonresident aliens -- who have made no contributions to establishing the fundamental rights that we treasure so highly -- should enjoy the same level of constitutional protections as "the people of this country" who have had to sacrifice to make the country what it is today.

Second, the district court's analysis did not properly take into account the balance struck by the Supreme Court in *Hamdi* between the liberty interests of American citizens accused of taking up arms against the United States and its allies, and the government's interests in keeping such individuals detained for the duration of hostilities. Even in the case of citizens, the Court was willing to allow indefinite detention based on proceedings before a military tribunal in which the government relied on hearsay evidence, and which adopted presumptions in favor of the government's enemy combatant allegation. *Hamdi,* 124 S. Ct. at 2648, 2649 (plurality opinion). A recognized criticism of hearsay evidence (and the reason that it is often excluded from criminal proceedings) is that its use frustrates a defendant's efforts to confront (and attempt to discredit) adverse witnesses. *Hamdi* nonetheless held, in light of the government's need to detain enemy combatants and to avoid overly burdensome proceedings, that hearings conducted to determine the enemy combatant status of American citizens could proceed entirely on the basis of hearsay evidence. In contrast, the district court

was far less flexible in its analysis of CSRT regulations governing use of classified information. The district court held that the CSRT regulation's denial of detainee access to classified information introduced into evidence violated due process because it unfairly denied detainees an opportunity to rebut the charges against them -- even though all classified information would be made available to the detainee's Personal Representative. Slip Op. 45-55. The district court's proposed alternative -- requiring appointment of an attorney to represent any alleged enemy combatant for whom classified evidence is to be used, so that a trained attorney could more fully evaluate the significance of that evidence -- is totally impracticable. Such a requirement would be impossible to satisfy in any large-scale war and (assuming, as is likely, that a significant portion of relevant evidence is classified) would effectively prevent the military from detaining the hundreds of thousands of enemy combatants that it has taken into custody in past wars.

Finally, Judge Green's due process analysis reaches a conclusion that stands in such sharp contrast to the manner in which war has been conducted throughout our nation's history. As *Hamdi* recognized, detention -- for the duration of the war -- of enemy combatants captured during hostilities has been a standard procedure in all wars. Judge Green suggested that the threat to liberty interests posed by the Guantanamo Bay detentions is particularly severe because

no one knows for certain when hostilities will cease. Slip Op. at 40. That suggestion is without merit -- in every war, the end date is unknown for so long as the war continues. Yet, Appellants have provided no evidence from any prior war, American or foreign, of an instance in which a detaining power's courts have second-guessed the military's determinations regarding which aliens to detain and or punish for their hostile actions. To the contrary, federal courts have been uniformly deferential to those types of military determinations. For example, in *Yamashita*, the Supreme Court entertained a challenge to a military tribunal's "lawful authority" to hear and decide a case. *In re Yamashita*, 327 U.S. 1, 8 (1946). But once such authority was established, the Court was unwilling to second-guess procedures established by the tribunal or its determinations regarding guilt or innocence. *Id.* By invoking the Due Process Clause to second-guess the procedures adopted by the military to evaluate detainees' claims that they are not, in fact, enemy combatants, Judge Green has strayed far afield from settled practices in dealing with judicial challenges to military affairs.

III. THE GENEVA CONVENTIONS ARE NOT PRIVATELY ENFORCEABLE

Judge Green declined to dismiss claims being pressed by at least some

Guantanamo Bay detainees -- those alleged to have fought for the Taliban -- under the Third Geneva Convention. She explicitly adopted the rationale of District Judge James Robertson that Geneva Convention provisions intended to protect individual rights are privately enforceable by the individuals protected. Slip Op. 69-70. *See Hamdan v. Rumsfeld,* 344 F. Supp. 2d 152 (D.D.C. 2004), *on appeal,* No. 04-5393 (D.C. Cir., dec. pending). Judge Green adopted the following rationale from Judge Robertson's opinion:

> Because the Geneva Conventions were written to protect individuals, because the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation, because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and because nothing in the Third Geneva Convention itself manifests the contracting parties' intention that it not become effective as domestic law without the enactment of implementing legislation, I conclude that, insofar as it is pertinent here, the Third Geneva Convention is a self-executing treaty.

Slip Op. at 70 (quoting *Hamdan,* 344 F. Supp. 2d at 165).

Judge Green's conclusion is contrary to the great weight of judicial opinion and is ultimately unsound. Every federal appeals court that has considered the issue, including this Court, has concluded that the 1949 Geneva Conventions do not grant individuals judicially enforceable rights. *See, e.g., Al*

Odah, 321 F.3d at 1147 (Randolph, J., concurring);[10] *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-09 (D.C. Cir. 1984) (Bork, J., concurring); *Hamdi v. Rumsfeld,* 316 F.3d 450, 468 (4th Cir. 2003), *vacated on other grounds,* 124 S. Ct. 2633 (2004).

Whether a treaty is judicially enforceable is ultimately depends on the intent of its drafters and President and the Senate when they ratified the treaty. But judicial enforceability is never presumed; and in the absence of clear intent to the contrary, a treaty "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Head Money Cases,* 112 U.S. 580, 598 (1884). Judge Green points to no evidence suggesting that the President and the Senate intended the Third Geneva Convention to be enforceable in the captor's courts by those being detained as enemy combatants.

To the contrary, as the federal government has spelled out at length, the only procedures specified in the text of the Third Geneva Convention for resolving alleged breaches are diplomatic in nature. For example, Article 132 provides:

> 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

---

[10] Judge Robertson declined to follow *Al Odah*, deeming that opinion's statements regarding enforceability of the Third Geneva Convention to be unsound, as well as nonbinding *dicta*. *Hamdan,* 344 F. Supp. 2d at 165 n.10.

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

See also, Art. 11. By specifying such diplomatic methods of resolving claims of breach, the Third Geneva Convention provides a strong indication that the President and Senate never intended to make the Convention judicially enforceable. Moreover, *Eisentrager* held that the 1929 predecessor to the Third Geneva Convention did not permit private enforcement, and Appellants can point to nothing in Congress's subsequent ratification of the Third Geneva Convention suggesting that it intended to adopt such a major change in the means of enforcement. *Eisentrager,* 339 U.S. at 789 & n.14.

Judge Green and Judge Robertson opined that the Third Geneva Convention is individually enforceable because it was meant to protect individuals. But the 1929 Convention was also meant to protect individuals, yet *Eisentrager* found that treaty not to be individually enforceable. Judge Green and Judge Robertson also opined that the Third Geneva Convention should be deemed individually enforceable because Congress understood that no additional legislation was necessary to put in place the protections of individual rights. Slip. Op. 70. That is a *non sequitur.* Simply because countries that signed the Convention bound themselves to abide by the provisions promising good

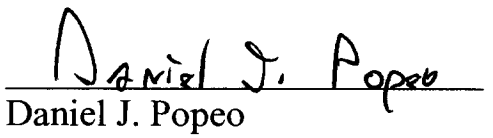
treatment for detainees does not mean that they also agreed to allow detainees to sue in the captor's courts to enforce those provisions.

Finally, *amici* note that Judge Green went well beyond Judge Robertson's holding in finding the Third Geneva Convention individually enforceable. Judge Robertson merely held that a detainee facing war crimes proceedings before a military tribunal could invoke the Convention as a defense in those proceedings. Judge Green's decision permits detainees to use the Convention as a sword as well as a shield -- to file suit to require his release from captivity and/or to require that he be granted prisoner-of-war status. Nothing in the language or history of the Third Geneva Convention requires such a result.

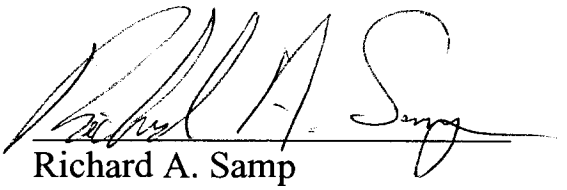
CONCLUSION

Amici curiae Washington Legal Foundation and Allied Educational Foundation request that the Court reverse Judge Green's January 31, 2005 order and direct that the federal government's motion to dismiss the 11 suits brought by Guantanamo Bay detainees be granted.

Respectfully submitted,



Daniel J. Popeo

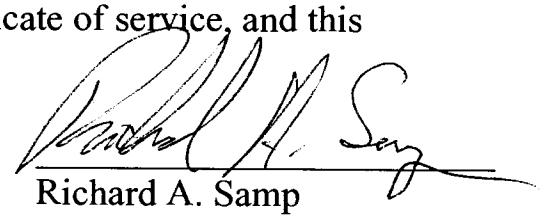


Richard A. Samp
(D.C. Bar No. 367194)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: April 27, 2005

CERTIFICATE OF COMPLIANCE

I am an attorney for *amici curiae* Washington Legal Foundation (WLF), *et al.* Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point, proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 9.0), the word count of the brief is 6,531, not including the certificate as to parties, table of contents, table of authorities, glossary, certificate of service, and this certificate of compliance.



Richard A. Samp

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of April, 2005, two copies of the foregoing Brief of Washington Legal Foundation, *et al.*, along with one copy of the Notice of Filing were deposited in the U.S. Mail, first-class postage prepaid, addressed to the following:

Robert M. Loeb
Douglas N. Letter
U.S. Department of Justice
Civil Division, Appellate
950 Pennsylvania Ave., NW
Washington, DC 20530-0001

Jon W. Norris
641 Indiana Avenue, N.W.
Washington, DC 20004
(202) 842-2695, Fax: (202) 842-2627
Email: jonnorrislaw@hotmail.com

L. Barrett Boss
COZEN O'CONNOR, P.C.
1667 K Street, NW, Suite 500
Washington, DC 20006-1605
(202) 912-4800, Fax: (202) 912-4830
Email: bboss@cozen.com

Thomas B. Wilner
SHEARMAN & STERLING
801 Pennsylvania Avenue, NW, Suite 900
Washington, DC 20004-2634
(202) 508-8050, Fax: 202-508-8100
Email: twilner@shearman.com

L. Barrett Boss
COZEN O'CONNOR, P.C.
1667 K Street, NW, Suite 500
Washington, DC 20006-1605
(202) 912-4800, Fax: (202) 912-4830
Email: bboss@cozen.com

Neil H. Koslowe
SHEARMAN AND STERLING LLP
801 Pennsylvania Avenue, NW, Suite 900
Washington, DC 20004
(202) 508-8000, Fax: (202) 508-8100
Email: neil.koslowe@shearman.com

Joseph Margulies
MACARTHUR JUSTICE CENTER
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60657
(773) 702-9560, Fax: (773) 702-0771
Email: jmarguli@uchicago.edu

Adrian Lee Steel, Jr.
MAYER, BROWN ROWE & MAW LLP
1909 K Street, NW
Washington, DC 20006-1152
(202) 263-3237, Fax: 202-263-3300
Email: asteel@mayerbrownrowe.com

Baher Azmy
SETON HALL LAW SCHOOL
CENTER FOR SOCIAL JUSTICE
833 McCarter Highway
Newark, NJ 07102
(973) 642-8700, Fax: (973) 642-8295
Email: azmybahe@shu.edu

Shayana Devendra Kadidal
ABINATI & ASSOCIATES
1712 N Street, N.W.
Washington, DC 20036
(212) 614-6438
Email: kadidal@ccr-ny.org

Barry J. Pollack
COLLIER SHANNON SCOTT, PLLC
3050 K Street, NW, Suite 400
Washington, DC 20007
(202) 342-8472, Fax: (202) 342-8451
Email: BPollack@colliershannon.com

Eric M. Freedman
250 West 94th Street
New York, NY 10025
(212) 665-2713, Fax: (212) 665-2714
Email: lawemf@hofstra.edu
Muneer I. Ahmad
AMERICAN UNIVERSITY WASHINGTON
COLLEGE OF LAW
4801 Massachusetts Avenue, NW
Washington, DC 20016
(202) 274-4140, Fax: (202) 274-0659
Email: mahmad@wcl.american.edu

Richard J. Wilson
4801 Massachusetts Avenue, NW
Washington, DC 20016
(202) 274-4147
Email: rwilson@wcl.american.edu

Barbara J. Olshansky
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6439
Email: bjo@ccr-ny.org

Shayana Devendra Kadidal
ABINATI & ASSOCIATES
1712 N Street, N.W.
Washington, DC 20036
(212) 614-6438
Email: kadidal@ccr-ny.org

Clive Stafford Smith
JUSTICE IN EXILE
636 Baronne Street
New Orleans, LA 70113
(504) 558-9867
Email: clivessgb@aol.com

John J. Gibbons
Gitanjali Gutierrez
Lawrence S. Lustberg
GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE
One Riverfront Plaza
Newark, NJ 07102
(973) 596-4493, Fax: (973) 639-6243
Email: ggutierrez@gibbonslaw.com
Email: jgibbons@gibbonslaw.com
Email: llustberg@gibbonslaw.com

George Brent Mickum, IV
KELLER & HECKMAN, LLP
1001 G Street, NW, Suite 500
Washington, DC 20001-4545
(202) 434-4245, Fax: (202) 434-4646
Email: mickum@khlaw.com

Douglas James Behr
KELLER & HECKMAN, LLP
1001 G Street, NW
Washington, DC 20001
(202) 434-4100, Fax: 202-434-4646
Email: behr@khlaw.com

Erwin Chemerinsky
DUKE LAW SCHOOL
Corner of Science Drive & Towerview Road
Durham, NC 27708
(919) 613-7173
Email: CHEMERINSKY@law.duke.edu

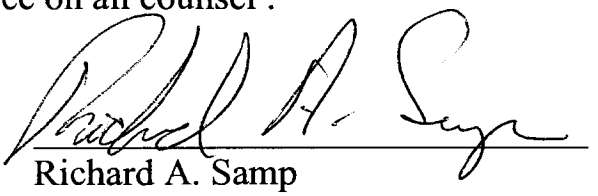
Karen Lee
Adrian Raiford Stewart
Andrew Bruce Matheson
Nathan Reilly
Pamela Rogers Chepiga
ALLEN & OVERY
1221 Avenue of the Americas
New York, NY 10020
(212) 610-6300, Fax: (212) 610-6399
Email: karen.lee@newyork.allenovery.com

Ralph A. Taylor
DORSEY & WHITNEY LLP
1001 Pennsylvania Avenue, NW
Suite 300 South
Washington, DC 20004
(202) 442-3562
Fax: (202) 442-3199
Email: taylor.ralph@dorseylaw.com
Christopher G. Karagheuzoff
Joshua Colangelo-Bryan
Mark S. Sullivan
Stewart D. Aaron
DORSEY & WHITNEY LLP
250 Park Avenue
New York, NY 10177
(212) 415-9200
Email: karagheuzoff.christopher@dorsey.com
Email: colangelo.bryan.joshua@dorsey.com
Email: sullivan.mark@dorsey.com
Email: aaron.stewart@dorsey.com

Kevin B. Bedell
DORSEY & WHITNEY LLP
1001 Pennsylvania Avenue, NW
Suite 400 South
Washington, DC 20004
(202) 442-3543, Fax: (202) 442-3199
Email: bedell.kevin@dorsey.com

David H. Remes
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
Suite 803E
Washington, DC 20004-2494
(202) 662-5212, Fax: (202) 778-5212
Email: dremes@cov.com

I also provided personal (electronic) service on all counsel .



Richard A. Samp